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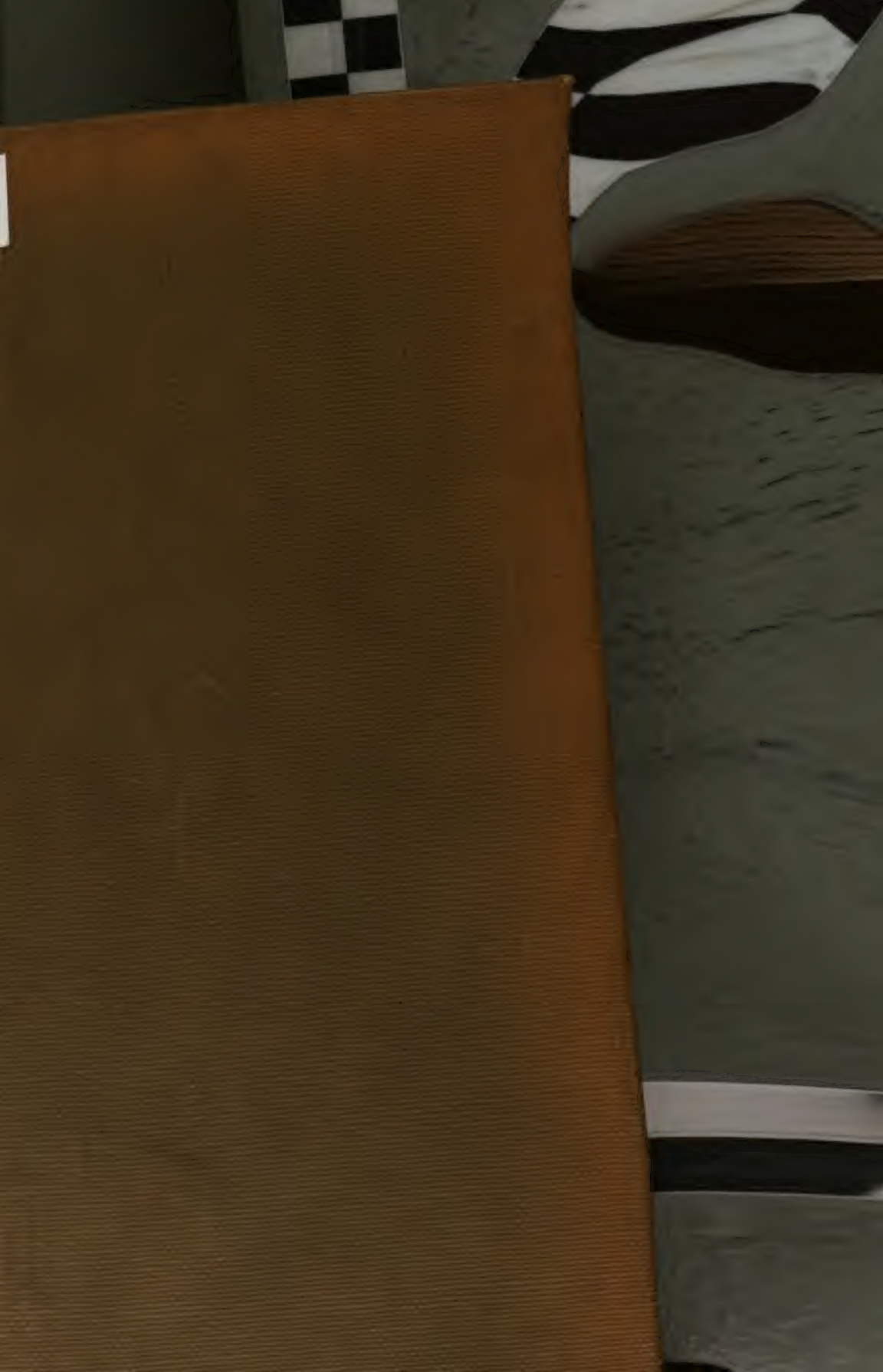
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THE
LAWYERS REPORTS
ANNOTATED

BOOK XXXIX

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH, EDITOR, AND
HENRY P. FARNHAM, ASST.

ROCHESTER, N. Y.
THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY
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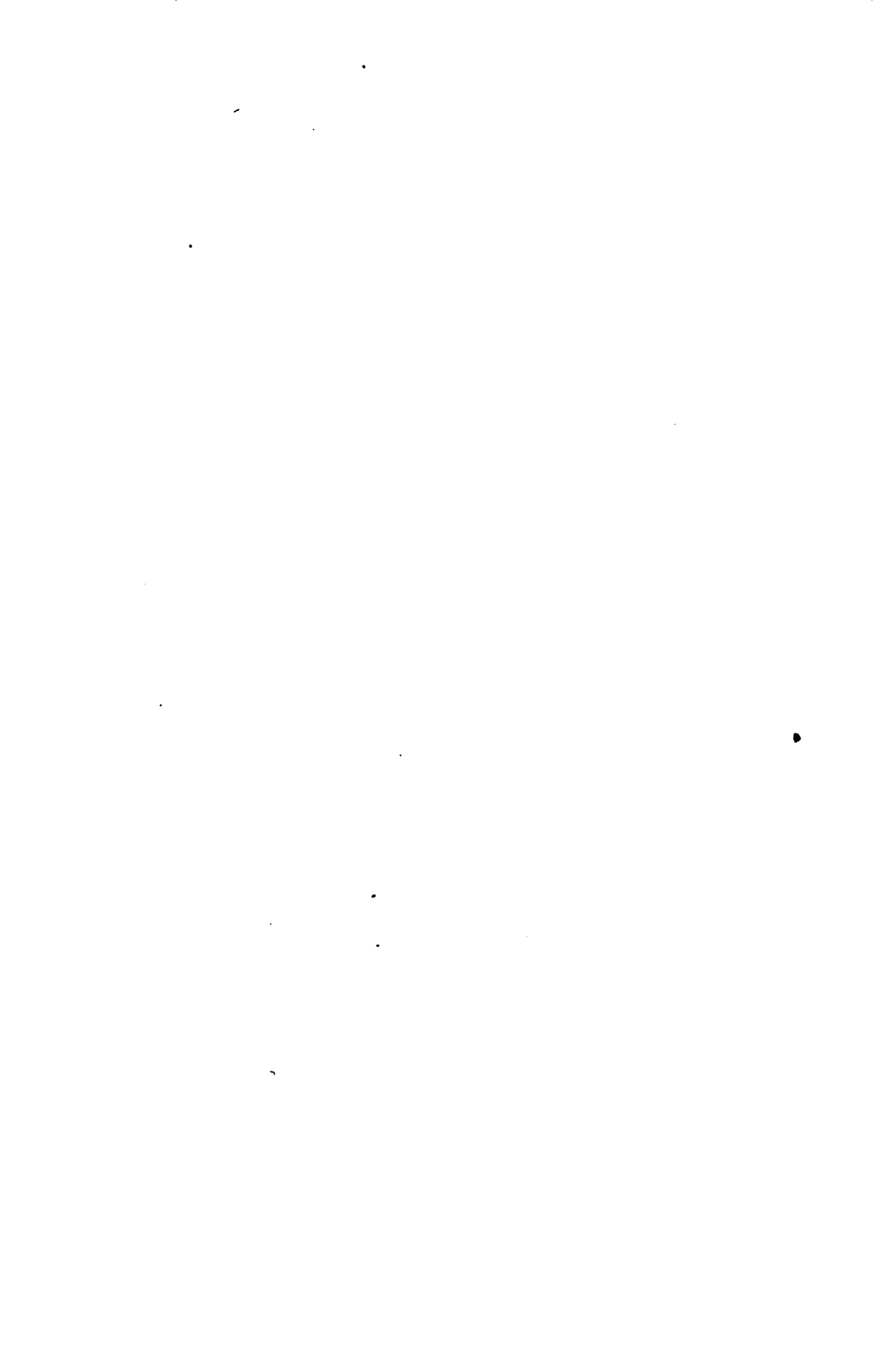
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LAWYERS' REPORTS

ANNOTATED.

NEW YORK COURT OF APPEALS.

Elizabeth G. HUGHES, *Appt.*,
v.
COUNTY OF MONROE, *Resp't.*
(147 N. Y. 49.)

I. A county is not liable for injuries received by an employee from a defective machine in an asylum which was maintained by the county in discharge of its duty as a political division of the state to care for its insane.

2. The maintenance of a county asylum

NOTE.—Liabilities of counties in actions for torts and negligence.

- I. *Injuries to travelers and vehicles.*
 - a. *By bridges and approaches being out of repair.*
 1. *Implied liability.*
 2. *Where statute imposes liability.*
 - b. *From defective roads and highways.*
 - c. *Where the injury was caused by the fright of a horse.*
 - d. *By negligence of employee.*
- II. *Injuries to other persons.*
 - a. *From condition of buildings.*
 1. *Generally.*
 2. *On account of escape from prison.*
 - b. *By negligence or wrongful act of employee.*
- III. *Injuries to real property from public improvements.*
 - a. *Generally.*
 - b. *By construction and operation of bridges.*
 - c. *By roads.*
 - d. *By ditches, canals, and dams.*
 - e. *By buildings.*
- IV. *Other wrongful and negligent acts affecting persons or property.*
 - a. *Generally.*
 - b. *Affecting property.*
- V. *Infringement of patents.*
- VI. *Damages by defaulting officer.*
- VII. *By misapplication, conversion, or taking property.*
- VIII. *Presentation of claims before county board as a condition precedent to suit.*
- IX. *Summary.*

With but few exceptions counties are not liable for torts or negligence in the condition, use, and management of public institutions. The cases frequently admit that the distinction between liabilities of counties and cities is one without a difference, but nevertheless adhere to the rule. The reasons in the several cases endeavoring to apply or evolve the principle are various, among which are the following: That there is no corporation fund out of which satisfaction could be made; that it is better that an individual should sustain an injury than that the public should sustain an inconvenience; that it is not a body corporate; that it is

does not become a private business such that the county is liable for injuries received by employees, by reason of the fact that some revenue is incidentally derived by the county from the sale of surplus farm products and from payments made by those liable for the support of insane persons kept in the asylum.

(October 8, 1895.)

APPEAL by plaintiff from an order of the General Term of the Supreme Court, Fifth

a voluntary corporation; that it is a subordinate political division of a state; that its action is legislative; that neither the state nor its counties could be sued for trespass of its officers; that counties are instrumentalities of government; that counties partake of the immunities of states; that they should not be liable on the ground of ancient precedent and public policy.

The cases which hold that there is an implied liability against a county maintain this on various grounds, some of which are as follows: Electing to act under a power granted imposes a duty rendering it liable; there is a liability for acts done in the discharge of a self-imposed duty not enjoined by law; compensation must be made for taking property without compensation; where the statute creates a duty to repair the liability is the same as that of a city.

The leading case on this question is *Russell v. Devon County*, 2 T. R. 661, which has been made more or less the foundation of all the cases denying a liability, although it can hardly be said that the counties in this country at the present time stand on the same footing as quasi corporations in England in 1799.

- I. *Injuries to travelers and vehicles.*
 - a. *By bridges and approaches being out of repair.*
 1. *Implied liability.*

In *JASPER COUNTY COMES. v. ALLMAN* it was held that, under Ind. Rev. Stat. 1881, § 2387, Rev. Stat. 1894, § 3277 (§ 3), providing that the board of county commissioners shall receive and appropriate donations for the erection and repair of bridges and aid the same when of general importance, providing, however, that if the board of commissioners shall not deem any such bridge of sufficient importance to make an appropriation from the county treasury for the erection or repairs thereof, the trustees of any township may appropriate any part of the road-tax fund for that purpose if they deem it right and expedient, the board of commissioners have no power to appropriate county funds to the repair of a bridge unless they deem it of sufficient importance, and therefore the county was not liable for injuries caused to a traveler by a defective approach to a bridge. It was further held that the board could only cause bridges to be repaired when the road district was

Department, granting a new trial after verdict in favor of plaintiff at the Monroe County Circuit in an action brought to recover damages for personal injuries alleged to have resulted from defective machinery furnished to plaintiff with which to perform work for the defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. Eugene Van Voorhis, with Messrs. J. & Q. Van Voorhis, for appellant:

The defendant is responsible for its negligence.

At the time of the accident in question, the statutes of this state prescribed that each county might sue and be sued in the manner prescribed by law.

1 Birdseye's Rev. Stat. p. 780, § 1.

not able to do it by its road work and tax. This case follows the late Indiana cases overruling the former cases, which held there was an implied liability on counties for injuries caused from defective bridges. This decision is in accord with the weight of authority.

In the absence of a statute it is generally held that counties are not liable in an action for damages for injuries caused by bridges being out of repair, although in Iowa, Maryland, and Pennsylvania a contrary rule prevails, as formerly in Indiana, and in some states a provision is made therefor by statute. The cases holding there is no implied liability are as follows:

The leading case on liability of counties for negligence and tort held that the inhabitants of a county were not liable for an injury done to a wagon in consequence of a bridge being out of repair, which ought to have been repaired by the county. It held that no recovery could be had in the absence of a statute imposing liability, distinguishing the cases where a recovery was had under the statute of hue and cry, because in those cases there was a statutory remedy. It was further held that there could be no liability because there was no incorporation fund out of which satisfaction could be made; also that the principle of law that where an individual sustains injury by neglect or default of another the law gives him remedy, must give way to the principle that it is better that an individual should sustain an injury than that the public should sustain an inconvenience. *Russell v. Devon County*, 2 T. R. 667.

In an action against the inhabitants of a county for injuries caused by a defective bridge, naming the county surveyor as defendant, under 48 Geo. III., chap. 59, § 4, providing that the inhabitants of counties shall and may sue for any damages done to bridges and other works, and repair at the expense of such counties respectively, and for the "recovering" of any property belonging to such counties in the name of their surveyor, "and also shall and may be sued in the name of such surveyor, . . . but the surveyor for the time being shall be deemed the plaintiff or defendant in such action . . . provided always, that every such surveyor . . . shall always be reimbursed and paid out of the moneys in the hands of the treasurer of the public stock of such county . . . all such costs and charges as he shall be put unto," which statute was passed fifteen years after the decision of *Russell v. Devon County*, 2 T. R. 667,—it was held at first that the plaintiff was entitled to recover, but the judgment was arrested on the ground that the words "costs and charges" did not give a liability against the county by an action against the surveyor. It was said that it may be reasonably considered that the legislature supposed there were some cases where the county was liable at common law, and might have execution against it for the damages, 39 L. R. A.

Police duties are always held to be public duties, performed for the benefit of the whole state, and neither counties nor municipalities, existing under special charters, are liable for acts of omission or commission in the matter of preserving order or confining offenders against the law.

2 Dill. Mun. Corp. 8d ed. § 974, (772); Shearm. & Redf. Neg. § 260; Beach, Pub. Corp. § 745.

Counties, and cities in states which recognize no distinction between the two are liable to action for private nuisance.

Michel v. Monroe County Supers. 39 Hun, 47; *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157; *Akron v. McComb*, 18 Ohio, 229, 51 Am. Dec. 458; *Rhodes v. Cleveland*, 10 Ohio,

though in truth "we believe there are none." It was also said: "It was much pressed that unless the words in question were allowed to have the operation contended for by the plaintiff, it was impossible to give them any at all. The court below felt the pressure of this argument, and attempted to meet it by one or two suppositions which do not entirely satisfy us. But this difficulty, even if it were greater than it appears to us, would not warrant us in giving such effect to these words as the plaintiff requires, creating a new liability clearly without the intention of the legislature, and working injustice at the same time. The judgment of the court below, therefore, will be affirmed." *Makinnon v. Penzon*, 25 Eng. L. & Eq. 457, affirming 18 Eng. L. & Eq. 509.

In *Thomas v. Sorrell, Vaughan*, 340, it was said that "if a man have particular damage by a foundrous way, he is generally without remedy though the nuisance is to be punished by the King. The reason is, because a foundrous way, a decayed bridge, or the like, are commonly to be repaired by some township, vill, hamlet, or a county who are not corporate, and therefore no action lies against them for a particular damage, but their neglects are to be presented, and they punished by fine to the King. But if a particular person or body corporate be to repair a certain highway, or portion of it, or a bridge, and a man is endamaged particularly by the foundrouness of the way, or decay of the bridge, he may have his action against the person or body corporate, who ought to repair for his damage, because he can bring his action against them; but where there is no person against whom to bring his action, it is as if a man be damaged by one that cannot be known."

So, a county was held not liable for injuries caused by a defective bridge on a public highway where there was no statute imposing liability, in *Granger v. Pulaski County*, 26 Ark. 37; *Barnett v. Contra Costa County*, 67 Cal. 77; *White v. Bond County*, 58 Ill. 297, 11 Am. Rep. 65; *Hedges v. Madison County*, 5 Ill. 567; *Wheatly v. Mercer*, 9 Bush, 704; *Carter v. Wilds*, 8 Honst. (Del.) 14; *Brabham v. Hinds County Supers.* 54 Miss. 363, 23 Am. Rep. 352; *White v. Chowan County Comrs.* 90 N. C. 437, 47 Am. Rep. 534; *Clark v. Adair County*, 79 Mo. 536.

In *Clark v. Adair County*, 79 Mo. 536, *Hannon v. St. Louis County*, 62 Mo. 313, was distinguished, as in that case the county was the owner and proprietor of the property it was improving.

And in *Wood v. Tipton County*, 7 Baxt. 112, 32 Am. Rep. 551, it was held that a county was not liable for failure to keep a county bridge in repair where there was no statute imposing such liability. It was said that a county was declared by statute to be a corporation, but this only meant in regard to contracts and the power to sue and be sued.

And a county was not liable for injuries caused by a defective bridge. It was said that counties

159, 86 Am. Dec. 82; *Proprietors of Locks & Canals v. Lowell*, 7 Gray, 223; *Hildreth v. Lowell*, 11 Gray, 345; *Haskell v. New Bedford*, 108 Mass. 206.

Counties, while they may be exempt for omission to perform public duties imposed upon them as such by the state, are liable for the private wrongs they commit against others to the same extent as private corporations.

It is a ridiculous condition of the law if counties are properly liable for committing nuisances, for infringing patents, and for converting funds, and yet owe no duty to employees for which they can be held responsible.

Hill v. Boston, 122 Mass. 358, 23 Am. Rep. 332.

are only quasi corporations created for the purpose of government, and their functions are political and administrative, and their powers are rather duties imposed than privileges granted, while cities are chartered for the private advantage of their citizens, and that some courts hold that counties are but political subdivisions of a state, and a suit would be in effect a suit against the state, but, whatever the distinction may be, cities are liable, but counties are not. *Heigel v. Wichita County*, 84 Tex. 362.

And a county was not liable for injuries caused by defects in a bridge in the absence of any statute imposing such liability, as counties are only quasi corporations. *Heigel v. Wichita County*, 84 Tex. 362.

So a county was not liable for injuries caused by a county bridge being out of repair. It was held that counties were not liable at common law for injuries caused in this manner, and the statute in force at the time of the alleged injury (1876) did not change the common-law rule. It was said that a county is not, in the proper sense of the word, a municipal corporation. *Woods v. Colfax County Comrs.* 10 Neb. 562.

And a parish is not liable for private injuries caused by the ruinous condition of one of the parish bridges on a highway where there is no remedy given by statute. *King v. Police Jury*, 12 La. Ann. 368.

In *King v. Police Jury*, 12 La. Ann. 368, the case of *Houston v. Police Jury*, 3 La. Ann. 566, was distinguished, as in the absence of a statute requiring a bridge to be built or to be kept in repair the liability is different from the liability of municipal corporations for the injurious acts of their agents done in the proper scope of their employment, which was the case in 3 La. Ann. 566.

And a county is not liable for injuries occasioned through the negligence of county officers in the construction and repair of county bridges, there being a distinction between cities and counties, as the first are compact and have officers empowered to act promptly, while it is almost impossible for counties covering a large area to provide against defects in highways and bridges. *El Paso County Comrs. v. Bish*, 18 Colo. 474.

In *El Paso County Comrs. v. Bish*, 18 Colo. 474, it was said that an implied liability is recognized in Iowa, Maryland, Indiana, and Pennsylvania from the failure of county officers to perform a statutory duty, but the weight of authority is *contra*.

And where a bridge was out of repair, but the delay in repairing was unavoidable, and the plaintiffs attempted to ford a creek, and lost his horse by drowning, the county was not liable. It was further held that if plaintiff attempted to cross a ford when it was apparent that it was dangerous, the defendants would not be liable for failure to give notice. The court said that it has not been usual, 39 L. R. A.

Where a county undertakes other matters than these public functions of government, for its own advantage or emolument, it loses its character as a public corporation, and it becomes liable in regard to those matters, to the same extent and in the same way as a private corporation.

1 Thomp. Neg. p. 618; 1 Shearm. & Redf. Neg. §§ 255-259; Wood, Mast. & S. §§ 462 *et seq.*; *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Bigelow v. Randolph*, 14 Gray, 548; *Jones v. New Haven*, 84 Conn. 1; *Perkins v. Lawrence*, 186 Mass. 805; *Hannon v. St. Louis County*, 62 Mo. 318; *Bailey v. New York*, 3 Hill, 581, 88 Am. Dec. 669; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *People v. Ingersoll*, 58 N. Y. 29, 17 Am. Rep. 178.

nor is it necessary, to give notice when the streams are "up," and "besides, it would have been contributory negligence on the part of the plaintiff to venture to cross a stream so swollen." *Jackson v. Greene County Comrs.* 76 N. C. 282.

So, the justices of a county were not liable for injuries caused by the breaking of a bridge which was admitted to be dangerous, and known to be so by the magistrates, who made a contract to have the same repaired as soon as they were aware of its condition, but the contractor had neglected to repair the same. It was said that the remedy for a bridge being out of repair is by mandamus, and that there was no liability created by any statute. *Kinsey v. Jones County Magistrates*, 8 Jones, L. 186.

And a county was not liable for injuries caused by neglect in keeping a bridge in repair where there was no statutory liability, although the statute imposed on the boards of county commissioners the duty of keeping in repair the bridges. *Bailey v. Laurence County*, 5 S. D. 393.

In *Bailey v. Laurence County*, 5 S. D. 393, it was said that counties are made corporations for civil and political purposes, but with limited powers; and while it is true that the legislature has imposed upon them the duty of keeping in repair all bridges on public highways, and provided the method, yet to hold that counties are thereby liable for injuries caused by defects in bridges in the absence of legislation would be a species of judicial legislation.

And where an action was brought against the supervisors of a county on a warrant issued for damages caused by the breaking of a bridge on a county road, which warrant had been refused payment, it was held that there was no liability under Cal. Code 1883, § 7, providing that all supervisors, or any officer, authorizing, auditing, or allowing any claim in violation of any of the provisions of this act shall be liable in person to the person damaged to the extent of his loss. It was held that neither the original holder of the warrant nor his assignee had any claim, as the warrant was invalid. *Bank of Santa Cruz County v. Bartlett*, 78 Cal. 301.

And for injuries caused by failure to repair a bridge the county was not liable under Cal. act March 23, 1855, creating a board of supervisors and giving them the management and control of bridges, and act April 28, 1855, concerning roads and highways, and imposing upon the overseers of the county the duty of keeping bridges on public highways in repair. The remedy, if any, for injuries resulting from neglect to keep such bridges in repair is against the road overseers or supervisors personally. *Huffman v. San Joaquin County*, 21 Cal. 423.

So, a county was not liable for injuries from a defective bridge in the absence of a statute, and it was held that Cal. Stat. 1875-76, p. 237, § 50, providing that a county is responsible for providing and keeping in good repair bridges, did not create any

The defendant was conducting a private business in connection with the care of its own pauper insane. Under the authorities this renders it liable to the same extent as a private individual.

Neff v. Wellesley, 148 Mass. 498, 2 L. R. A. 500; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Worden v. New Bedford*, 181 Mass. 23; *Tindley v. Salem*, 187 Mass. 172; *Eastman v. Meredith*, 86 N. H. 285.

There is no ground for claiming that the warden of this asylum was an independent officer, over whom the defendant had no control.

2 Dill. Mun. Corp. 8d ed. § 974 (772); *New York & B. Sawmill Lumber Co. v. Brooklyn*, 71 N. Y. 584; *Appleton v. New York Water Comrs.* 2 Hill, 485; *Bailey v. New York*, 8 Hill, 531, 38 Am. Dec. 669.

liability, as the act did not say the county shall be responsible in damages for the failure to keep the bridges in repair. *Barnett v. Contra Costa County*, 67 Cal. 77.

And a county was not liable for injuries caused from a defective bridge on a highway, under Miss. Rev. Code, arts. 12-14, 17, 18, 21, providing that boards of county police are charged with the duty of making provisions for the building of bridges, making roads and keeping them in repair in their respective counties, and of dividing the public roads into convenient districts, and of appointing one overseer for each district. *Sutton v. Carroll County Bd. of Police*, 41 Miss. 236.

In this case it was said that under Rev. Code, 600, art. 162, making it the duty of the overseer to keep the roads in his district in good repair, and Rev. Code, 178, art. 38, providing that the board of police shall contract for building and keeping in repair any bridge which the overseer of the road cannot conveniently make with the labor of the hands under his charge, the action would lie against the overseer or contractor.

And the county of St. Louis was not liable for negligence in not keeping a bridge in repair upon a public road. *Reardon v. St. Louis County*, 36 Mo. 555. This case was distinguished in *Hannon v. St. Louis County*, 62 Mo. 313.

So, where injuries were caused by the failure to keep a bridge in safe condition upon a public highway the county was not liable. It was also held that Mo. Const. art. 2, § 21, providing that private property shall not be taken or damaged for public use without just compensation, did not apply. *Pundman v. St. Charles County*, 110 Mo. 564.

In *Pundman v. St. Charles County*, 110 Mo. 564, it was said that Chester County v. Brower, 117 Pa. 647, which held that a county was liable where the plaintiff's property was damaged by the erection of the abutments of a bridge some 14 feet above the grade of the street in front of his house, and which held that municipal corporations shall make just compensation for property taken, injured, or destroyed by the construction of their highways or improvements, did not furnish any support to this action.

And a county was not liable in damages for injuries caused by defects in a bridge arising from the neglect of the county to maintain it, under N. Y. Laws 1837, chap. 388, § 9, providing that in case a bridge of a certain chartered company shall be impassable for the term of fifteen days, or taken down for the purpose of being rebuilt, or if the same shall not be rebuilt within eighteen months, the bridge shall thereupon become a public bridge, and may be maintained at the expense of the county of L. *Ensign v. Livingston County Supers.* 25 Hun, 20.

39 L. R. A.

The factory law in force at the time of this accident required manufacturing establishments to provide safe mechanical contrivances for the purpose of throwing on and off belts or pulleys. It also provided that machinery of every description in such manufactories shall be properly guarded.

Laws 1890, chap. 398, § 12; *Knisley v. Pratt*, 75 Hun, 828; *Cobb v. Welcher*, 75 Hun, 283.

Messrs. Parker, Drake, & Parker, for respondent:

Counties are under no liability in respect of torts, except as imposed (expressly or by necessary implication) by statute.

2 Dill. Mun. Corp. 4th ed. § 963; *Addison, Torts, Banks & Bros.'s ed.* p. 1298, § 1526; *Mazmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Ensign v. Livingston County Supers.*

Under N. Y. Laws 1892, chap. 688, declaring counties to be municipal corporations, an action could not be maintained for injuries caused by a defective bridge between two counties, as this statute did not change the liability of counties. *Albrecht v. Queens County*, 84 Hun, 390; *Abern v. Kings County*, 89 Hun, 148.

In *MARKEY v. QUEENS COUNTY*, where plaintiff's intestate lost his life by a temporary bridge being out of repair while the bridge was being reconstructed between the counties of Queens and Kings, it was held that the board of supervisors were executing a certain public duty imposed upon them as the proper public agents in that particular civil division of the state, and that a county could not be subjected to a private action for injuries occurring in or by reason of the performance of the work. It was further held that N. Y. Laws 1892, chap. 688, providing that a county is a municipal corporation, and that an action to enforce any liability created or duty enjoined upon it or upon any of its officers or agents for which it is liable, or recover damages for any injuries to any property or rights for which it is liable, shall be in the name of the county, did not import any greater liability than that which already existed before the passage of the law.

In Indiana, Iowa, Maryland, and Pennsylvania, counties have been held liable for injuries caused to travelers by bridges being out of repair, under an implied liability, but in Indiana a long line of such cases has been now overruled.

Indiana.

In *JASPER COUNTY COMRS. v. ALLMAN* it was held that a county was not liable for damages caused by negligence of its officers in respect to keeping bridges in repair, in the absence of any statute imposing a liability. In this case all the previous cases in Indiana holding a county liable in such case were overruled, and it was held that counties are instrumentalities of the government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state.

So, following that case, it is held in *Johnson County Comrs. v. Hemphill*, 14 Ind. App. 219, *Cowan v. Adams County Comrs.* 142 Ind. App. 690, that a county is not liable for injuries caused by the defective condition of an approach to a bridge.

Nor for negligence in permitting the county bridge to become out of repair. *Montgomery County Comrs. v. Coffinberry*, 14 Ind. App. 701.

But in *Park v. Adams County Comrs.* 3 Ind. App. 538, under the previous holding of the courts in this state a county was liable for injuries resulting from the negligence of the contractor employed by the county to repair bridges, who failed to place

25 Hun, 20; *Alamango v. Albany County Supers.* 25 Hun, 551; *Symonds v. Clay County Supers.* 71 Ill. 355; *Hollenbeck v. Winnebago County*, 95 Ill. 155, 85 Am. Rep. 151; *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109; *Summers v. Daviess County Comrs.* 103 Ind. 262, 53 Am. Rep. 512; *Downing v. Mason County*, 87 Ky. 208; *Dosdall v. Olmsted County*, 30 Minn. 96, 44 Am. Rep. 185; *Brubham v. Hinds County Supers.* 54 Miss. 868, 28 Am. Rep. 352; *Kincaid v. Hardin County*, 53 Iowa, 480, 36 Am. Rep. 236; *Sherbourne v. Yuba County*, 21 Cal. 118, 81 Am. Dec. 151; *Barnett v. Contra Costa County*, 67 Cal. 77; *Crowell v. Sonoma County*, 25 Cal. 813; *Rear-don v. St. Louis County*, 86 Mo. 555; *Pund-man v. St. Charles County*, 110 Mo. 594.

Even a municipal corporation proper, as a city created by special charter, is not liable for

the negligence of its officers and agents, except in relation to a certain class of matters.

Western College of Homeopathic Medicine v. Cleveland, 12 Ohio St. 875; *Ulrich v. St. Louis*, 112 Mo. 138; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Ham v. New York*, 70 N. Y. 459; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Calwell v. Boone*, 51 Iowa, 687, 38 Am. Rep. 154; *Blake v. Pontiac*, 49 Ill. App. 543; *Buttrick v. Lovell*, 1 Allen, 172, 79 Am. Dec. 721; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 868; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Toomey v. Albany*, 38 N. Y. S. R. 91; *Smith v. Rochester*, 76 N. Y. 506; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Pettingell v. Chelsea*, 161 Mass. 368, 24 L. R. A. 426; *Howard v. Worcester*, 153 Mass. 426, 12 L. R. A. 160; *Finch v. Toledo Bd. of Edu.*

lights or barricades to warn travelers of the danger.

And a county was held liable for negligent omission to keep in a reasonably safe condition the bridges on the public highways. *Morgan County Comrs. v. Pritchett*, 85 Ind. 68; *Pritchett v. Morgan County Comrs.* 62 Ind. 210.

And a county was held liable for injuries caused by a defective bridge, in the absence of express statutory liability, under 1 Ind. Rev. Stat. 1876, p. 239, providing that the board of county commissioners shall cause all bridges therein to be kept in repair. *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657.

In *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, *Russell v. Devon County*, 2 T. R. 687, was not followed; and it was said that *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109, overruled *Brown County Comrs. v. Butt*, 2 Ohio, 348.

In an action for injuries caused by the breaking down of a bridge from hauling a heavy load over it, evidence that if the bridge had been kept in good repair, as originally built, it would have sustained a much larger load, should have been admitted. *Bonebrake v. Huntington County Comrs.* 141 Ind. 62.

In *Fulton County Comrs. v. Rickel*, 106 Ind. 501, it was said that counties are liable for negligence respecting county bridges.

In *State, Roundtree, v. Gibson County Comrs.* 80 Ind. 478, 41 Am. Rep. 821, it was said that counties are liable for injuries received because of negligence in not making bridges safe for travel.

And a county was held liable, under Ind. Rev. Stat. 1881, § 2302, for injuries caused to plaintiff from defects in a bridge, where she and her husband, a good and careful teamster, were driving. It was further held that an allegation that the bridge was on a public highway leading into a city, at or near the city limits on the south side of the city, showed that the bridge was not within the city, and that it was the duty of the county to keep it in repairs. So it was held that Ind. Rev. Stat. 1881, § 2302, Rev. Stat. 1894, § 2323, providing that the township superintendent shall place a warning against fast driving at the end of any bridge in his district whose chord is less than 25 feet, does not relieve the county from repairing a bridge which was less than 25 feet. It was also held that the allegation that the bridge was constructed by the county avoided the presumption that it was a township bridge. *Jackson County Comrs. v. Nichols*, 139 Ind. 611.

And under Ind. Rev. Stat. 1881 (Acts 1855, p. 18, § 11), providing that the board of commissioners of such county shall cause all bridges therein to be kept in repair, a county was held liable for injuries 39 L. R. A.

caused by negligently suffering a bridge to remain out of repair, although such action was not authorized expressly by statute; and the county could not escape liability by showing that the bridge had been built, repaired, and maintained by township officials alone, and had never been recognized as a county bridge by the commissioners, where it was erected upon and part of a public highway over which the board of commissioners had exclusive dominion. *Vaught v. Johnson County Comrs.* 101 Ind. 123.

And a county was held liable in *Gibson County Comrs. v. Emmerson*, 95 Ind. 579, for negligence in not keeping a bridge in proper repair whereby a party was injured. It was held that 1 Ind. Rev. Stat. 1876, p. 239 (act. March 3, 1855, § 11), providing that the boards of commissioners of the respective counties shall cause all bridges to be kept in repair, continuing in force as Rev. Stat. 1881, § 2302, was not affected by act March 2, 1883, p. 62, providing that the supervisors of roads shall carry into effect all orders of the trustee of the township touching highways and bridges therein, and keep the same in good repair.

And a county was liable for injuries caused through negligence of the county board in suffering a bridge to get out of repair, and this liability was not changed by the act of 1881, providing for the superintendent of roads, or by the act of 1883 in regard to counties. *Patton v. Montgomery County Comrs.* 96 Ind. 131.

So, evidence of repairs made by the county on a bridge shortly after an accident was competent to show that the bridge was a county bridge, but not for the purpose of showing negligence. *Shelby County Comrs. v. Blair*, 8 Ind. App. 574.

And where injuries were caused by negligence in failing to keep a bridge on a public highway in repair a county was held liable without regard to the cost of the repairs. It was held that this liability was not relieved by Ind. acts 1883, p. 68, amended by acts 1885, p. 202, § 3, providing that if the probable cost of constructing and repairing any bridge shall exceed \$75, the township trustees of the township shall notify the board of commissioners of the necessity of such bridge or culvert; and if, in the opinion of the county commissioners, the public convenience shall require the building or repairing of the same, they shall cause the same to be erected, and the township shall pay \$75 of the cost. *Sullivan County Comrs. v. Arnett*, 116 Ind. 438.

And where injuries were caused by negligence in constructing or maintaining a public bridge a county was liable, and it was not a defense to show irregularities in the proceedings establishing the highway of which the bridge was a part. *Knox County Comrs. v. Montgomery*, 109 Ind. 62.

80 Ohio St. 37, 27 Am. Rep. 414; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *McKay v. Buffalo*, 9 Hun, 401, Affirmed 74 N. Y. 619; *Givens v. Paris*, 5 Tex. Civ. App. 705; *Whitfield v. Paris*, 84 Tex. 432, 15 L. R. A. 788; *Curran v. Boston*, 151 Mass. 505, 8 L. R. A. 243; *Benton v. Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436.

While municipal corporations proper may be liable in cases where counties would not be, still, neither can be held liable for negligence of its officers or agents in the execution of powers conferred for the public good.

The officers are created by the statute, and the officers' powers and duties defined by the statute, and they are public officers, performing public duties by virtue of the statute, and in the performance of those duties are absolutely independent of the board of supervisors. Whether individually they would be liable to

a private person for negligence or not, the county certainly cannot be liable therefor.

Ham v. New York, 70 N. Y. 459; *Smith v. Rochester*, 76 N. Y. 506; *Bamber v. Rochester*, 26 Hun, 587; *Curran v. Boston*, 151 Mass. 505, 8 L. R. A. 243.

The fact that the asylum received a small sum from the sale of surplus produce, etc., of its farm, is unimportant.

Curran v. Boston, 151 Mass. 505, 8 L. R. A. 243; *Alamango v. Albany County Supers.* 25 Hun, 551; *People, Society of New York Hospital, v. Purdy*, 126 N. Y. 679.

The fact that the plaintiff was an employee at the asylum when she was injured does not affect the question of the county's liability.

Pettingell v. Chelsea, 161 Mass. 368, 24 L. R. A. 426.

It is of no materiality whether in fact the asylum derived some slight revenue from pay-

But a county was not liable for injuries caused from a defective bridge or culvert, where it was not shown over what the bridge spanned, or over what it constituted a passageway; and this was not cured by the averment that "the defendant in its corporate capacity had supervision over, and had control of, the structure." It was further held that the allegation that the plaintiff was without fault was not overcome by an averment that the plaintiff attempted to pass over the bridge with a steam threshing engine. *Clark County Comrs. v. Brod*, 8 Ind. App. 586.

And where the bridge was within a city, formed one of its streets, and it was not shown that it belonged to the county, or that it was its duty to keep it in repair. *Spicer v. Elkhart County Comrs.* 126 Ind. 390.

In *Goshen v. Myers*, 119 Ind. 186, it was said: "It has often been held by this court that it is the duty of the counties in this state to keep their bridges in repair, and that they are liable in damages to those injured, without their fault, for a neglect of that duty. . . . But the county is not liable for a failure to keep in repair bridges over which the board of commissioners has no control."

In *Shelby County Comrs. v. Deprez*, 87 Ind. 509, it was said that a county was liable for injuries caused by defective approaches to bridges; but in this case the petition failed to show that the bridge was a part of a public highway. As to whether a county could be held liable for a bridge in a city was not decided.

Where the question was as to notice of defects, a county was held liable for injuries caused by the negligent construction of a bridge, and it was no defense that the bridge had been safely used for thirteen years. Where it was shown that the bridge was negligently constructed so as to be unsafe, it was not necessary to allege that the county had notice of its condition. *Wabash County Comrs. v. Pearson*, 120 Ind. 426.

And in an action against a county for negligence in not keeping a county bridge in repair, it is not necessary to allege that the board of supervisors had notice of the condition of the bridge, and it is no defense that the bridge had been built and maintained by the township, and that they have sufficient means to keep it in repair, as it is the duty of the board of commissioners under Ind. Rev. Stat. 1881, § 2392, and the act of March 2, 1883, did not relieve the county. *Allen County Comrs. v. Bacon*, 96 Ind. 81.

So, a county was liable for injuries caused by a defective bridge where its proper officers did not exercise reasonable care in ascertaining the condition, and repairing the same. It was held that no-

notice might be inferred where defects existed for such length of time that the county by the exercise of reasonable care could have discovered the same. *Howard County Comrs. v. Legg*, 110 Ind. 479.

So, a county was liable for the breaking down of a bridge, where it had been built for seven or eight years, and the county had been petitioned to erect a new bridge, the present one being unsafe, the timbers having been placed upon the ground and rotted. The duration of time and manner of structure was held to be notice to the county of its dangerous character. *Bonebrake v. Huntington County Comrs.* 141 Ind. 62.

And where the county not only negligently used unfit and unsafe material, but during eight years of use and exposure to the elements made no inspection of it, and the defects were of such a character as to be easily discernible on inspection, it was held liable. *Allen County Comrs. v. Creviston*, 133 Ind. 89.

So, a county was liable for injuries caused by negligence in not keeping a county bridge in repair. It was held that notice, express or implied, on the part of the county should be shown in order to recover for failure to repair. It was said that a county adopting a bridge erected by others would be bound to the same extent as though it originally constructed it; but that if it was a township bridge the county would not be liable. *Howard County Comrs. v. Legg*, 98 Ind. 523, 47 Am. Rep. 390.

And a county was liable for injuries caused by failure to keep a bridge in repair, where a horse was frightened by a crooked log placed at the corner of the bridge to keep the earth from washing away, and there was no railing, and it was shown that two members of the county board had crossed the bridge some months before, but had not noticed that there was no railing. It was further held that Ind. Rev. Stat. 1881, § 2392, requiring county boards to keep bridges on public highways in repair, was not repealed by act of 1885, and that the duty resting on the county board to repair bridges applied to approaches and railings where the same were needed to make a bridge reasonably safe for travel by those who exercised ordinary care. *Sullivan County Comrs. v. Sisson*, 2 Ind. App. 311.

Where a county was held liable for injuries from a defective bridge it was further held that it was no defense to show that the plaintiff was driving in the dark. *Jackson County Comrs. v. Nichols*, 139 Ind. 611.

And where a recovery was had for injuries caused by a bridge being out of repair, and the verdict was that "had the timber in said bridge been sound the same would have carried said load over safely," and the verdict did not show that the

ing patients admitted by agreement made between the warden and individuals.

Benton v. Boston City Hospital, 140 Mass. 18, 54 Am. Rep. 486; *Doune v. Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602; *McDonald v. Massachusetts Gen. Hospital*, 120 Mass. 436, 31 Am. Rep. 529; *Murlaugh v. St. Louis*, 44 Mo. 479.

Defendant owed plaintiff no duty in the way of furnishing a finger bar or guard.

Hickey v. Taaffe, 105 N. Y. 26; *Sweeney v. Berlin & J. Envelope Co.* 101 N. Y. 520, 54 Am. Rep. 722; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31; *Sisco v. Lehigh & H. R. Co.* 145 N. Y. 296; *French v. Aulls*, 72 Hun, 442.

Defendant owed no duty to plaintiff to provide any device for shifting the belt other than was furnished.

Even if it were the duty of defendant to provide safeguards, and the same had been provided, the accident would not have been

averted, and whether the injuries to plaintiff would have been different or less severe is merely conjecture.

Pauley v. Steam Gauge & Lantern Co. 181 N. Y. 90, 15 L. R. A. 194; *Babcock v. Fitchburg R. Co.* 140 N. Y. 808.

The warden was a physician, not a machinist. He was selected for that position, not because of his knowledge of machinery, but because of his knowledge of the proper method of treating the insane. The asylum was primarily a hospital, and the laundry department, like the kitchen department, was but an incident. The rule of duty therefore to be applied in this case is the rule applicable where the master and servant are to be charged with equal knowledge and ignorance.

Marsh v. Chickering, 101 N. Y. 896; *Thomp. Neg.* 1009; *French v. Aulls*, 72 Hun, 442; *Benfield v. Vacuum Oil Co.* 75 Hun, 209.

The injury sustained by plaintiff resulted

load was unusual, the deceased was held not guilty of contributory negligence. *Allen County Comrs. v. Creviston*, 138 Ind. 39.

And the petition stated a cause of action where it alleged the negligent use of defective material in the construction of a bridge, and the failure to keep the same in repair, whereby an engine, boiler, and wagon fell through the bridge, without fault or negligence on the part of plaintiff's intestate, causing his death. It was held that the attempt to cross the bridge with an engine, boiler, and wagon was not negligence *per se*. *Allen County Comrs. v. Creviston*, 138 Ind. 39.

And it was held that if the county was bound to know of the defective condition of the bridge by reason of the long continuance of such condition this would not charge the deceased, and contributory negligence was not shown by hauling an engine weighing over 11,000 pounds, where the deceased had threshed in that neighborhood for three years, and had used the bridge a few days before, and did not know that it was unsafe, and examined it carefully before attempting to cross. *La Porte County Comrs. v. Ellsworth*, 9 Ind. App. 566.

And where traction engines were in use in the neighborhood for many years previous to the construction of the bridge, it was held that the bridge was presumed to have been built in anticipation of taking such engines over it. *Bonebrake v. Huntington County Comrs.* 141 Ind. 62.

So, a county was liable for injuries caused from a defective bridge, although plaintiff had knowledge of the kind of timber of which the bridge was constructed, and of the length of time the timbers had been in the bridge, as he would have the right to assume that the decayed timber would be removed and the defects repaired. *Apple v. Marion County Comrs.* 127 Ind. 553.

But in *Vermillion County Comrs. v. Chippe*, 181 Ind. 56, 16 L. R. A. 223, where a man was killed in hauling a traction engine over a bridge, and the bridge had been built for about fifteen years before traction engines were used on highways, and it was tested about two weeks before the accident by the county expert, it was held that if he made a mistake the county cannot be charged with negligence by reason of such mistake. "The duty of the county was to exercise reasonable care in selecting a proper person to examine and repair the bridge, and to require of him the exercise of his skill, and if it did so, and the bridge still remained unsafe, the county was not liable," and it was error to allow the plaintiff to prove that it was usual and ordinary for traction engines to pass over other highways and bridges than the one in controversy, and the fact that one engine had passed over this bridge

shortly before this accident did not make that the usual and ordinary mode of travel over it. It was held that one who uses a bridge and subjects the same to an extraordinary strain cannot recover damages.

And a county was not liable for damages for injuries caused by a public bridge being out of repair and dangerous, where the plaintiff knew that such was its condition, although the bridge was being used by the public and plaintiff exercised care in going upon it. *Morrison v. Shelby County Comrs.* 116 Ind. 481.

And it was no defense that the bridge was over an artificial ditch, as the county should keep all bridges upon highways safe regardless of the kind of stream or ditch which they span. *Howard County Comrs. v. Legg*, 110 Ind. 479.

And a county is liable whether the bridge is on a natural or artificial watercourse. *Jackson County Comrs. v. Nichols*, 139 Ind. 611.

An action for causing death by want of a railing over a county bridge across a mill race on a highway, where the horse shied and there was no railing, an allegation in the complaint that the bridge complained of was constructed at a point "where the defendant had the right to and it was its duty to construct it," was a conclusion, and did not show that the county had authority to build it; but another allegation that the bridge complained of was a part of a public highway in said county, and was situated and located over and across a mill race through which a large quantity of water flowed rapidly, was sufficient to show that it was a county bridge within the meaning of Ind. Stat. 1881, § 2892, providing that the board of county commissioners shall cause all bridges in the county to be kept in repair, and §§ 2880, 2885, authorizing such board to erect bridges over streams and watercourses. Evidence that the county board exercised control over it by looking after and repairing it was competent for the purpose of showing that it had adopted it and considered it a part of the highway. *Shelby County Comrs. v. Blair*, 8 Ind. App. 574.

And in that case it was held that the law was settled in Indiana that the board of commissioners are required to keep all bridges in the county over watercourses, either natural or artificial, which are part of the highway, and a failure on the part of the county in the performance of this duty renders the county liable to a traveler for damages.

And a county was liable for injuries caused by defects in a bridge over a natural watercourse on a highway, under Ind. Rev. Stat. 1881, § 2892, providing that the board of commissioners of such county

from conditions, the risk of which was assumed by plaintiff when she entered into the employment of operating the mangle.

Hickey v. Taaffe, 105 N. Y. 26; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540; *Ogley v. Miles*, 139 N. Y. 458; *Appel v. Buffalo, N. Y. & P. R. Co.* 111 N. Y. 550; *Crown v. Orr*, 140 N. Y. 450; *DeForest v. Jewett*, 88 N. Y. 284; *Cowhill v. Roberts*, 71 Hun, 127; *French v. Aulla*, 72 Hun, 442.

The very accident suggests carelessness on plaintiff's part, and she is bound to prove her freedom from negligence, which, we submit, she has failed to do.

Babcock v. Fitchburg R. Co. 140 N. Y. 308.

Bartlett, J., delivered the opinion of the court:

The plaintiff appeals from an order, made

shall cause all bridges therein to be kept in repair. *Parke County Comrs. v. Wagner*, 138 Ind. 609.

In *Parke County Comrs. v. Wagner*, 138 Ind. 609, it was said: "The cases in this state are in confusion upon this question, many apparently holding that the liability arises from the fact that the bridge forms a part of the highway, and not depending upon the size of the bridge or the character of the stream or body of water crossed by it. *Sullivan County Comrs. v. Arnett*, 116 Ind. 438; *Hamilton County Comrs. v. State*, *Stephenson*, 118 Ind. 179; *Knox County Comrs. v. Montgomery*, 109 Ind. 69; *Vaught v. Johnson County Comrs.* 101 Ind. 123; *Allen County Comrs. v. Bacon*, 96 Ind. 31; *Gibson County Comrs. v. Emmerson*, 95 Ind. 579; *Howard County Comrs. v. Legg*, 93 Ind. 523, 47 Am. Rep. 390; *Madison County Comrs. v. Brown*, 89 Ind. 43; *Morgan County Comrs. v. Pritchett*, 85 Ind. 69; *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657; *Harris v. Vigo County Comrs.* 121 Ind. 299; *Owen County Comrs. v. Washington Twp.* 121 Ind. 373, and probably other cases. In *Howard County Comrs. v. Legg*, 110 Ind. 479, and *Boone County Comrs. v. Mutchler*, 137 Ind. 140, it was expressly held that the size of the bridge, and the character of the stream or ditch crossed were unimportant if the bridge was a part of the public highway, and liability was extended to bridges crossing ditches for the drainage of wet lands. In *Carroll County Comrs. v. Bailey*, 122 Ind. 46; *Clark County Comrs. v. Brod*, 8 Ind. App. 585; *Shelby County Comrs. v. Castetter*, 7 Ind. App. 309; *Shelby County Comrs. v. Blair*, 8 Ind. App. 574,—it was held that Rev. Stat. 1881, § 2892 (Rev. Stat. 1894, § 3232), should be construed in connection with other provisions of the statute requiring counties to build and repair bridges, and when so construed the authority of the counties was to build bridges only over watercourses, and the duty of counties was only to repair such bridges as they were authorized to build. The latest decision by this court is that of *Boone County Comrs. v. Mutchler*, 137 Ind. 140, and if we found it necessary to reconcile the conflict suggested, and to adhere to the holding in that case, it would be unnecessary to decide whether the definitions of a watercourse given by the trial court in this case were correct, since they could in no way have harmed the appellant, but would have required more from the appellee than necessary to establish his cause of action." And the court concludes "The channel should have a supply of living water, though it is not necessary that the supply should be sufficient at all times, or most of the time, to flow the entire length of the channel."

A county was liable for injuries caused by the negligent construction of a bridge over a ditch, under Ind. Rev. Stat. 1881, § 2892, providing that the board

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on a motion heard at the general term in the first instance, granting a new trial after verdict at the Monroe circuit in her favor.

The plaintiff, an employee of the Monroe County Insane Asylum, was severely injured while operating a machine known as a steam mangle, which was used in the laundry.

At the trial it was insisted on behalf of the defendant that the county of Monroe was not liable in any event; that assuming its liability, the plaintiff had failed to make out a cause of action.

As we are of opinion that the county of Monroe is not liable under the facts as disclosed in this record, it is unnecessary to determine whether the plaintiff was entitled to go to the jury.

The plaintiff was injured February 11, 1891. Before this action was commenced the county law of 1892 was in force, but it is unnecessary

of commissioners of such county shall cause all bridges therein to be kept in repair, where plaintiff's horse was frightened by a hog in a ditch on a free gravel road, a public highway, and backed the buggy over the side of the bridge, there being no railing to protect the same. It was held that another allegation that the county negligently permitted the adjoining owner to allow his animals to run in the ditch, thereby frightening the horse, stated no cause of action; but this did not affect the cause of action as to the construction of the bridge, or relieve the county from liability. It was also held that it was not necessary to allege notice where the cause of action arose from faulty construction. It was further held that the fact that the horse was driven by plaintiff's daughter, a married woman who was a skilful driver, did not show contributory negligence. *Boone County Comrs. v. Mutchler*, 137 Ind. 140.

But in an action for injuries caused by the breaking down of a bridge a demurrer was properly overruled to an answer averring "that the bridge or culvert complained of was not a bridge or structure which spanned a watercourse with defined bed and banks; but was a small bridge or culvert made to carry the surface water from said road away from it after heavy rains," as under a general denial in the answer these facts might be proved. *Bonebrake v. Huntington County Comrs.* 141 Ind. 62.

A county was not liable for damages resulting from a defective bridge described as one "spanning a ditch which made a deep break in said highway," and "which was a natural outlet for surface water from adjoining lands, and for waters that flowed from under a railroad near by, being dry portions of the year only." *Reinhart v. Martin County Comrs.* 9 Ind. App. 572.

In *Reinhart v. Martin County Comrs.* 9 Ind. App. 572, the case of *Boone County Comrs. v. Mutchler*, 137 Ind. 140, was distinguished, as in that case the ditch was regarded as a public ditch, and it was constructed by the board of commissioners as a part of a free gravel road.

In an action to recover damages for injuries from an unsafe bridge, it must be alleged that the unsafe condition of the bridge was the cause of the injury. An allegation that the bridge was unsafe, and the plaintiff's horse was injured, was held not to show any connection between the two things. *Harris v. Vigo County Comrs.* 121 Ind. 299.

And a county was liable for negligence in allowing a slab bridge over a pond to remain out of repair, causing injury, and the fact that it was in this condition for six months was sufficient to imply notice. A recovery was not prevented by the fact that plaintiff knew that it was somewhat out

to examine its provisions, as the status of the county of Monroe on the 11th day of February, 1891, must determine its liability.

Prior to the year 1863 the county of Monroe cared in part for its insane in a department of the county poorhouse. By chapter 82, Laws of 1863, it was enacted that the insane asylum of the county of Monroe should be a separate and distinct institution from that of the Monroe county poorhouse, and the board of supervisors were placed in control and authorized to elect a warden, who was to hold office for three years, and a board of three trustees for a like term.

The warden was constituted the chief officer of the asylum, subject to the regulations established by the board of supervisors; all purchases for the asylum were to be made by the warden under the direction of the trustees; all contracts with the attendants and assistants

were to be made in the official names of the trustees; the warden was also required to make out and deliver to the trustees annually an inventory of all property belonging to the asylum; the warden was also authorized to make contracts for the support of insane persons of the county, and by the direction of the board of supervisors or the trustees to demand from the state lunatic asylum all persons who were chargeable to the county of Monroe or to any town or city in the county.

It was further provided that no insane person residing in the county of Monroe and likely to become a county charge should thereafter be admitted to the state lunatic asylum without the written consent of the trustees of the Monroe county asylum or the chairman of the board of supervisors.

By chapter 638, Laws of 1870, it was made the duty of the trustees to determine all ques-

of repair. *Madison County Comrs. v. Brown*, 89 Ind. 48.

And a county was liable for injuries caused from a defective bridge on a public highway which spanned a watercourse. *La Porte County Comrs. v. Ellsworth*, 9 Ind. App. 566.

In *Parke County Comrs. v. Sappenfield*, 10 Ind. App. 609, where a recovery was allowed for negligent failure to erect and maintain suitable railings upon a county bridge, it was held that the evidence was sufficient to authorize the jury to find that the bridge was constructed over a natural watercourse—a "branch," as one of the witnesses styled it.

And a verdict for damages for injuries from failure to erect barriers on a bridge was not set aside on conflicting evidence. *Parke County Comrs. v. Sappenfield*, 10 Ind. App. 609.

But a county was not liable for damages caused by a defective culvert on a public highway, where such culvert drained water from a ravine only in case of rain, under Ind. Rev. Stat. 1881, § 2885, requiring the county commissioners to repair or build bridges over watercourses. This was held not to be a watercourse, and a distinction was made between the care required for bridges and highways. *Carroll County Comrs. v. Bailey*, 122 Ind. 46.

Iowa.

In Iowa counties are held liable for failure to exercise care in the construction or repair of county bridges and a notice to any one of the county agents or officers will render the county liable for injuries thus caused. This rule has been limited to bridges of such size as the county should take care of, and does not extend to small bridges.

And a county was liable for injuries caused by a defective bridge. In this case the court recognized that the question was one upon which there was conflict, but refused to change the rule of that state. It was held that the county was bound to exercise such care as reasonably prudent and careful men used in the conduct and management of their own affairs of like importance. *Cooper v. Mills County*, 60 Iowa, 360.

And in this case where the court instructed the jury, in substance, that if the bridge was properly built, though from a plan in the builder's head, such plan will be sufficient, and a jurymen wrote on a paper planned to that part of the instruction "not sufficient," such writing was held to be only an irregularity, and did not have the force of a special verdict, although perhaps some of the jury may have understood that as an interrogatory.

Where an action was brought for \$20,000 damages for injuries caused by a defective bridge, and the petition was amended increasing the claim to \$35,000, 89 L. R. A.

and the amendment was not filed within two years from the time the cause of action occurred, as required by statute for bringing an action, and the action was brought within the proper time, the amendment was properly allowed, and a recovery could be had for damages within the amount claimed in the petition and amended petition. *Cooper v. Mills County*, 60 Iowa, 350.

And evidence by an expert bridge builder as to the effect of decay, and the ordinary life of bridge timber, was held competent as tending to show notice to the county of defects, and it was further held that a county should provide a competent person to inspect the bridges if the board had not that skill. *Morgan v. Fremont County*, 92 Iowa, 644.

A notice to one of the board of supervisors of a county for defects in a bridge is notice to the county, where it is the duty of the board to act, and a meeting of the board is held after the notice and before the accident. *Morgan v. Fremont County*, 92 Iowa, 644.

A verdict for \$1,000 was held not excessive for injuries caused by defective bridges, where plaintiff was lamed, his jaw injured, some teeth broken, and his injuries caused much suffering. *Morgan v. Fremont County*, 92 Iowa, 644.

A county was liable for negligence in the construction of a bridge, and was required to exercise reasonable skill and care in adopting a plan, and it could not negligently or carelessly adopt an unsafe and insufficient plan on account of its cheapness, and be allowed to escape all liability for damages resulting from the insufficiency of the plan. It was also held that the bridge may have been built so long and become so old that the defendant in the exercise of ordinary care and prudence ought to have known that it would in such time become rotten and unsafe; and, further, that if the members of the county board did not possess the requisite skill to discharge the duty of inspection, then it was the duty of the board to appoint or provide someone possessing such skill, and to have all county bridges under their care examined as frequently as a man of ordinary prudence and care would deem necessary for the safety of the public. But it was further held that if the bridge had stood for a period greater than the average life of timber of which it was composed, and had been rotten and unsafe for some months, the county would not be liable unless some member of the board in the exercise of reasonable care should have known of such condition. *Ferguson v. Davis County*, 57 Iowa, 601.

In *Huff v. Poweshiek County*, 60 Iowa, 529, it was held that it was a question for the jury whether the county was negligent in allowing bridge timbers

tions in relation to the indigent insane as to whether their maintenance was properly a charge upon a specified town within the county of Monroe, or upon the city of Rochester, or upon the county of Monroe; the trustees were also empowered when any lunatic, not indigent, was placed in the asylum, to charge his estate, or the person legally responsible, for his maintenance, and to collect the same.

It will thus be observed that the county of Monroe, being legally chargeable as one of the political divisions of the state with the care of its insane, saw fit in 1863, with the consent of the legislature, to undertake the discharge of that duty through the instrumentality of a county asylum.

In other words, the county of Monroe from that time shared with the state the burden of caring for the insane, withdrew from the state lunatic asylum all indigent insane for whose maintenance it was liable, and secured legisla-

tion requiring all the pauper insane of the county to enter its own asylum.

When an insane person is deprived of his liberty and the custody of his property, placed in close confinement, and separated from family and friends, it is an extreme exercise of the police power by the state, or some political division thereof, for the protection of society and to promote the best interests of the unfortunate victim of mental alienation.

It therefore follows that the county of Monroe, while acting under the statutes referred to, was engaged in the discharge of a most important public duty and, consequently, not liable to the plaintiff in damages by reason of her injuries. 2 Dill. Mun. Corp. 4th ed. § 693; Addison, Torts, Banks' ed. p. 1298, § 1526.

In *Maximilian v. New York*, 63 N. Y. 160, 20 Am. Rep. 468, this court laid down the rules of law that control this case. The plaintiff sought to recover damages for the death of her

to become rotten, and if the bridge was unsafe the county was liable if any member of the board of supervisors knew of its unsafe condition, or by the exercise of ordinary care and watchfulness would have known of it.

In *Roby v. Appanoose County*, 68 Iowa, 114, it was held that notice to the agents or proper officers of a county of the condition of the approach to a bridge was notice to the county in order to hold it liable for injuries caused thereby.

But it was held that the county was not liable where it was not shown to have had notice of the defect, or that it was of such duration as to imply notice. It was said that a county is liable for injuries caused by a defective bridge which it has neglected to repair, where the railing is insufficient. *Davis v. Allamakee County*, 40 Iowa, 217.

And where a county had obstructed an unsafe bridge by barriers, which had been removed at the time of the accident without the knowledge of the county, it was not liable unless sufficient time had elapsed after the removal of the same, and before the accident, for the county, in the exercise of ordinary care and vigilance, to have discovered the fact, and to have caused the barriers to be replaced. *Weirs v. Jones County*, 80 Iowa, 361.

And under Iowa Code, § 527, providing that all public bridges exceeding 40 feet in length over any stream crossing a county street or highway shall be constructed and kept in repair by the county, and § 308, requiring the board of supervisors of each county to provide for the erection of all bridges which may be necessary to keep the same in repair, and § 990, providing that when notified in writing that any bridge or any portion of the public highway is unsafe the supervisor shall be liable for all damages after a reasonable time, and if there is in the district any bridge erected or maintained by the county, then he shall on such notice of the unsafe condition of such bridge obstruct the passage and use diligence in notifying the board of supervisors, and if he fails to obstruct or notify he shall be liable for all damages, providing that nothing shall be construed to relieve the county from liability for the defects of such bridge,—a county was liable for all bridges which exceeded 40 feet in length, and the liability for constructing and maintaining bridges less than 40 feet was not affected by these provisions, but depended upon the necessity and importance to the public and the ability of the road district. The county was liable where there were two spans 20 feet apart, one of which was over 40 feet and the smaller one not more than 40 feet long, and the smaller one was out of repair causing personal injury. *Casey v. Tama County*, 75 Iowa, 655.

That a bridge was wholly within B. county did not exonerate T. county, under Iowa Acts, 17th Gen. Assen. authorizing the construction of county bridges on county-line roads wholly within one of the two counties interested where a suitable site cannot be obtained on the county line, where the defendant rebuilt the span over the main stream and put piling under the other after this law went into effect. *Casey v. Tama County*, 75 Iowa, 655.

In this case it was held that it was a question for the jury to determine whether or not the road in question on which was the bridge was a public highway.

A county was liable for injuries caused by defects in a county bridge upon a public highway, where such bridge was erected and maintained by the county. *Krause v. Davis County*, 44 Iowa, 141; *Hughes v. Muscatine County*, 44 Iowa, 672.

And was liable for injuries resulting from the negligent construction of a county bridge, and from the failure to keep the same in repair, although it could have been remedied by the road supervisor at a small expense. *Huston v. Iowa County*, 43 Iowa, 456.

And for injuries caused by a county bridge being out of repair, a county was liable under the Iowa statute making it the duty of the county in which the bridge is situated to build bridges and make all repairs requiring an extraordinary expenditure of money. It was held that this duty involved the corresponding obligation or liability to pay damages for the injuries resulting from the neglect of the same. *Wilson v. Jefferson County*, 13 Iowa, 181.

And a county was liable for injuries caused by a county bridge being out of repair, and all that was incumbent on the plaintiff was to show that this road existed and was traveled as a public highway in order to bring it within the duty of a county to keep it in repair. It was further held that an obstruction and notice warning the public that it was dangerous to use the bridge would not excuse, where it was not shown that such notice and obstruction existed at the time of the injury or that plaintiff had seen the same. *Brown v. Jefferson County*, 16 Iowa, 389.

The fact that it was the duty of the road supervisors to make slight repairs about a county bridge or its approach would not relieve the county from liability for injuries caused thereby, as a like obligation rests upon the county under Iowa Code, § 527. *Roby v. Appanoose County*, 68 Iowa, 114.

In this case it was said that it would be presumed that the bridge was a county bridge where the instructions were based upon that theory, and there was no evidence in the record to the contrary.

But a county is not liable for injuries caused

intestate, who was killed by an ambulance wagon which was driven by an employee of the commissioners of charities and corrections.

It was held that when the city of New York, by legislative enactment, was required to elect or appoint an officer to perform a public duty laid not upon it, but upon the officer, in which it had no private interest, and from which it derived no special advantage, such officer is not a servant or agent of the municipality for whose acts it is liable, even though the officer had in charge and was negligently using corporate property.

Judge Folger said (p. 164, 30 Am. Rep. 470): "There are two kinds of duties which are imposed upon a municipal corporation. One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general

by a defective bridge, where such bridge is in a town which has been recently changed into a city of the second class, under Iowa Rev. Stat. §§ 1078-1097, providing that cities of the second class shall be invested with the power to control its own bridges and charged with the duty of keeping them in repair. *McCullom v. Black Hawk County*, 21 Iowa, 410. But this case was remanded for a new trial with leave to amend, if possible, to show that at the time the accident happened there had been no regular annual election for the city officers as a city of the second class, as the county would then be liable.

And a county was not liable for a defective bridge where the same was a small bridge, 12 feet span, and a complete and safe bridge with railings could have been built for \$75, and the defect in the bridge was the absence of railings, which could have been put on at a cost of \$5, and the road district had employed men to erect the same, and there was an absence of evidence that the county ever had anything to do with the bridge. It was said that if it had been a large bridge the county would have been liable. *Chandler v. Freemont County*, 42 Iowa, 58.

And where it was not shown that the county had control over or constructed the bridge there was no liability; and the fact that it subsequently made an appropriation for repairing or reconstructing could not be shown. *Titler v. Iowa County*, 48 Iowa, 90.

So, where the bridge was small and one which it was the duty of the officers of the particular road district to keep in repair, the county was not liable. *Taylor v. Davis County*, 40 Iowa, 295.

A distinction was made between expensive bridges and small bridges, although in this case the county board of supervisors had sent a committee to examine the work including the bridge, and then established the road where the road had been changed. This bridge had not been erected by the county or by the county funds.

And a county was not liable for injuries caused by a defective culvert or bridge which was a part of an ordinary road or highway, as counties were not charged by law with the duty of keeping in repair the ordinary highways or roads, but this duty was committed to the several road districts whose officers acted independently and in the exercise of their duty were not under the control of the county authorities, and no right of action existed against the county in respect to defective roads. *Soper v. Henry County*, 26 Iowa, 289.

In that case it was said under Iowa Rev. Stat. § 312, ¶ 18, § 710, authorizing county authorities to make and repair bridges and levy a bridge

law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes (*Lloyd v. New York*, 5 N. Y. 874, 55 Am. Dec. 347). . . . But where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents. *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 802."

In the case at bar, it is true, we are not dealing with a municipal corporation, for in February, 1891, the county of Monroe was a political division of the state, and at most only a quasi corporation; but, nevertheless, the reasoning in the opinion just cited is applicable.

By the act of 1863 the county of Monroe, through its board of supervisors, was required

tax, counties were liable for injuries caused by the condition of such bridge requiring extraordinary expense to build and maintain, but were not liable for small bridges which it was the duty of the road-district officers to maintain.

So, a county was liable for negligence in the construction and maintenance of the approaches to its bridges the same as it would be for a bridge, and the fact that a part of the cost of the construction of the county bridge was contributed by others did not relieve the county from liability. *Albee v. Floyd County*, 46 Iowa, 177.

It was held that the question whether or not the approach was a part of the bridge was one of fact for the jury. It was also held that where the bridge was of such an extent that it required a large expenditure of money to construct it, it would be a county bridge, although the repairs could be made for a small amount, and the bridge had been built by others than the agents of the county. *Moreland v. Mitchell County*, 40 Iowa, 394.

And where a trestle work was made between a road and a bridge intended to be filled on both ends of the trestle work, but the fill was incomplete, and a man in driving along the road at night approached the trestle work when he was on the embankment and got out of the buggy to investigate and fell off because there was no railing, it was held that the jury were authorized to find that it was a continuation of the traveled highway, and when connected with the trestle work the whole formed an approach to the bridge. It was also held that if the embankment was intended to connect the trestle work, and one fill was made first, which when connected with the trestle work, made it dangerous to persons traveling along the highway, the county would be liable even if there was negligence on the part of the contractor, as it would be the duty of the county to see that suitable barriers were erected. It was further held that the jury were authorized to find that plaintiff was rightfully passing over both the earth and trestle work, although it had not been used before for public travel, as someone must be the first to pass over a newly constructed or repaired highway, and that whether he was guilty of contributory negligence or not was a question for the jury. *Van Winter v. Henry County*, 61 Iowa, 684.

The questions whether an approach to a bridge is a part of the same or forms a part of the highway, and also whether the accident occurred upon the approach, where there are no barriers on an approach of the height of 30 feet, should both be submitted to the jury at the same time. *Newcomb v. Montgomery County*, 79 Iowa, 487.

Whether an approach to a county bridge built by

by the legislature to elect a warden and trustees of its insane asylum to perform an important public duty in which it had no private interest, and from which it derived no special advantage. The warden and trustees, when so elected, were in no legal sense the agents of the county of Monroe, but were public officers engaged in the discharge of duties which involved the exercise of the police power, and in which the general public were interested.

While the county of Monroe, by its board of supervisors, was empowered to enact general rules and regulations for the government of the asylum, and to elect its warden and trustees, it had no power to interfere directly with the management of the institution unless the warden so elected was guilty of misconduct, when he could be removed by the board of supervisors.

The nonliability of counties and also of municipal and other corporations having special

charters for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty, is established by many cases. *Ensign v. Livingston County Supers.* 25 Hun, 20; *Alamango v. Albany County Supers.* 25 Hun, 551; *Ham v. New York*, 70 N. Y. 459; *Smith v. Rochester*, 76 N. Y. 506; *Benton v. Boston City Hospital*, 140 Mass. 18, 54 Am. Rep. 436; *Curran v. Boston*, 151 Mass. 505, 8 L. R. A. 243.

The learned counsel for the plaintiff, evidently appreciating the force of the general rule to which we have adverted, sought to show that the case at bar was, by reason of special facts, not within its operation.

It is insisted that the defendant, at the time of this accident, was not only caring for the pauper insane of Monroe county, but also for other patients through contracts made for that purpose.

There is no evidence that the county of

the road district was a part of the bridge was a question for the jury in an action for injuries caused from the dangerous condition of the bridge and approach, and it was erroneous for the court to hold that, as a matter of law, the bridge and approach being more than 40 feet long are to be considered together as constituting a county bridge. *Nims v. Boone County*, 68 Iowa, 642, 66 Iowa, 272.

So, in *Nims v. Boone County*, 66 Iowa, 272, it was said that in *Moreland v. Mitchell*, 40 Iowa, 394, it was held that whether an approach to a bridge constitutes a part of the bridge, for negligence in the construction of which the county is liable, is a question of fact for the determination of the jury; and the court said it was held by the court that the jury in that case rightfully found the approach to be part of the bridge, but there are many differences between the facts of that case and this.

And in *Roby v. Appanoose County*, 63 Iowa, 118, it was held that an approach to a bridge may be a part of the bridge, for negligence in the construction and repair of which the county would be liable. In this case the evidence did not show who built the approach.

The plaintiff must show that he has exercised due care in order to recover.

A county was liable for injuries caused by a county bridge being out of repair, and the plaintiff was held not to be guilty of contributory negligence where he got out of his wagon and examined the bridge before crossing, although one end had settled about 2 feet but appeared to him to be strong, and there was no other place to cross. *Kendall v. Lucas County*, 26 Iowa, 395.

And an instruction that if the defect in a bridge was "observable to all" the defendant's officers would be presumed to have known of it did not show that plaintiff was guilty of contributory negligence in going upon the bridge. *Homan v. Franklin County*, 98 Iowa, 692. See former trial, 90 Iowa, 185.

And it was held that the plaintiff was not guilty of contributory negligence in driving on a bridge when he had no knowledge of any defect therein, although the accident happened by reason of decay and rottenness of its timbers. *Huff v. Poweshiek County*, 60 Iowa, 529.

But a county was not liable for injuries caused by want of a railing on a bridge where the same had existed for two years, which was known to the deceased, who, in walking on the bridge at night carrying a lantern and reading a letter, stumbled and fell and was killed, as his contributory negligence would bar a recovery, although such accident may have been caused by a large spike projecting from the floor, but there was no evidence that the county

had knowledge of the same. *Dale v. Webster County*, 76 Iowa, 370.

And where injury was caused in an attempt to cross a defective bridge with a threshing outfit and steam engine weighing 8,250 lbs. where the plaintiff laid 3x12 inch planks 16 feet long for the wheels of the engine and moved at a slow speed, it was a question for the jury whether the use of such bridge was contributory negligence, and whether such use was reasonable, proper, and probable in view of the extent, kind, and nature of the travel and business on that road. *Yordy v. Marshall County*, 80 Iowa, 405.

In *Walker v. Decatur County*, 67 Iowa, 307, it was held erroneous to exclude evidence offered by the county to show that there was another equally convenient and perfectly safe road by which the plaintiff might have reached his destination and escaped injury from an unsafe bridge. It was further held that an instruction that if he knew the bridge was dangerous and could have reached his destination as readily by a different road, the use of this bridge constituted contributory negligence, was erroneous, in that the mere fact that it was unsafe would not of itself prevent a recovery, and that whether plaintiff exercised reasonable discretion in attempting to pass over was a question for the jury.

It was said that a county was liable for an injury to a person caused by a defective county bridge; but that this doctrine would not be carried any further and apply to anything else, as it was recognized as contrary to other decisions. *Kincaid v. Hardin County*, 53 Iowa, 430, 38 Am. Rep. 238. The court attempted to make a distinction between bridges and court-houses in respect to liability for defects on the ground that the county had an option as to building bridges but none as to court-houses.

Maryland.

In Maryland counties are held liable for injuries to travelers from the defective condition of the county bridges.

Where a party injured was negligent, but his negligence only remotely contributed to produce the accident caused by a small bridge being out of repair, he would be entitled to recover providing the road was in disrepair through defendant's negligence, and if the consequences of plaintiff's negligence would have been thereby avoided. *Kennedy v. Cecil County Comrs.* 69 Md. 65.

And under Md. Code, art. 23, § 1, declaring county commissioners to be a corporation, and to have power to appoint supervisors, and to have charge and control over county roads and bridges, and to

Monroe was caring for insane patients not residing in the county, for a consideration, but if such were the case it would be without warrant of law, as we think a fair construction of § 7 of chapter 82 of Laws of 1868, limits the contracts to be made "to any individual of said county" who wishes to contract as to the care of the insane of Monroe county.

There can be no doubt that the committee of a lunatic, or anyone legally liable to support him, should, in the first instance, be required to pay for his maintenance and the income derived in this manner is in no sense a source of profit to the county so that it would be deemed in law as conducting a private business.

We may also consider in this connection the suggestion that as the asylum received a small sum annually from the sale of surplus farm product it was to be treated as engaged in a private enterprise resulting in profits.

have power to appoint all officers, agents, and servants as are required for county purposes, the county of Baltimore was liable for injuries caused by neglecting to repair a bridge on one of the public highways, and it was held that if the act of April 11, 1874 (Acts 1874, chap. 274), repealing local legislation for that county in relation to road supervisors until the January succeeding the accident, suspended power under that act, there was still general power under the Code. *Baltimore County Comrs. v. Baker*, 44 Md. 1.

Under Md. Code, art. 23, providing that the county commissioners of each county shall have charge of and control over county roads and bridges, and authorizing them to build and repair bridges, a county was liable for injuries caused by a defective bridge, where a bridge was erected by a canal company at the crossing of a highway and burned down, and the canal company erected another bridge at the same place. It was held that, although it was the duty of the canal company to maintain the bridge, and it was liable to the party injured or to reimburse the county, the county was also liable for injuries occurring. *Eylerv. Alleghany County Comrs.* 49 Md. 257, 33 Am. Rep. 249.

Where it was the duty of a canal company to keep a bridge in repair and it had notice of the suit, the county had a remedy over against the canal company for the amount of a judgment against the county. *Chesapeake & O. Canal Co. v. Alleghany County Comrs.* 57 Md. 201, 40 Am. Rep. 430.

The burden of proving contributory negligence in an action against a county for injuries caused from a defective bridge is on the defendant. The simple fact of the existence of a hole in the bridge with the knowledge of the plaintiff is not sufficient to bar a recovery against the county, where it is not shown that the hole rendered the bridge practically impassable. *Prince George's County Comrs. v. Burgees*, 61 Md. 20, 48 Am. Rep. 88. *Pennsylvania.*

In Pennsylvania a county is liable to travelers for injuries received from a bridge being out of repair or insecure, where the county has notice of its condition. The fact that the plaintiff had reason to believe that the bridge was unsafe was held not to bar a recovery, as permitting the public to use it would hold the county liable; but it would not be liable where a statutory notice to repair was required but not given.

So, under Pa. act June 13, 1836, relating to roads, highways, and bridges, providing that county bridges on the line of adjoining counties shall be maintained and kept in repair by the commissioners of such counties at the joint and equal charge

The revenue derived from both of the sources referred to is merely incidental and tends to some little extent to lessen the public burden assumed by the county of Monroe. *Curran v. Boston*, 151 Mass. 505, 510, 8 L. R. A. 243; *Alamango v. Albany County Supers.* 25 Hun, 551-553; *People, Society of New York Hospital, v. Purdy*, 126 N. Y. 679, and 58 Hun, 886.

We have considered the other suggestions of counsel for appellant contained in his brief and consulted the authorities to which he refers, but find nothing to take this case from the operation of the general rule.

The order of the General Term should be affirmed and under the stipulation of plaintiff judgment absolute ordered for the defendant dismissing the complaint on the merits, with costs to defendant in all the courts.

Ordered accordingly.

All concur, except **Haight, J.**, not sitting.

of both, under act April 13, 1843 (Pub. Laws, 221), making it the duty of the county commissioners of the several counties to repair all bridges erected by the county, and act May 5, 1854, extending this provision to the county of Armstrong, the county was liable where it was known that the timbers were rotten and the bridge unsafe, and that it was left in this condition. It was further held that it was not contributory negligence for plaintiff to use such bridge although he knew the condition, if the county did not see fit to give notice or prevent its use. *Humphreys v. Armstrong County*, 56 Pa. 204, 3 Brewst. (Pa.) 49.

In *Armstrong County v. Clarion County*, 66 Pa. 218, it was held that where the county was liable to pay for injuries caused by a defective bridge, as in *Humphreys v. Armstrong County*, 56 Pa. 204, such county might recover contribution from the other county.

Where a recovery was had against a county for injuries caused by a defective bridge, an instruction was proper which submitted to the jury the question that there could be no recovery if the deceased attempted to use a vehicle of extraordinary weight, if he did not first examine the condition of the bridge. The court held that the jury must have found that the injury was caused without any fault of the decedent, and in consequence of the negligence of the county. *Shadler v. Blair County*, 136 Pa. 488.

The county of Blair was liable for injuries causing death, from a defective bridge, where the deceased tried to cross a county bridge with a threshing engine and the bridge gave way, and the timbers were badly decayed, and ordinary inspection would have disclosed this defect. The bridge was built by the counties of Huntingdon and Bedford and was entered of record as a county bridge, and Blair county was formed from Huntingdon and Bedford counties, and from the organization of Blair county the bridge was known as a county bridge, and the only repairs ever made thereon were made by that county. Under Pa. act April 13, 1843 (Pub. Laws, 221), providing that it shall be the duty of the county commissioners to repair all county bridges, and act February 23, 1846 (Pub. Laws, 64), providing that Blair county and all the officers therein shall be subject to perform the same duties as other similar officers in other said counties, it was held that Blair county was bound by the same rule as other counties. *Shadler v. Blair County*, 136 Pa. 488.

But a county was not liable for injuries caused by defects in a county bridge, arising from a concealed breakage in an iron rod, which had probably existed for a long time. In the absence of evi-

Kate MARKEY, Admr., etc., of Hugh Markey, Deceased, *Appl.*,
v.

QUEENS COUNTY, Impleaded, etc., *Resp.*

(154 N. Y. 675.)

1. No new liability for torts is imposed upon a county by a statute making it a municipal corporation for exercising the powers and discharging the duties of local government and the administration of public affairs, and providing that actions for damages for any injury to any property or rights for which it is liable shall be in the name of the county.
2. A county is not liable for the negligent exercise of the duty of maintaining bridges, imposed on it by the state, since it derives no special advantage from it in its corporate capacity.

(*Bartlett and Martin, JJ., dissent.*)

(January 11, 1898.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Queens County in favor of defendant in an action brought to recover damages for personal injuries resulting in death alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

dence or of direct proof of negligence in the acceptance by the county, it would be presumed that upon the erection of the bridge it was properly examined. It was error to submit to the jury the question "Did the bridge fall by reason of a defect in the original construction?" *Childe v. Crawford County*, 176 Pa. 139.

And a county was not liable for injuries causing death occasioned by an unsafe bridge, under Pa. act March 6, 1860, § 2 (Pub. Laws, 106), making it the duty of the several townships and boroughs of S. county, in which any county bridge may be erected, to keep the same in repair at their own expense, and act March 21, 1861 (Pub. Laws, 163), providing that that section shall not be construed so as to require the several townships and boroughs in S. county in which any county bridge or bridges are now or may be erected to keep the same in repair, when in the opinion of the auditors of the township or borough the expense of repairing shall at any one time exceed \$20, and if in the opinion of said auditors the repairs shall exceed the sum of \$20 they shall cause the same to be made known to the county commissioners, who shall cause the same to be done at the expense of the county, and no notification as to the condition of the bridge or cost of repairs was given by the auditors to the commissioners. It was held that it was a question for the jury whether the injury was caused by defects in the original structure of the bridge or from want of repair. In the former event the county would be liable, in the latter the township, as it was only the duty of the county commissioners to make repairs in such cause where the township or borough auditors were of the opinion that the expense exceeded \$20, and when, in addition, such opinion was made known to the commissioners. It appeared that its original construction was safe, but the bridge had become out of repair. *Rigony v. Schuylkill County*, 103 Pa. 382.

2. Where statute imposes liability.

Alabama.

In Alabama there is a statute imposing liability
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Mr. Charles J. Patterson, for appellant:
Each county is now a municipal corporation.

County Law, Laws 1892, chap. 686, § 2; General Corporation Law, Laws 1892, chap. 687, § 2; General Municipal Law, Laws 1892, chap. 685, § 1.

By the county law it is clearly contemplated that an action may be maintained against a county for damages.

Laws 1892, chap. 686, § 3.

The county of Queens and the county of Kings were charged by law with the duty of reconstructing this bridge (Laws 1892, chap. 288).

People, Keene, v. Queens County Supers. 142 N. Y. 271.

In England it is settled that a municipal corporation or other public body will not be held liable to an injured person for a mere nonfeasance consisting of a neglect to repair a public highway, even though the duty to repair is imposed by law upon the corporation.

Cowley v. Newmarket Local Board, 1 Fed. Rep. 45; *Thompson v. Brighton*, 9 Fed. Rep. 111; *Gibson v. Preston*, L. R. 5 Q. B. 218; *M'Kinnon v. Penson*, 8 Exch. 319; *Young v. Davis*, 7 Hurlst. & N. 760, Affirmed in 2 Hurlst. & C. 197.

It is also settled that for misfeasance whereby the safety of the highway is disturbed the corporation will be held liable.

upon counties for failure to take an indemnity bond from contractors on public bridges where the guaranty has expired, but this liability does not attach to bridges which are not built by the county; and in the absence of this statute there is no implied liability on the part of counties.

So, a county was liable for injuries caused by a bridge falling in where the guaranty had expired, under Ala. Code, § 1203, providing that the county is liable for damages by a defect in a county bridge if a guaranty is not taken from the contractors, or the period has expired. This section was held to apply although it was not a toll bridge. *Barber County v. Brunson*, 36 Ala. 362.

And under Ala. Code, § 1203, the county was liable, although the bridge might have been built before the passage of the act, where the injury complained of occurred after its passage; but a charge given to the jury assuming that the bond was void, or that a period of six years during which the bridge was to be kept in repair had expired, was incorrect, where the bond was not invalid, as the question of the expiration of the guaranty where the date was uncertain was one for the jury; and it was also erroneous as a charge upon the effect of the evidence. *Barbour County v. Horn*, 48 Ala. 649.

Under Rev. Code, § 1396, same as § 1203, it must be alleged that no guaranty was taken from the builders of the bridge, or that such guaranty was taken, and that the time stipulated for its continuance had expired before the injury complained of was inflicted, in order to recover. *Barbour County v. Horn*, 48 Ala. 649.

A county was liable for damages for injuries from a defective bridge, under Ala. Code, § 1692, where the guaranty had expired, and the county could not be discharged by devolving the duty to repair on the overseer of the road, or by claiming that the repair amounted to a contract for the erection of another bridge. *Greene County v. Eubanks*, 80 Ala. 204.

But under Ala. Code, § 1203, providing that when a bridge has been erected under a contract with

Bathurst v. Macpherson, L. R. 4 App. Cas. 256; *Smith v. West Derby Local Board*, L. R. 3 C. P. Div. 423; *White v. Hindley Local Bd. of Health*, L. R. 10 Q. B. 219; *Blackmore v. Mile End Old Town*, L. R. 9 Q. B. Div. 452; *Whitehouse v. Fellows*, 10 C. B. N. S. 765; *Foreman v. Canterbury*, L. R. 6 Q. B. 214; *Tucker v. Azbridge Highway Board*, 52 J. P. 87; *Cox v. Paddington*, 64 L. T. N. S. 566; *Ruck v. Williams*, 8 Hurlst. & N. 808; *Brownlow v. Metropolitan Bd. of Works*, 13 C. B. N. S. 768. Affirmed on appeal in 16 C. B. N. S. 546; *Southampton & I. Floating Bridge & R. Co. v. Southampton Local Bd. of Health*, 8 El. & Bl. 801.

The same distinction prevails in Massachusetts, where it has been held that at common law neither cities, counties, nor towns were liable for mere nonfeasance to a person injured by a defective highway.

Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332 and cases cited.

But the liability for misfeasance has been repeatedly enforced.

Doherty v. Braintree, 148 Mass. 495; *Waldron v. Haverhill*, 148 Mass. 582; *Doane v. Randolph*, 132 Mass. 475; *Hawks v. Charlemont*, 107 Mass. 414.

The construction and maintenance of the temporary structure are part and parcel of the general work of reconstruction, and negligence in such construction and maintenance

of the temporary bridge is a positive misfeasance as distinguished from nonfeasance. It is like the case of one who lawfully digs a pit in the highway and puts a temporary bridge over it for public passage. Such a one is bound to use care in constructing and maintaining the temporary bridge.

Nolan v. King, 97 N. Y. 565, 49 Am. Rep. 561.

All public corporations are liable for creating nuisances.

Thayer v. Boston, 19 Pick. 511, 31 Am. Dec. 157; *Hawks v. Charlemont*, 107 Mass. 414.

There is no sound distinction between the sanction of an obligation voluntarily assumed by a public body and that of an obligation which the legislature in the due exercise of its powers has imposed upon it.

1 Thomp. Neg. p. 619; *Jones, Neg. of Mun. Corp.* §§ 59-69, pp. 113-129.

Where a duty to maintain or repair a highway or bridge is imposed by law upon a county, the county will be held liable at common law out of its corporate funds for an injury occasioned to an individual arising from the neglect to keep the bridge or highway in repair.

Mahanoy Twp. v. Scholly, 84 Pa. 136; *Newlin Twp. v. Davis*, 77 Pa. 319; *Rapho & West Hempfield Twp. v. Moore*, 63 Pa. 404, 8 Am. Rep. 202; *Dean v. New Milford Twp.* 5 Watts & S. 545; *Anne Arundel County Comrs. v.*

the county commissioners with a guaranty by bond any person injured may sue on the bond, and, if no guaranty has been taken or the period has expired, may recover damages of the county, an action against a county on the ground that a bond of insufficient amount was taken, was denied. *Barbour County v. Horn*, 41 Ala. 114.

Where the evidence affirmatively showed that the bridge was not erected by contract of the county commissioners as provided by § 456, Code 1886, providing that a bond of indemnity shall be required of a contractor building a bridge, and if none is taken the county shall be liable for injuries caused by defective condition, under which the plaintiff sought to fix the liability upon the county, no recovery could be had. *Roberts v. Cleburne County (Ala.)* 22 So. 545.

In *Covington County v. Kinney*, 45 Ala. 176, it was held that in cases not under Ala. Rev. Code, § 1266, providing substantially as § 1208 for a liability for defective bridges on failure to take a bond from the contractor, counties were not required to keep public bridges in repair, and no liability attached for an injury from a defective bridge built by private subscription, although it was shown that the county had at one time paid for hauling lumber to repair said bridge, but the repairs were done by citizens gratuitously.

And under Ala. Rev. Code, § 1266, a county was not liable for injuries caused by a defective public bridge, where the bridge was not erected by a contract with the court of county commissioners, and was not such a bridge erected under the provisions of the Code as required the county to keep it in repair. *Sims v. Butler County*, 49 Ala. 110.

And in *Barbour County v. Horn*, 43 Ala. 649, it was said there was no liability against a county for damages from a defective bridge in the absence of a statute imposing a liability.

And a detached county in which was a defective bridge was not liable for injuries caused by such bridge where it was built by the county from which this county was detached, but there was no statute imposing a liability upon the detached county. 39 L. R. A.

Askew v. Hale County, 54 Ala. 630, 25 Am. Rep. 730.

In *Askew v. Hale County*, 54 Ala. 630, 25 Am. Rep. 730, it was said "that a county is not liable to an individual for an injury sustained, because of its failure to exercise a governmental power with which it is clothed, or because it is not exercised in the manner most conducive to the safety of the public, or because of the negligence or unskillfulness of its officers or agents, in the absence of a statute expressly declaring the liability."

Georgia.

In Georgia there is a statute imposing a liability where the bridge is a toll bridge built by the county or a bridge built by contract, if the county fails to take a seven-year guaranty bond, but the county is not liable after the expiration of seven years or for defects existing in other bridges.

So, a county was liable in damages for an injury resulting from a defective bridge where the bridge was built by a contract, and the county failed to take the bond, under Ga. Code, § 671, providing that when a public bridge is let out the contractor must in his bond make a condition to keep it in good repair for at least seven years, although the injury complained of occurred more than seven years after its completion. *Mackey v. Murray and Whitfield Counties*, 59 Ga. 332. (See *Gwinnett County v. Dunn*, 74 Ga. 358. This case is in effect overruled by *Monroe County v. Flynn*, 80 Ga. 499, although not referred to in that case.)

And where a county had let out a bridge by contract, and had failed to take a bond of sufficient guaranty, and injury was caused thereby, under Ga. Code, § 691, providing that if no bond or sufficient guaranty has been taken by the ordinary, the county is also liable for damages, it was held that the plaintiff could sue either the county or the contractor. *Arnold v. Henry County*, 81 Ga. 730.

And where the time covered by the contractor's bond for keeping it in repair had expired, and the county did not make a new contract for that pur-

Duckett, 20 Md. 468, 88 Am. Dec. 557; *Calvert County Comrs. v. Gibson*, 86 Md. 229; *Prince George's County Comrs. v. Burgess*, 61 Md. 29, 48 Am. Rep. 88; *Baltimore County Comrs. v. Baker*, 44 Md. 1; *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Harford County Comrs. v. Wise*, 71 Md. 48; *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657; *Morgan County Comrs. v. Fritchett*, 85 Ind. 68; *Fritchett v. Morgan County Comrs.* 62 Ind. 210; *Shelby County Comrs. v. Deprez*, 87 Ind. 509; *Madison County Comrs. v. Brown*, 89 Ind. 48; *Howard County Comrs. v. Legg*, 93 Ind. 523, 47 Am. Rep. 390; *Gibson County Comrs. v. Emmerson*, 95 Ind. 579; *Patton v. Montgomery County Comrs.* 96 Ind. 131; *Vaught v. Johnson County Comrs.* 101 Ind. 123; *Knox County Comrs. v. Montgomery*, 109 Ind. 69.

The foregoing cases were recently overruled on the ground that by the true construction of the Indiana statute the county was not charged with the repair of bridges, and could not, except in special cases, appropriate county funds to repair them.

Jasper County Comrs. v. Allman, 142 Ind. 578; *McCalla v. Multnomah County*, 8 Or. 424; *Eastman v. Clackamas County*, 32 Fed. Rep. 24; *Wilson v. Jefferson County*, 13 Iowa, 181; *Brown v. Jefferson County*, 16 Iowa, 339; *McCullom v. Black Hawk County*, 21 Iowa, 409; *Soper v. Henry County*, 26 Iowa, 264; *Collins v. Council Bluffs*, 32 Iowa, 324, 7 Am.

Rep. 200; *Chandler v. Fremont County*, 42 Iowa, 58; *Huston v. Iowa County*, 43 Iowa, 456; *Krause v. Davis County*, 44 Iowa, 141; *Kincaid v. Hardin County*, 53 Iowa, 430, 36 Am. Rep. 236; *Huff v. Poweshiek County*, 60 Iowa, 529; *Cooper v. Mills County*, 69 Iowa, 350; *Hannon v. St. Louis County*, 62 Mo. 313; *Sims v. Butler County*, 49 Ala. 110; *Jackson v. Greene County Comrs.* 76 N. C. 282; *Threadgill v. Anson County Comrs.* 99 N. C. 352; *White v. Chowan County Comrs.* 90 N. C. 437, 47 Am. Rep. 584.

In the New England states and in many others it has been held that there is no distinction in liability between the cases of cities, counties, and towns, and that all three classes of corporations are free from such liability at common law.

Farnum v. Concord, 2 N. H. 392; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Brady v. Lowell*, 8 Cush. 121; *Morgan v. Hollowell*, 57 Me. 375; *Jones v. New Haven*, 84 Conn. 1; *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 842; *Sussex County Chosen Freeholders v. Strader*, 18 N. J. L. 108, 35 Am. Rep. 530; *Fray v. Jersey City*, 32 N. J. L. 394; *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *Wingbiger v. Los Angeles*, 45 Cal. 36; *Taylor v. Peckham*, 8 R. I. 349, 5 Am. Rep. 578; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Young v. Edgefield Dist. Road Comrs.* 2 Nott

pose but undertook to keep the bridge in repair itself. *Davis v. Horne*, 64 Ga. 69.

And a county was liable for an injury caused by a public bridge being out of repair where such county had failed to take the contractor's bond, under Ga. Code, § 691, providing that if the county authorities fail to take the bond required by § 671 of the Code then the county shall be liable in the place of the contractor, and such bridge was built prior to the passage of the act of 1888, and where the injury occurred by reason of a horse becoming frightened at a hole in the bridge and backing the buggy over into the stream below, there being no banners or railings. (There was no question made as to the cause being fright. In this case the bridge was built to connect two counties, and one county refused to co-operate, and the suit was against the county which built the bridge.) *Cook v. De Kalb County*, 95 Ga. 218.

In *Hammond v. Richmond County*, 78 Ga. 188, it was said that where the statute provides a liability for counties for failure to take a bond to keep a bridge in repair, a recovery can be had for injuries.

And where a county was liable for injuries caused by a defective bridge, the county commissioners could be compelled by mandamus to pay it. *Dearing v. Shepherd*, 78 Ga. 23.

In *Moreland v. Troup County*, 70 Ga. 714, it was held that the right to recover for injury from a defective bridge was not affected by the adoption of the Constitution of 1877, art. 7, § 6, ¶ 2, restricting the taxing power of a county, and a demurrer to the petition on the ground that the injuries occurred after the adoption of the Constitution was overruled.

But a county was not liable for injury caused by want of proper repairs to a public bridge, where there was no allegation that the bridge was erected by letting it out to the lowest bidder, and that no bond was taken from the contractor faithfully to perform his contract and to indemnify for all damages occasioned by the failure so to do and to keep the bridge in good repair for seven years, 39 L. R. A.

and for such further time as may be embraced in the contract, under Ga. Code, § 691, providing that on failure to take such bond the county is liable. *Collins v. Hudson*, 54 Ga. 25.

And a recovery was denied where a party was injured by a defective bridge which was built under a contract awarded on May 12, 1886, and a bond was taken, as Ga. act December 20, 1888, did not apply to bridges which had been let out and built before the passage thereof. It was said that before the passage of the act of 1888 counties were not primarily liable for injuries received from defective bridges where they had taken bond as required by law from the contractor. *Mappin v. Washington County*, 92 Ga. 130.

And under Ga. Code, § 671, requiring, in case of county bridges built by the lowest bidder, that the contractor should give a bond for seven years, and a bond for three years was taken, the county was not liable where the accident occurred before the three years expired, as the contractor was primarily liable. It was said that if the accident had happened after the three years the county would probably have been liable, as in that event the county should be treated as having taken no bond at all under the Code, § 691. *Mappin v. Washington County*, 92 Ga. 130.

And where there was no contract to build the bridge, and it had been more than seven years since it had been built, and it was a public bridge, and was not under bond, a county was not liable for injuries caused from the same being out of repair. It was held that Ga. Code, December 22, 1888, on the subject of county bridges (Acts 1888, p. 30), was not applicable to any county bridge erected before the passage of the act, and under the prior laws the counties were not liable in a case of this kind. *Bibb and Crawford Counties v. Dorsey*, 80 Ga. 72; *Grays v. Bibb County*, 94 Ga. 606.

And a county was not liable for injuries caused by neglect of the proper authorities to repair a bridge where it was not a toll bridge or one built by contract, under Ga. Code, § 709, providing for suit against counties for neglect to keep bridges in

& M'C. 537; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Stilling v. Thorp*, 54 Wis. 528, 41 Am. Rep. 60; *Hiner v. Fond du Lac*, 71 Wis. 74; *Akadelfphia v. Windham*, 49 Ark. 189.

Other courts, agreeing in the proposition that there is no distinction in liability between counties, cities, and towns, hold that they are all equally liable for negligence in the maintenance of public highways and bridges whereby an individual is injured.

Dean v. New Milford Twp. 5 Watts & S. 545; *Rapho & West Hempfield Twp. v. Moore*, 68 Pa. 404, 8 Am. Rep. 202; *Mahanoy Twp. v. Scholly*, 84 Pa. 186; *Newlin Twp. v. Davis*, 77 Pa. 317; *Chandler v. Fremont County*, 42 Iowa, 58; *Wilson v. Jefferson County*, 18 Iowa, 181; *Anne Arundel County Comrs. v. Duckett*, 20 Md. 468, 88 Am. Dec. 557; *Jackson v. Greene County Comrs.* 76 N. C. 282; *Hous v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657; *McCalla v. Multnomah County*, 8 Or. 424; *Eastman v. Clackamas County*, 32 Fed. Rep. 24; *Hannon v. St. Louis County*, 62 Mo. 313; *Sims v. Butler County*, 49 Ala. 110.

Some classes of duties undoubtedly pertain strictly to the government, such as the furnishing of jails, court-houses, and the distribution of public charity.

Alamango v. Albany County Supers. 25 Hun, 551.

Other classes of duties belong to the private

and corporate character, such as the maintenance of the New York and Brooklyn Bridge.

Walsh v. New York, 107 N. Y. 220.

Or such as the maintenance of public docks.

Mersey Docks & Harbour Board v. Gibbs, 11 H. L. Cas. 686.

Or beacons.

Gilbert v. Trinity House, L. R. 17 Q. B. Div. 795.

The cases in this state holding that towns could not be sued for negligence are put upon the ground that the town is not charged with the duty of repairing highways.

Morey v. Neufane, 8 Barb. 645. See also *People, Loomis, v. Little Valley Town Auditor*, 76 N. Y. 317.

The artificial reasoning which is used to discharge the county is exhibited in the opinion in *Albrecht v. Queens County*, 84 Hun, 399.

Mr. Townsend Scudder, for respondent:

A county is a corporation of limited corporate capacity and liability, and is under no liability in respect of torts.

1 Dill. Mun. Corp. §§ 22, 23 *et seq.*; *Ensign v. Livingston County Supers.* 25 Hun, 21; *People, Downing, v. Stout*, 23 Barb. 338; *Hamilton County Comrs. v. Mighela*, 7 Ohio St. 109; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Fitzgerald v. Quann*, 109 N. Y. 441; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *People, Keene, v. Queens County*

repair when the bridge is a toll bridge built by the county, or § 731, providing that if a bond is not taken from the contractor the county shall be liable for damages, did not apply. *Scales v. Chattahoochee County*, 41 Ga. 225.

A county was not liable for injuries resulting from a defective bridge where it was not alleged that toll was charged, under Ga. Code, § 669, providing that the ordinary may establish a toll bridge for the benefit of the county; but when toll is charged the county is liable as individuals owing them. *Arline v. Laurens County*, 77 Ga. 249.

In *Arline v. Laurens County*, 77 Ga. 249, the cases of *Gwinnett County v. Dunn*, 74 Ga. 358, and *Collins v. Hudson*, 54 Ga. 25, were approved.

In *Gwinnett County v. Dunn*, 74 Ga. 358, it was held that an action did not lie against a county for damages caused by neglect of proper authorities to repair a bridge, where it was not shown that it was a toll bridge or such a one as was built by a contractor, and that there was a failure to take the proper bond of indemnity required by the Code. Following *Scales v. Chattahoochee County*, 41 Ga. 225, and *Collins v. Hudson*, 54 Ga. 25.

In *Gwinnett County v. Dunn*, 74 Ga. 358, it was said that the decisions in *Mackey v. Murray* and *Whitfield Counties*, 59 Ga. 382, and *Davis v. Horne*, 64 Ga. 66, seem to have been made without any reference to *Collins v. Hudson*, 54 Ga. 25.

In *Monroe County v. Flint*, 80 Ga. 429, it was held that a county was not liable for injury from a defective bridge although no bond was taken and more than seven years had expired, under Ga. Code, § 671, providing that the contractor must in his bond make a condition to keep it in good repair for at least seven years, as the construction would be that a contractor would be liable and the county would be liable if they failed to take the bond, and the contractor would be liable to keep the bridge in good repair for seven years, and the liability of the county did not extend beyond that. This case virtually overrules *Mackey v. Murray* and *Whitfield Counties*, 59 Ga. 382, but does not refer to that case.

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A county was not liable for damages caused by a defective bridge where the plaintiff by the use of proper care could have prevented the injury. *Macon County v. Chapman*, 74 Ga. 107.

Kansas.

In Kansas it was formerly held that there was no implied liability against counties for failure to keep a bridge in proper condition, but now a statute provides that if the chairman of the board of county commissioners has five days' notice of such defects the county will be liable.

So, a county was not liable for injuries caused from a defective public bridge in the absence of any statute imposing a liability. The court said there is a distinction between the liability of cities and of quasi corporations like counties in this state. *Marion County Comrs. v. Riggs*, 24 Kan. 255.

Where defects in a county bridge are described by witnesses who have knowledge of the same, and the character and extent of such defects are comprehensible by the ordinary mind, the jury are the judges of the safety of such bridge for travel, and evidence by a witness, even an expert, as to his opinion, is incompetent. *Murray v. Woodson County Comrs. (Kan.)* 48 Pac. 554.

But a county is only bound to exercise reasonable or ordinary care and diligence in the discovery and repair of defects in its bridges, under *Taylor's Kan. Gen. Stat. 1889, § 7134 (Laws 1887, chap. 237)*, providing that any person who shall without contributory negligence sustain damage by reason of a defective county bridge may recover from the county, where the chairman of the board of county commissioners shall have had five days' notice of such defects prior to the time when such damage was sustained. *Murray v. Woodson County Comrs. (Kan.)* 48 Pac. 554.

In an action under *Taylor's Kan. Gen. Stat. § 7134 (Laws 1887, chap. 237)*, to recover for injuries occasioned by a defective bridge, it must be proved that the chairman of the county board had notice of such defect, and the presumption that another

Supers. 143 N. Y. 271; *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63.

The maintenance of highways and bridges is a public, not a private, function of government, and for its exercise a county does not incur a liability to an individual.

Marmikan v. New York, 63 N. Y. 160, 20 Am. Rep. 468; *Lloyd v. New York*, 5 N. Y. 374, 55 Am. Dec. 347; *Eastman v. Meredith*, 86 N. H. 284, 72 Am. Dec. 302; *Hill v. Boston*, 122 Mass. 344, 28 Am. Rep. 332.

A county, in caring for highways and bridges, performs a duty properly belonging to the towns within its limits; a town not being liable for defects in highways and bridges, the county can incur no liability by the performance of this duty.

Hill v. Livingston County Supers. 12 N. Y. 52; *Barber v. New Scotland*, 88 Hun, 522; *Martin v. Brooklyn*, 1 Hill, 545; *Waldron v. Baverhill*, 143 Mass. 582; *Doherty v. Braintree*, 148 Mass. 495; *Hawks v. Charlemont*, 107 Mass. 414; *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Bigelow v. Randolph*, 14 Gray, 541; *Chidey v. Canton*, 17 Conn. 475; *Reed v. Belfast*, 20 Me. 248; *Eastman v. Meredith*, 86 N. H. 284, 72 Am. Dec. 302; *Morey v. Newfane*, 8 Barb. 645; *People, Van Keuren v. Esopus Town Auditors*, 74 N. Y. 316; *Hill v. Boston*, 122 Mass. 344, 28 Am. Rep. 332.

The bridge in question was in the control of

member told him will not be indulged. *Murray v. Woodson County Comrs.* (Kan.) 48 Pac. 554.

Where the evidence showed that the county rebuilt, maintained, and undertook to repair a bridge at the expense of the county, which cost more than \$200, the court properly instructed the jury "there is no dispute of the fact that the bridge and approaches in question were built and paid for by the county." *Nemaha County Comrs. v. Allbert* (Kan. App.) 51 Pac. 307.

The mere fact that the board of county commissioners established a rule that the matter of repairing bridges should be left to the commissioners in whose district the bridge is located did not tend to show whether or not the chairman had actual notice of the defective and dangerous condition of the bridge, and such evidence was properly refused. *Nemaha County Comrs. v. Allbert* (Kan. App.) 51 Pac. 307.

See subhead *Where the injury was caused by the fright of a horse, I. c.*

Massachusetts.

In Massachusetts there is a statute imposing a liability.

Under Mass. Stat. 1877, chap. 234, and 1879, chap. 244, providing that for injuries the plaintiff should within thirty days thereafter give written notice of the time, place, and cause of said injury, a notice was sufficient where it stated the name of the bridge and that "said injuries were caused by a defect in the planking of the said bridge, one of the plank being insufficient in length, which insufficiency caused a hole in the said bridge into which I fell," although it appeared in evidence that there were three holes of a similar character, but the others were not as large as the one into which the plaintiff fell. The notice was also sufficiently addressed: "To Lewis Warner, Treasurer County of Hampshire. Dear Sir,—I hereby give you notice that I have this day . . . received bodily injuries, etc.," under Mass. Stat. 1877, chap. 234, providing that notice may be given in the case of a county to any one of the county commissioners or to the county treasurer. *Lyman v. Hampshire County*, 186 Mass. 74.

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the contractors, who alone are liable for the failure to keep it in repair.

2 Dill. Mun. Corp. §§ 1028-1030; *Engel v. Eureka Club*, 137 N. Y. 100; *Nolan v. King*, 97 N. Y. 565, 49 Am. Rep. 561; *Pack v. New York*, 8 N. Y. 222; *Blake v. Ferris*, 5 N. Y. 48; *Kelly v. New York*, 11 N. Y. 432; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178; *Engel v. Eureka Club*, 137 N. Y. 100.

Gray, J., delivered the opinion of the court: Plaintiff's intestate lost his life through the breaking down of the bridge over Newtown creek, and this action was brought to recover damages of the defendants, the county of Queens and the city of Brooklyn, for their alleged negligence with respect to the condition of the bridge. A bridge had long existed over Newtown creek, which was the boundary line between the counties of Kings and Queens; and, pursuant to an act passed in 1892, the boards of supervisors of these counties had made a contract for its reconstruction. Meanwhile, a temporary foot bridge, for the accommodation of foot passengers during the progress of the work, was erected, and made use of by the public. The plaintiff alleges that this temporary bridge was insufficient, out of repair, inadequate for its purposes, and not calculated to bear the strain to which it would be subjected, and that the defendants were

A county was liable for injuries caused to a person by a defect in a bridge, under Mass. Stat. 1794, chap. 30, which provided for imposing one half the expense on said county and the other half on a town, although the officers of the town had always made the necessary repairs, receiving one half of the expense thereof from the county. It was held that both the town and the county would be equally liable, but after verdict nonjoinder of the town could not be set up. *Lyman v. Hampshire County*, 140 Mass. 311.

Where plaintiff was injured by stepping into a hole on a bridge, and there was evidence that it had existed for ten years, and that the officers of the county were very frequently on the bridge, it was a question for the jury whether the county might have had notice by reasonable diligence, and whether the injury to the plaintiff might have been prevented by care and diligence on the part of the county; and the fact that he had previous knowledge of the defect was not conclusive evidence of his negligence. *Lyman v. Hampshire County*, 140 Mass. 311.

Michigan.

Under How. (Mich.) Stat. § 1442, the township, village, city, or corporation whose corporate authority extends over a public highway, street, bridge, or culvert, is liable for injuries caused by negligence in not keeping the same in repair. There appear to be no cases against counties under this statute.

Nebraska.

In Nebraska a county was not liable in the absence of any statute, but there is now a liability imposed by statute for injuries caused to travelers from defective bridges.

A county was not liable for injuries caused by a defective public bridge in the absence of any statute imposing a liability. It was said: "Counties were not liable at common law for injuries caused in the manner set forth in the petition in this case, and our statute, in force at the time of the alleged injury, did not change the common-law rule." *Woods v. Colfax County Comrs.* 10 Neb. 552.

But a county was liable for negligence in failing

negligent in permitting its use by the public in that condition. The county of Kings, under chapter 954, Laws 1895, became absorbed on January 1, 1896, into the city of Brooklyn, which was therefore made a defendant. The county of Queens, the other defendant, demurred to the complaint, for not stating facts sufficient to constitute a cause of action against it. The demurrer was sustained at the special term and at the appellate division of the supreme court, in the second judicial department, which latter court has certified the case to us, as involving a question of law which ought to be reviewed by this court. That question, broadly, is whether, by any rule of law, as established in this state, a county may be held liable at the suit of a private individual who has received personal injuries from a defective bridge, with the maintenance of which the county was chargeable. The question is one of considerable interest, and, beyond the general discussion, demands an interpretation of the provisions of the county law of 1892 (Laws 1892, chap. 686), the 2d section of which declares the county to be a municipal corporation. The provision is as follows: "A county is a municipal corporation, comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs conferred

upon it by law." By the 8d section, it is provided that "an action . . . to enforce any liability created, or duty enjoined upon it, or upon any of its officers or agents for which it is liable, or to recover damages for any injury to any property or rights for which it is liable, shall be in the name of the county." It is argued that the county, being thus declared a municipal corporation and being charged by law with the duty of maintaining the bridge, is made subject to those liabilities which it was understood the law attached to that class of corporations for breaches of duty. It is urged that as counties never were known, before this statute, as municipal corporations, the legislature, in its enactment, must have intended that they should be treated as upon a par with cities, when engaged in similar transactions, and that this proposition should be sustained from the point of view of public interest. In considering the question before us, we must not fail to observe that the language of § 8, above quoted, seems to import no further liability than that which was then existing. The only portion of that section which is material to the case is that which provides for an action "to recover damages for any injury to any property or rights for which it is liable." In other words, what the legislature appears to have done was to provide that, where the county is liable for an injury, the

to keep a bridge in repair, under Neb. act July 1, 1890 (Laws 1890, chap. 7, Rev. Stat. p. 733), providing that if damage happens to any person or property by means of insufficiency or want of repair of a highway or bridge which the counties are liable to keep in repair, the person sustaining the damage may recover against the county. *Hollingsworth v. Saunders County*, 36 Neb. 141.

In *Hollingsworth v. Saunders County*, 36 Neb. 141, *Woods v. Colfax County Comrs.* 10 Neb. 552, was distinguished, as this statute was passed after that decision.

New Jersey.

In New Jersey there was no implied liability for injuries to travelers from defective bridges, but there is now a statutory liability.

The board of chosen freeholders of a county was not liable for injuries sustained by reason of an abutment of a public bridge being without side railings, under N. J. Rev. Laws, 47, § 1, providing that the freeholders are to consider and decide upon the utility and necessity of erecting, rebuilding, or repairing bridges, as this statute made it discretionary. It was said that if they erred in judgment, however well meaning, and the plaintiff's counsel were correct in their argument, they would be exposed to all the responsibility, but "this gross injustice arises from the counsel's substituting the responsibility of the freeholders in place of the county, which latter is under all circumstances bound prima facie to keep the public bridges in good repair and liable to indictment if it do not." *Sussex County Chosen Freeholders v. Strader*, 18 N. J. L. 108, 35 Am. Rep. 580.

An individual could not sustain an action against the board of chosen freeholders for injuries sustained by reason of a defect in a public bridge constructed by them. *Cooley v. Essex County Chosen Freeholders*, 27 N. J. L. 415, following *Sussex County Chosen Freeholders v. Strader*, 18 N. J. L. 108, 35 Am. Rep. 580.

But the freeholders of a county were liable on the ground of neglect for injuries caused by falling off the abutment wall of the approach to a bridge, under N. J. act March 15, 1890 (Pub. Laws, p. 285, 39 L. R. A.

Rev. p. 86, § 9), where they adopted a plan which contemplated the filling in of the sidewalk by others so as to bring it up to the abutment wall, and were preparing a permanent railing to render the approach safe, but put up no temporary barrier, and the dangerous condition was notorious for more than two weeks before the injury. *Morris County Chosen Freeholders v. Hough*, 55 N. J. L. 628. In this case the plan of the committee contemplated a structure with the sidewalk filled in by others to be protected by a railing erected by defendants on the wing wall of the bridge, and the defendants were in the performance of that duty when the plaintiff was injured, and the neglect consisted in not providing a temporary barrier, having knowledge of its danger.

Oregon.

In Oregon there was a statutory liability for defective bridges, but this statute has been repealed.

A county was not liable for injury resulting from defect in a bridge, after Oregon Code, § 847, providing that an action may be maintained against a county for injury to the rights of plaintiff arising from some act or omission of such county, was amended in 1887 by omitting the words "or for an injury to the rights of the plaintiff, arising from some act or omission of such county or other public corporation." It was held that Oregon Const. art. 1, § 10, providing that every man shall have a remedy by due course of law for injury done him in person, property, or reputation, did not prevent a repeal of this statute, although before the adoption of the Constitution there was a similar statute enacted by the territorial legislature. *Templeton v. Linn County*, 22 Or. 313, 15 L. R. A. 730. In this case the statute was repealed before the injury was caused.

In *Templeton v. Linn County*, 22 Or. 313, 15 L. R. A. 730, the case of *McCalla v. Multnomah County*, 8 Or. 424, was distinguished, as the statute was different in that case.

But under Oregon Code Civ. Proc. subd. 4, § 870, authorizing the county court to provide for the erection and repair within the county of public bridges on any road or highway, and Laws 1854-'55, p. 168, act June 7, 1854, § 4, authorizing an action

action shall be in the name of the county. If, prior to the passage of the county law, the county was not liable for such an injury as was sustained in the present case, did it become so thereafter, by implication from the language of the 2d section, as argued for the appellant, in the use of the words "municipal corporation," or by reason of the 8d section?

To a clear understanding of the question, it may be well to consider what was the legal status of counties of this state, and then, incidentally, what is that of a municipal corporation proper, such as an incorporated city. The civil divisions of a state into counties had their origin in England, where, preceding the organization of the Kingdom itself, they were thereafter continued, from recognized necessities in government, as other countries had their departments or their provinces. In such divisions it was found that the purposes of local government and of the administration of justice were promoted. Differing from England in their origin, in this country they were first created by the legislatures of the various colonies, and subsequently by the states of the Union. They were invested with such corporate attributes as were essential to a proper performance of the duties of local government. They were, in effect, subdivisions of the governed territory, established for the more convenient administration of government and having such powers as were necessary to be exercised and for the welfare, advantage,

and protection of the public within their boundaries. While in the people resided the sovereign right to declare the general mode of their government, it was the appropriate duty of their legislative body to so arrange the territory of the state into civil divisions, and to so apportion among them governmental duties, as would best conduce to the advantage of its citizens. By the common law of England, a county, though sometimes regarded as a quasi corporation, could not be subject to a civil action for a breach of its corporate duty unless such an action was expressly given by statute. The duty of maintaining and repairing bridges belonged to it, but the only remedy for a breach of that duty was by presentment or indictment. An unsafe condition of a highway, or a bridge as a part of the highway, was regarded as the subject of a popular action, and not of a private action. In *Russell v. Devon County*, 2 T. R. 667, which was an action by an individual against the inhabitants of a county for an injury sustained through the defective condition of a county bridge, it was held that they were not such a corporation, or quasi corporation, against whom such an action could be maintained. It was reasoned that, while the inhabitants of the county might be a corporation for some purposes, no statute had authorized such an action, and that the action would be one against the public. The authority of that case, as settling the rule at common law

against a county for an injury to the rights of plaintiff arising from some act or omission of said county, a county was liable where a plank in the floor of a bridge was broken or too short, and one horse of a team becoming frightened pushed the other horse, causing him to step off the bridge drawing the team and buggy over and injuring plaintiff. It was further held that act February 21, 1887, amending Code Civ. Proc. chap. 4, title 4, § 847, restraining the right to maintain an action against the county to cases arising on contract, which act was passed after this action was commenced, did not affect plaintiff's claim. It was said: "The 14th Amendment declares that the state shall not deprive any person of . . . property without due process of law.' Assuming, as I do for the present, that the plaintiff's right of action, whether vested or not, is not 'property,' within the meaning of this amendment, there is nothing in the Constitution of the United States or of this state prohibiting the passage of retrospective laws by the latter, provided they do not impair the obligation of contracts, or partake of the character of *ex post facto* laws. Subject to these qualifications, the state may pass retrospective laws, and thereby divest vested rights, without violating the Constitution of the United States. . . . And admitting that the right to maintain this or an equivalent action for the redress of this wrong is a vested one, of which the plaintiff ought not to be wantonly deprived, it is clear the legislature may do so, if it will, unless the Constitution of the state is in the way." But it was further held that, under Or. Const. art. 1, § 10, providing that every man shall have a remedy by the course of law for injury done him in personal property or reputation, this right could not be taken away by any statute. *Eastman v. Clackamas County*, 32 Fed. Rep. 24.

And a county, having laid out and opened a road and built a bridge thereon, and invited the public to walk thereon, was estopped from denying that it was a public road. *Eastman v. Clackamas County*, 32 Fed. Rep. 24.

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And under Oregon Laws, December 19, 1865, § 4 (Oregon Laws, 723, § 40, note), providing that a bridge of 10 feet or more span shall be built in a good substantial manner and covered with sound plank well spiked down, the county was chargeable with negligence in not having planks well spiked down, by reason of which an injury was caused. The want of railing was negligence on the part of the county when the accident could have been prevented by a railing on the bridge. *Eastman v. Clackamas County*, 32 Fed. Rep. 24.

And a county was liable for damages caused by a defective bridge which was out of repair through the negligence of the county, under Oregon Stat. 863, § 19, providing that all county roads shall be under the supervision of the county in which such road is situated, and making it the duty of the county court to appoint supervisors, and giving the court power to remove the same on failure to perform their duties, and Oregon Code, p. 235, § 847, providing that an action may be maintained against the county for an injury to the rights of plaintiff arising from some act or omission of such county. *McCalla v. Multnomah County*, 3 Or. 424.

A county was liable for damages caused by a defective bridge where such bridge was a public bridge or was knowingly recognized as a county structure by the proper officials of said county, and they had been notified for a reasonable time prior to the accident of the defective condition of the bridge, or where it had been openly and notoriously unsafe to such an extent as to convey notice of its condition for a reasonable time prior to the accident. It was further held that the mere fact of intoxication of the injured party would not of itself bar a recovery. *Ford v. Umatilla County*, 15 Or. 313.

In *Ford v. Umatilla County*, 15 Or. 313, it was said that under Oregon Sess. Laws 1887, p. 45, the liability of counties had been changed but the act was passed after this accident, and it was held that it did not apply, as in *Eastman v. Clackamas County*, 32 Fed. Rep. 24. The decision in the *Ford* case evi-

that no civil action could be maintained for an individual injury in consequence of the breach of a public duty on the part of the inhabitants of a county, has been repeatedly recognized in England and in this country. I may refer in particular to the case of *Bartlett v. Crozier*, in this state (17 Johns. 439, 8 Am. Dec. 428), and to the cases in Massachusetts of *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169, 5 Am. Dec. 85, and *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 68, and to the very thorough discussion of the cases in England and in the United States, which will be found in *Hill v. Boston*, 122 Mass. 844, 23 Am. Rep. 382, and in chapter 28, 2 Dill. Mun. Corp. I think it, however, sufficient to confine the present discussion to what the statutes and decisions of this state require us to hold upon the question.

In this state, its division into counties or sections for the purposes of local government was but a continuance of a method which, while a colony, it had adopted from England. By the Constitution of the state, it was provided that such parts of the common law as formed the law of the colony of New York were retained as the law of the state. If, under the common law, counties could not be subjected to private actions for the results of acts done in the performance of governmental duties, then it should follow that counties of this state could not become liable to such actions, unless the common law in that respect has been changed by statute. Where a prin-

ciple of the common law has entered into our form of government, it is controlling, until by legislation, express in its terms, it is modified, or negated by the substitution of a new declaration upon the subject. The only statute for which that could be claimed is the county law of 1892, which heretofore I have referred to. Having regard to the fact that counties were created such for the better and more convenient government of the state, both upon authority and upon principle, in the exercise of those political powers which appertain to local government, and which are for the public benefit, they should be no more liable for damages resulting therefrom, at the suit of a private individual, than would be the state itself. The counties and towns of this state were always bodies corporate for certain purposes; having been endowed with capacities to purchase and to hold real and personal property, and to make contracts in reference thereto. Rev. Stat. pt. 1, art. 1, title 1, chaps. 11, 12. The corporate powers were of defined and limited extent, and in all other respects which concern governmental duties, included among which was the conservation of highways, roads, and bridges, they were merely divisions organized for the convenient exercise of portions of the political power of the state. *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120. The common-law rule which rested the duty of caring for and repairing highways and bridges upon the counties did not obtain in this state. That

notice must have been upon the same statute upon which the prior affirmative decisions were made, although such statute was not referred to in the opinion, but reference was made to the new statute which relieved the counties from liability.

In *Helluer v. Union County*, 7 Or. 83, 33 Am. Rep. 708, it was held that a county was liable for injuries caused by a bridge being out of repair, but no recovery could be had where it was not shown that the county authorities knew of its condition, or no averment made of a statement of facts from which they might have known it with reasonable diligence. It was held that if the condition of the bridge was stated to be such that the road supervisor by the use of ordinary diligence might have known of its condition, a recovery would be allowed.

South Carolina.

Under S. C. Gen. Stat. § 1087, making the county liable for injuries from defective roads, and providing that such damage should not be recovered by the person so injured if his load exceeded the ordinary weight, amended December 19, 1892, so as to read "provided, such person has not in any way brought about such injury or damage by his own act, or negligently contributed thereto, etc.; and provided further, that such county shall not be liable, unless such defect was occasioned by the neglect or mismanagement," etc., where a person was injured before the amendment and the action was not brought until after the amendment,—it was held that if his action was under the prior statute he should negative the proviso to show that his vehicle was not overloaded, and if the amendment applied no recovery could be had unless the county commissioners were negligent. It was further held that they were not negligent in this case, where they were very active in their effort to repair a bridge over a swamp after a flood and made a contract and gave notice that the bridges were let out for repair, and that they would not be responsible for any damages while crossing, which

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notice was posted up at each side of the swamp. The trial judge held that no recovery could be had under the old statute on an allegation that plaintiff was riding a mare and plaintiff showed that he was driving, as the variance would be important under a statute fixing the load at a certain weight. *Cope v. Hampton County*, 42 S. C. 17.

Where a horse was frightened on a public bridge by reason of a piece of timber which was lying near for the purpose of repairing the bridge, and backed the buggy off the bridge where there was no railing, and injured the plaintiff, and the only allegation of defect in the repair of the bridge was that one piece of railing or bannister was absent, it was held that the absence of such piece of railing would not be called a defect in the repair contemplated by S. C. Gen. Stat. § 1087. *Brown v. Laurens County*, 38 S. C. 232.

See also subhead, *Where the injury was caused by the fright of a horse*, I. c.

West Virginia.

A county was liable for injuries caused by a horse becoming frightened at a pile of large rocks on the roadside, and backing over an unprotected wall of the approach to a bridge, throwing the plaintiff out and injuring the buggy, which would not have happened if a suitable railing had been placed along the bridge, where the fall of the horse and the accident were almost simultaneous, and want of care could not be imputed to the driver. *Rohrbough v. Barbour County* Ct. 39 W. Va. 472. (For the West Virginia statute see *Phillips v. Ritchie County* Ct. 31 W. Va. 478, subd. I. b.)

In *Rohrbough v. Barbour County* Ct. 39 W. Va. 472, it was said that in *Smith v. Kanawha County* Ct. 38 W. Va. 713, 8 L. R. A. 82, a recovery was denied in a similar case for a defective road, but that was on account of the negligence of the driver.

See also subhead, *Where the injury was caused by the fright of a horse*, I. c.

b. From defective roads and highways.

It is held, with but few exceptions, that counties

duty was confided to the officers of towns. But special acts were passed from time to time, whereby the burden has been shifted so as to be imposed, either upon two or more towns, or upon the county, or upon both counties and towns. *Hill v. Livingston County Supers.* 12 N. Y. 52. In the county law of 1892 it was provided that where a bridge spans any of the navigable tide waters of this state, as in the present case, forming a boundary line between two counties, the expense of its maintenance is made an equal charge on the two counties in which the bridge is situated. § 63. Whether the maintenance of highways and bridges is devolved as a duty upon the towns or upon the counties of the state, it must be regarded as a duty, in its nature, public and governmental. *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120. There is no distinction to be made between highways and bridges, in the matter of the duty. A public bridge is a public highway. Angell, *Highways*, § 40. Its maintenance is quite as much a governmental duty towards the public within the territory of the state, and the principle that the state holds its highways in trust for the public is applicable. *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 386. This is especially true where a bridge is necessary to cross the navigable waters of the state, but it is true under all circumstances. In *People v. Rensselaer & S. R. Co.* 15 Wend. 113, 134, 30 Am. Dec. 33, it was said by Savage, Ch. J.: "There can be no ques-

tion, therefore, that the state legislature has the power to build bridges where they shall be necessary for the convenience of its citizens. . . . It is the duty of the state governments to afford their citizens all the facilities of intercourse which are consistent with the interests of the community." To charge the duty of building and maintaining a bridge over navigable waters upon the boards of supervisors of counties was but a convenient mode of exercising that governmental function. The power thus conferred upon the county officers was for the public benefit, and in its exercise they acted as the agents for the public at large. The state, in its sovereign character, had a duty to perform in the maintenance of the bridge as a part of the public highway, and its performance might properly be delegated to the officers of the particular civil division. The corporate body of Queens county derived no especial advantage from it in its corporate capacity, and, if that be true, it should not be liable for the negligent acts of the board of supervisors, upon whom the duty was rested of reconstructing the bridge. It should be as exempt from a private action as would be the state itself. In *People v. Queens County Supers.* 142 N. Y. 271, we expressly held that the power conferred upon the counties of Kings and Queens with respect to this work was in the public interests, and for the public benefit. As lately as in the case of *Hughes v. Monroes County*, 147 N. Y. 49, *ante*, 33, where it was sought to hold the de-

are not liable for injuries to travelers caused by roads or highways being out of repair, in the absence of a statute imposing a liability. Some of the states which allow a liability for defective bridges refuse to apply the same rule in regard to roads, although recognizing that the principle is the same. In Maryland a recovery is allowed. So in New Jersey where the county made an excavation in the road. In South Carolina and West Virginia the statute imposes a liability.

In Indiana a county was held not liable for personal injuries sustained while driving upon a free gravel road of a county, by reason of defects in the construction and repair of such road. It was said that the principle was the same in regard to roads as in regard to bridges, but that Indiana has adopted a rule in regard to bridges which was contrary to the weight of authority [since overruled, see *supra*, I, a], and it would not be extended to apply to roads. *Cones v. Benton County Comrs.* 137 Ind. 404.

And a county was not liable for injuries caused from a defective highway where lumber on the same caused plaintiff's horse to run away, as the law has not given boards of commissioners power to raise money to repair highways, nor imposed the duty of keeping public highways in repair upon county boards. *Abbott v. Johnson County Comrs.* 114 Ind. 61.

In *Fulton County Comrs. v. Rickel*, 106 Ind. 501, it was said that counties are not responsible for defective highways.

And for damages occasioned by a defective sidewalk under its control a county was not liable. It was said that counties partake of the immunity of states, and are not subject to liabilities of this kind. *Clark v. Lincoln County*, 1 Wash. 518.

So where a party was injured by reason of a sidewalk on the court-house premises being out of repair a recovery was refused. *Dodsall v. Olmsted County*, 50 Minn. 96, 44 Am. Rep. 185.

Where a county contracted for a curb between a park owned by the county and the street, and the commissioners prohibited the dirt from being

thrown on the grass, and the contractor placed it on the sidewalk without warning or protection to passersby at night, and a person fell into the trench, no recovery could be had, as the work was not being done by the county but by independent contractors. *Eby v. Lebanon County*, 166 Pa. 382.

In *Worden v. Witt* (Idaho) 89 Pac. 1114, in an action against a county commissioner individually for injuries received from defective highways, it was said: "To hold counties or county commissioners liable for all injuries arising from defective highways, in this country would result in two very undesirable conclusions.—the literal abrogation of the office of county commissioner (for no sane man would assume the position, with such a liability attached), and the bankruptcy of every county in the state."

In *May v. Ralls County*, 31 Fed. Rep. 473, it was said that counties are not liable for failure to keep roads, bridges, or public buildings in repair and in a safe condition, and for injuries sustained in consequence of such neglect on the part of the county officials a suit is not maintainable against the county.

Under N. J. Pub. Laws 1889, p. 58, an act to compel boards of chosen freeholders to acquire, improve, and maintain public roads, where a declaration alleged that it thereby became the duty of the board to maintain a highway in good and safe condition for public use, and that plaintiff was injured while passing along the highway, which was out of repair and in an unsafe condition, it was held that a municipal corporation charged with the performance of a public duty was not liable to an individual for neglect to perform or negligence in the performance of such duty, whereby a public wrong has been done for which an indictment will lie, although such an individual has suffered special damages thereby, and this exemption was put on the ground of ancient precedent and public policy. But the other count of the declaration, that said board wrongfully and illegally made a deep excavation in a public highway under the control

fendant liable for injuries sustained by the plaintiff while operating a steam mangle in the laundry of an insane asylum, the doctrine was plainly asserted of the nonliability of counties and of other municipal corporations for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty. This doctrine of nonliability, resting as it does upon the principle that the grant of power is to the county in its political character, and as a means of the exercise of the sovereign power in measures of public interest and for the public benefit, is illustrated in various decisions of this court where the question arose as to the liability of a city for corporate acts resulting, through a negligent performance, in injury to individuals.

With respect to such a municipal corporation proper as a city, the rule of law is well settled by frequent adjudications that the grant by the legislature of a city charter authorizing and requiring a city to perform certain duties renders it liable to a private action for neglect in their performance, when a county or town would not be so liable. A distinction exists between such a corporation, which is created by charter, and is granted the power to own and to manage private property, and is invested with particular franchises, and a municipal corporation, which is created for the purposes of state government, and to exercise, as one of its civil divisions, certain of its political powers. In the case of the former, its

responsibility depends upon the nature of the powers exercised. Nelson, Ch. J., in *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669, discusses the powers of cities as municipal corporations, but the discussion is not without its usefulness to the present case. He laid down the doctrine (which has been followed in subsequent decisions in this court) that a clear distinction exists between the powers which belong to a city as a municipal body. He observed that, if they were "granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." This doctrine was reiterated in *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347, and in *Mazmilian v. New York*, 62 N. Y. 164, 20 Am. Rep. 468, Folger, J., in the latter case, expounding the nature of the duties imposed upon a municipal corporation, said: "One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power

of said board, into which the plaintiff while lawfully passing along the highway fell and was injured, disclosed a special injury inflicted on plaintiff by a common public nuisance, created, not by the defendant's neglect, but by its active wrongdoing, and there was no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury was inflicted by their wrongful act as distinguished from mere negligence, and that count charged a cause of action. *Hart v. Union County Chosen Freeholders*, 57 N. J. L. 90.

A recovery was allowed against a county where a minor child was killed while riding a horse, his death being caused by the bad condition of the county road. It was held that the care and caution required of a traveler on a public road were such as persons of common prudence ordinarily exercised. *Hartford County Comrs. v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739.

Under Md. act 1853, chap. 239, § 1, constituting and declaring the county commissioners a corporation and body politic, and providing that they shall have charge of and control over the property owned by the county, and over county roads and bridges, a county was held liable for injuries caused by a defective road. In this case the case of *Russell v. Devon County*, 2 T. R. 661, was distinguished, as in that case the county was not a corporation for that purpose and had no corporate fund. The liability was placed on the same ground as that of a city. *Anne Arundel County Comrs. v. Duckett*, 20 Md. 463, 33 Am. Dec. 557.

And where the plaintiff was injured by falling off of an unprotected precipice on the edge of a road, an instruction that if he traveled on a dark night walking on the edge of the road without a light, and voluntarily took the dangerous edge, when by taking the middle of the road he could have avoided the accident, he could not recover, was properly rejected, as the question of contributory negligence was one for the jury. The county was liable for injuries caused by an unguarded precipice on a road

where such road was negligently constructed and left to remain by the defendants in an unsafe condition for travelers, where the plaintiff used due care and caution and was injured. *Alleghany County Comrs. v. Broadwaters*, 69 Md. 533.

So, a county was liable for injuries caused to a wagon and carriage by a defective road through the negligence of the supervisor, and this liability was not changed by Md. act. 1853, § 8, directing the commissioners to require the road supervisors to give bond to the state, which bond may be put in suit for the benefit of any person suffering by the neglect of said supervisors, as this does not take away the right of action against the commissioners of a county. An instruction that no recovery could be had against a county for injuries from a road out of repair, if the injuries could have been avoided by using another road in a good condition but a short distance further, was erroneous as it did not state that there was any knowledge on the part of the plaintiff that one road was dangerous and the other was safe. *Calvert County Comrs. v. Gibson*, 36 Md. 229.

A county was liable for injuries caused by a defective highway through improper work done under the supervision of the county officials, under S. C. Gen. Stat. § 1067, providing that counties are liable for injuries caused from defective highways and bridges. This statute was not unconstitutional in that it deprived counties of their property without process of law, or that it denied to counties the equal protection of the law, or that it subjected counties to restraints other than are laid upon other corporations under S. C. Const. art. 1, § 12, or that it imposed a new obligation upon counties for the benefit of another class of citizens when they are guilty of no neglect or duty. *Blum v. Richland County*, 88 S. C. 291.

But under S. C. Gen. Stat. § 1067, providing that any person who shall receive bodily injury or damage in his person or property through a defect in the repair of a highway, causeway, or bridge may recover in an action against the county the amount

is private, and is used for private purposes; the latter is public, and is used for public purposes.

Where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser, by the public agents." The principle that a city, as a municipal corporation, is held to a strict liability to respond in damages, at the suit of a private individual, for its negligence in the maintenance of its streets and other properties, was thus explained by Selden, J., in *Weet v. Brockport*, 16 N. Y. 102, footnote: "The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking, on the part of the corporation, to perform with fidelity the duties which the charter imposes." The reasoning of these cases has its pertinency to the present case. The county law of 1892, in denominating a county as a municipal corporation, specifies the purpose to be that of "exercising the powers and discharging the duties of local government and the administration of public affairs;" and, prior to the enactment, it existed to perform just such governmental functions.

I think that the principle of our decision must necessarily be this: "That as the counties of this state were bodies corporate, for

certain specific purposes, before the enactment of the county law of 1892, now that they are declared thereby to be municipal corporations their liability for corporate acts is no further enlarged than what may be clearly read in, or implied from, the statute. Their becoming municipal corporations in name imports no greater liability, because by the 3d section of the law their liability for injuries is confined by the language to that which was existing. The liability remains as it was,—neither greater nor less. No new duty or burden has been imposed upon counties in respect to the maintenance of bridges over navigable boundary streams. The duty which always existed for public purposes and for the public benefit is continued. The work of maintaining the bridge in question was properly charged upon the counties, because it could be more advantageously performed by them than by the towns. Towns themselves were not liable for damages arising from defective highways and bridges until, by an act of the legislature in 1881, the liability which formerly rested upon the commissioners of highways was transferred to them. If it was necessary, in order that towns might be made liable in private actions, that there should be such legislation, it is as necessary, I think, that there should be some express legislation, in order to impose the liability upon a county which did not previously exist. The object of the county law of 1892, in my judgment, in declaring the county a municipal corporation,

of damage fixed by the finding of the jury, a recovery cannot be had where the injury occurred on a road under a railway trestle, which was a divergence from the county road because the county road was very rough, although this road had been improved some by the overseer of the road hands without any authority, as act 1883, 18 Stat. at. L. 631, providing for appointing commissioners and employing a surveyor to change the location of a highway, was the only law prescribing the mode of making a change, and the act of the overseer in this case was without lawful authority, even if it could be assumed that the county commissioners approved of this change. *Hill v. Laurens County*, 34 S. C. 141.

And under this act a recovery could not be had where the injury arose from a defective ferry boat operated by the county, as a ferry boat was not a highway within the intention of the statute. *Chick v. Newberry & Union Counties*, 27 S. C. 419.

In *Smith v. Kanawha County Ct.* 33 W. Va. 718, 8 L. R. A. 82, it was held that under W. Va. Code 1887, chap. 43, § 7, providing that the road surveyor shall cause the roads and bridges to be put in good order and repair to the proper width, the county was not liable where the party was injured while driving on a narrow road and two calves appeared suddenly out of the bushes causing the horse to become frightened and back over a steep bank. It was held that the road was as wide as could be expected at that place with a steep river bank on one side and a slipping hillside on the other. It was further held there was some evidence to show that the plaintiff pulled the horse. The negligence of the driver barred a recovery.

Under W. Va. Code, chap. 43, imposing a liability on counties for injuries sustained by reason of a public road or bridge being out of repair, the county was not liable where about eight days before the injury a landslide came into the road filling it about 4 feet on one side and extending nearly to the other side, and plaintiff attempted to drive over the same and struck a small stone, which tilted

the buggy, frightening the horse, causing it to run away, and upset the buggy. The condition of the road was such that it was reckless to drive over it, and contributory negligence barred a recovery. *Phillips v. Ritchie County Ct.* 31 W. Va. 478.

In this case it was also held that it was unnecessary for the plaintiff to allege or prove that the county had notice of the defect which caused the injury.

Under W. Va. Code 1887, p. 331, chap. 43, providing for an action against a county court to anyone who has sustained injury by reason of a public road or bridge being out of repair, and Code 1868, chap. 43, § 7, p. 267, providing that every surveyor of roads, shall cause the same to be put in good repair and to be clear and "kept clear of rocks, falling timber, landslides, and other obstructions," the county was not liable for an injury caused by a dead tree standing within 5 feet of the roadside which fell on the plaintiff and injured him. This law was amended three days after the accident, requiring the surveyor to remove all dead timber standing within 30 feet of the road, and W. Va. Code 1887, chap. 43, § 7, p. 318, and the law prior to the Code of 1868, required the surveyor to keep the roads secure from the falling of dead timber therein. It was held that the omission in the law in existence at the time of the accident indicated that the surveyor was only to pick up falling timber and obstructions, and not to cut it down. It was further held that if it was his duty to cut it down an action would not lie against the county court as there was no statute imposing a liability. *Watkins v. Preston County Ct.* 30 W. Va. 667.

c. Where the injury was caused by the fright of a horse.

In the states where a recovery may be had for injuries from a defective bridge, either on account of implied liability or by statute, a question has been made as to a recovery for an injury caused through the fright of a horse. It seems that

was in order that it might be sued as a legal entity in cases where previously actions were maintainable only in the name of the board of supervisors.

The appellant's counsel attacks the reasoning which distinguishes between counties and chartered municipal corporations in respect to their liability for corporate acts, as being unsubstantial and artificial, and he is able to cite us to some observations by text-writers to that effect. The distinction is none the less real, however, because processes of reasoning might lead to the conclusion that the two classes of corporations should be placed upon a par in their attributes and incidents. The distinction rests upon established conditions of state government, which must endure until the legislature expressly changes them. It has not unfrequently been the case that statutes have so far modified some common-law condition, under which we were governed as a society, as to subject what remained of it to criticism similar to that now indulged in, but the rule is firmly established that the common law has been no further abrogated by a statute than is to be understood from the unmistakable import of the language used. *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 381, presents an interesting discussion, in point, under that head.

The conclusion I have reached after a careful consideration of the subject is that in the work of construction of this bridge the board of su-

pervisors were executing a certain public duty, imposed upon them as the proper public agents in that particular civil division of the state, and that the county could not be subjected to a private action for injuries occurring in, or by reason of, the performance of the work. I do not think it is consonant with the reason of the rule of law which concedes to the sovereign power in government an exemption from liability that a private individual may have a right of action against those who have but exercised a lawful power which was vested in them by the legislative body for the public convenience and welfare, and not for any private benefit of the corporate body.

The judgment appealed from should be affirmed, with costs.

Bartlett and Martin, JJ., dissenting:

Where the duty to construct a highway or bridge is imposed by law upon a county, we see no reason why, in case of negligence and consequent injury to the citizen, there should be any substantial difference as to liability between counties and cities, as the former, like the latter, are now municipal corporations. The county, in the performance of this duty, is clothed with a special power, not intrusted to it as a political division of the state in the exercise of the sovereign power for the benefit of all citizens, but strictly in the interest of the municipality.

where the injury would not have happened if there had been sufficient railing, the liability was allowed, but on this there is some little conflict, and a case in Indiana held that where the horse was frightened at the defective bridge and overturned the buggy a recovery was denied.

Under an Oregon statute, providing for an action against the county for injuries to the rights of plaintiff arising from some act or omission, a county was liable where a horse became frightened because a plank was broken, and caused the other horse to go over a bridge which was unprotected. *Eastman v. Clackamas County*, 32 Fed. Rep. 24.

And under a statutory liability to travelers from defective bridges a recovery was had where a horse was frightened by a hole in the bridge, and backed the buggy over into the stream below, and there were no banisters or railings. There was no question made in the case as to the proximate cause being fright. *Cook v. De Kalb County*, 95 Ga. 218.

Where the plaintiff's horse took fright and backed her buggy off the approach to a bridge which had no guards or railings, the county was liable if the chairman of the board of county commissioners had notice of the defect and it was a county bridge. The question of contributory negligence was one for the jury, and the court did not discuss the question of fright. *Nemaha County Comrs. v. Allbert* (Kan. App.) 51 Pac. 307.

Where plaintiff attempted to cross a small bridge which was out of repair, and his mules became frightened, and he was injured, an instruction that if the accident was caused by the fright of the mules the verdict must be for the defendant, unless the fright was caused by a defect in the road manifestly calculated to frighten horses of ordinary gentleness, and the defendants by the use of ordinary care and diligence might have known of the same in time to repair it, was erroneous in stating that the plaintiff was not entitled to recover under any circumstances unless the fright of the mules was caused by failure of duty on the part of the defendants. It was said that the fright of the

mules did not necessarily imply any negligence or culpability on the part of the plaintiffs, and it was error to direct the attention of the jury to this sole inquiry without considering anything else. *Kennedy v. Cecil County Comrs.* 60 Md. 65.

And the fact that the conduct of the horse might have been one proximate cause of an injury from the failure to have railings on a bridge would not prevent the county from being liable if its negligence was also a proximate and concurring cause of the injury. *Parke County Comrs. v. Sappenfield*, 6 Ind. App. 577, 10 Ind. App. 609.

A county was liable for injuries resulting from a defective county bridge, where a hole in the bridge was covered by a stone which frightened plaintiff's horses, and there were no barriers on the approaches to protect the same. *Moreland v. Mitchell County*, 40 Iowa, 394.

And a county was liable where a horse was frightened at a pile of rocks on a road, and backed the buggy over an unprotected approach to a bridge, where the fall of the horse and the accident were simultaneous. *Rohrbough v. Barbour County Ct.* 39 W. Va. 472.

So, a county was liable for injuries caused by failure to keep a bridge in repair where a horse was frightened at a crooked log placed at the corner of the bridge to keep the earth from washing away, and there was no railing. *Sullivan County Comrs. v. Sisson*, 2 Ind. App. 311.

So, where the horse shied and death was caused by want of a railing over a county bridge, a recovery was allowed, in *Shelby County Comrs. v. Blair*, 8 Ind. App. 574.

In *Boone County Comrs. v. Mutchler*, 137 Ind. 140, it was said that a county was liable where plaintiff's horse was frightened at a hog in a ditch on a free gravel road, and backed the buggy over the side of the bridge where there was no railing. The court said: "It is quite certain that the injury in this case would not have been caused had there been proper guards upon the bridge. And if it be conceded that the fright of the horse and the defect in the bridge were concurrent causes of the injury,

INDIANA SUPREME COURT.

BOARD OF COMMISSIONERS OF JAS. PER COUNTY, *Appt.*,

v.

John L. ALLMAN, Admr., etc., of Reuben P. Ryan, Deceased.

(142 Ind. 572.)

1. Counties, being subdivisions of the state and instrumentalities of government exercising authority given by the state, are no more liable for the acts or omissions of their officers than the state.
2. A county is not liable by implication for damages caused by negligence of its officers in respect to keeping bridges in repair, where the county commissioners have no power to appropriate county funds for that purpose except when and so far as the road district is unable to make the repairs, and there is no statute giving a right of action against the county for its negligence or that of its commissioners, or authorizing the use of county funds to pay damages caused thereby.
3. It is the duty of the court to overrule a decision or series of decisions if clearly incorrect either through a mistaken conception of the law or through misapplication of the law to the facts, if no injurious results would follow from their overthrow.

(November 25, 1886.)

both present and active in the result, yet, as neither party was to blame for the fright of the horse, and as the appellant was alone to blame for the defect in the bridge, it is quite evident that the appellant cannot escape responsibility. *Fulton County Comrs. v. Rickel*, 106 Ind. 501; *Shelby County Comrs. v. Sisson*, 2 Ind. App. 811."

But a county was not liable for injuries caused by a horse becoming frightened at a pile of lumber on a road and running away, as the county was not liable for defective roads. *Abbett v. Johnson County Comrs.*, 114 Ind. 61.

In *Fulton County Comrs. v. Rickel*, 106 Ind. 501, it was held that a county was not liable for injuries caused by a horse becoming frightened at a plank standing upright in a bridge, as an injury caused by the horse's fright was not the proximate result of a breach of duty, and no greater duty is imposed upon counties in respect to bridges than that of using ordinary care and diligence to make and keep them safe for travel. In this case the frightened horse caused the carriage to upset and there was no question made as to defective railing, but fright of the horse at the defective bridge seems to have been the cause.

And a county was held not liable for injuries caused by a runaway team to a foot passenger on account of failure to erect proper barriers over a long and narrow county bridge in a large city, where the bridge was a solid stone bridge in good repair erected fifty years previous and sufficiently adequate at that time. It was further held that the commissioners were not negligent in anticipating that horses would become frightened on a wagon road and injure foot passengers; also that Pa. act February 18, 1870 (Pub. Laws, 181), providing that the commissioners of L. county are authorized to erect foot sidewalks adjoining the stone bridge at the expense of the county, was discretionary and not mandatory, for which there would be no liability. *Lehigh County v. Hoffert*, 116 Pa. 119, 19 W. N. C. 863.

89 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Newton County in favor of plaintiff in an action brought to recover damages for the death of plaintiff's intestate which was alleged to have been caused by a bridge which defendant had allowed to become defective. *Reversed.*

The facts are stated in the opinion.

Messrs. S. P. Thompson and Stuart Brothers & Hammond, for appellant.

While the statute makes it the duty of the county board to cause the bridges of the county to be kept in repair, the county is not liable for injuries caused by defects in such bridges for the reason that there is no statute imposing such liability.

Cones v. Benton County Comrs., 137 Ind. 404; *Bailey v. Lawrence County*, 5 S. D. 393.

The rule of *stare decisis* cannot properly be invoked as a reason for following the line of decisions which hold counties liable in such cases.

Certainly no one would have a right to incur a risk to his person from a defective bridge on the strength of decisions holding the county liable in such cases. The fact that he did so would be a most conclusive reason why he could not recover.

28 Am. & Eng. Enc. Law, p. 36.

If the deceased knew, as he is presumed in the absence of an averment to the contrary to

In South Carolina there is a statute imposing a liability, but where the proximate cause of the accident was the fright of a horse the county would not be held liable. *Brown v. Laurens County*, 38 S. C. 232.

A county was not liable under a statute requiring roads to be kept in good repair, where a horse was frightened by two calves coming out of the bushes, and backed over a steep bank. There was some evidence to show that the plaintiff was guilty of contributory negligence. *Smith v. Kanawha County Ct.*, 33 W. Va. 713, 8 L. R. A. 82.

And under a statute imposing a liability for roads and bridges being out of repair a county was not liable where plaintiff attempted to cross a landslide on the road, and his horse ran away, as the driver was reckless. *Phillips v. Ritchie County Ct.*, 31 W. Va. 478.

And where a horse was being driven on a buggy across a public bridge, and as he put his fore feet on the bridge became frightened by a large hole under the bridge, and, backing, threw the buggy over the edge of the approach to the bridge, and the timbers there, being rotten, gave way with the rocks and rolled down upon the plaintiff and injured him, no recovery could be had, as the injury was not received because of the hole under the end of the bridge, but from the fright of the horse. *Mason v. Spartanburg County*, 40 S. C. 330.

Under S. C. act, 1874, Gen. Stat. § 1067, providing that any person who shall receive injury in his person or property through a defect in the repair of a highway, causeway, or bridge, may recover in an action against the county, a county was not liable where a mule, drawing a buggy, became frightened at a placard advertisement on a bridge, and backed against the railing, which gave way and the vehicle was thrown over the bridge, and the commissioners as soon as they knew of the placard had it removed. Nor was it error to ask the jury, "Would a prudent man have driven his mule across the bridge, with two ladies in his buggy, with the sign staring him

have known, of the dangerous condition of the approach as described, and attempted to cross it on a load of hay, as averred in the complaint, and met with his death by the wagon slipping off the grade, which was "so narrow on top as to be dangerous for travelers and persons to pass and drive over," he was guilty of such contributory negligence as precludes a recovery.

Jonesboro & F. Turnp. Co. v. Baldwin, 57 Ind. 86; *Indianapolis v. Cook*, 90 Ind. 10; *Morrison v. Shelby County Comrs.* 116 Ind. 481; *Wilson v. Trafalgar & B. County Gravel Road Co.* 83 Ind. 326; *Albion v. Hettrick*, 90 Ind. 545, 46 Am. Rep. 230; *Riest v. Goshen*, 42 Ind. 389; *Wabash, St. L. & P. R. Co. v. Johnson*, 96 Ind. 40; *Gosport v. Evans*, 112 Ind. 188; *Horton v. Ipswich*, 13 Cush. 488; *Lake Shore & M. S. R. Co. v. Pinchin*, 112 Ind. 592; *Ohio & M. R. Co. v. Walker*, 113 Ind. 196.

A county, like a state, is not liable for the negligence of its agents and officers, unless made liable by a statute.

Morris v. Switzerland County Comrs. 131 Ind. 285; *Vigo County Comrs. v. Daily*, 182 Ind. 73; *Smith v. Allen County Comrs.* 181 Ind. 116; *Cones v. Benton County Comrs.* 187 Ind. 404; *Parke County Comrs. v. Wagner*, 188 Ind. 609; *Vermillion County Comrs. v. Chippe*, 181 Ind. 56. 16 L. R. A. 228.

The county is only liable when a bridge is out of repair that it is in fact not what its appearance indicates.

In this case the width of the bridge and its

approaches, their relative height from the ground and the stream, were matters of the original plan, survey, and estimate. The plan was adopted by the board as one in its opinion suitable to the width of the highway, the banks of the stream, the extent of the travel, and all the circumstances; and this political determination of the board cannot certainly be changed at the behest of the circuit court or a petit jury of another county.

The liability must be limited to one class of persons also, to wit, travelers using due care in entering upon and passing over the bridge needing repair.

O'Connell v. Lewiston, 65 Me. 84, 20 Am. Rep. 678; *Mauch Chunk v. Kline*, 100 Pa. 119, 45 Am. Rep. 364; *Schaeffer v. Sandusky*, 88 Ohio St. 246, 81 Am. Rep. 583; *Taylor v. Yonkers*, 105 N. Y. 202, 59 Am. Rep. 492.

Messrs. R. W. Marshall, Cummings & Darroch, and *Brown & Hall*, for appellee:

In *Parke County Comrs. v. Wagner*, 188 Ind. 609, the court uses the following language: "We are unable to recede from the position of this state upon the question [liability of counties for defective bridges], since that position has been so often assumed that it has become a part of 'the law of the land,' and if hereafter departed from it must be by legislative direction," and in support of this proposition cites the following cases:

Vigo County Comrs. v. Daily, 182 Ind. 73; *Vermillion County Comrs. v. Chippe*, 181

in the face?" This was not a charge on the fact within the provisions of the Constitution, art. 4, § 23, as the violation would be in the judge deciding a fact about which there was a dispute, and so instructing the jury. *Acker v. Anderson County*, 20 S. C. 495.

d. By negligence of employee.

Counties are not liable to travelers for injuries caused by negligence of employees, in the absence of a statute imposing such liability.

So, the county commissioners were not liable for an injury sustained by a person driving on the county road by reason of a tree falling upon him through the negligence of a laborer employed by the road supervisors, under Md. act 1878, chap. 364, authorizing the appointment of a road supervisor by commissioners, who fix the price paid by the supervisors, but do not contract with the laborer. It was held that a laborer employed by the supervisor was not the servant of a county commissioner. *Arundel County Comrs. v. Duvall*, 54 Md. 850, 39 Am. Rep. 393.

And where a cart driven negligently by a convict of the chain gang collided with plaintiff's buggy the county was not liable. Va. Code 1873, chap. 45, § 13, providing that counties may sue and be sued, did not impose any liability, as this provision applied to contracts. *Fry v. Albemarle County*, 86 Va. 195.

And under S. C. act 1874 (Gen. Stat. 1087), providing liability for defective highways, causeways, and bridges, a county was not liable for loss of a wagon and mule from the sinking of a ferry boat, as this was not within the terms of the statute. *Chick v. Newberry and Union Counties*, 27 S. C. 419.

II. Injuries to other persons.

a. From condition of buildings.

1. Generally.

In the absence of a statute counties are not liable for personal injuries caused by reason of negligence in the construction or maintenance of public buildings.

39 L. R. A.

So, a county was not liable for personal injuries sustained by reason of the defective construction of its court-house, and the failure to keep it properly lighted at night. It was said that the question is similar to that of liability for a county bridge but that the doctrine of the liability of a county would not be extended. A distinction was made that under the Iowa Code, § 303, the board of supervisors are empowered to build and keep in repair the necessary buildings, and this imposes an involuntary duty to provide a place for holding court. But under the Code, § 303, subd. 18, providing that the board of supervisors shall have power to provide for the erection of bridges which may be necessary to keep the same in repair, the counties are not absolutely required to build any bridge, and when they elect to build a bridge there is a duty incurred which renders them liable for negligence. *Kincaid v. Hardin County*, 53 Iowa, 480, 36 Am. Rep. 236.

And a county was not liable for injuries caused to a witness in attendance upon court who was injured by reason of negligence in not properly lighting the stairway in the court-house. It was held that Ohio act March 12, 1853, § 7 (Swan's Rev. Stat. 181), providing that the boards of commissioners in the several counties shall be capable of suing and being sued, did not constitute or declare the county or the board of county commissioners a body corporate, and made no provision for claims against the county for torts. *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109.

And a county was not liable where the plaintiff, then but eight years old, was injured while attending a school exhibition in the county court-house, and fell from the veranda, which had no railing. It was said that a county is not liable for an injury arising from its neglect, or even its positive act, unless the liability is imposed by statute. *Sheppard v. Pulaski County*, 13 Ky. L. Rep. 672.

In holding that a county was not liable for damages for personal injury caused by negligence in

Ind. 56, 16 L. R. A. 228; *Morris v. Switzerland County Comrs.* 181 Ind. 285; *Smith v. Allen County Comrs.* 181 Ind. 116; *Fulton County Comrs. v. Rickel*, 106 Ind. 501.

This court has frequently had occasion to sustain the doctrine of *stare decisis*.

Stout v. Grant County Comrs. 107 Ind. 348; *Hale v. Matthews*, 118 Ind. 527; *Fowler v. Wallace*, 181 Ind. 849.

The approaches to a bridge are a part of a bridge, which it is the duty of a county to keep in repair as a part of the structure itself.

Huntington County Comrs. v. Huffman, 184 Ind. 4; *Driftwood Valley Turnp. Co. v. Bartholomew County Comrs.* 72 Ind. 228; *State, Winterburg v. Demaree*, 80 Ind. 519; *Shelby County Comrs. v. Deprez*, 87 Ind. 509; *Elliott, Roads & Streets*, 24.

It is the duty of counties to keep the bridges of the counties in repair, and for failure to do so damages may be recovered for injuries.

House v. Montgomery County Comrs. 60 Ind. 580, 28 Am. Rep. 657; *Driftwood Valley Turnp. Co. v. Bartholomew County Comrs.* 72 Ind. 228; *Shelby County Comrs. v. Deprez*, 87 Ind. 509; *Madison County Comrs. v. Brown*, 89 Ind. 48; *Howard County Comrs. v. Legg*, 93 Ind. 523, 47 Am. Rep. 890; *Allen County Comrs. v. Bacon*, 96 Ind. 81; *Porter County Comrs. v. Dombke*, 94 Ind. 72; *Patton v. Montgomery County Comrs.* 96 Ind. 131; *Vaught v. Johnson County Comrs.* 101 Ind. 128; *Knox County Comrs. v. Montgomery*, 109 Ind. 69; *Howard County Comrs. v. Legg*, 101 Ind. 479; *Wabash County Comrs. v. Pearson*, 120 Ind. 426; *Sullivan County Comrs. v. Sisson*, 2 Ind. App. 317.

the care and control of a court-house, it was said that counties are involuntary corporations organized as political subdivisions for governmental purposes, and not liable for the negligence of its agents unless made so by statute. It was further said there may be little distinction between the duties in regard to bridges and public buildings, but the rule as to bridges would not be extended. *Vigo County Comrs. v. Daily*, 182 Ind. 73.

For damages caused by maltreatment of a person committed to jail by the ordinary preparatory to being sent to the lunatic asylum, under Ga. Code, § 1864, providing for proceedings to confine a lunatic at the instance of third persons a county, was not liable. It was said that the injured person must sue the jailor, sheriff, or those who maltreated him while in jail. *Wilson v. Fannin County*, 74 Ga. 818. In this case his limbs were so badly frozen that one leg had to be amputated, and the toes on his other foot were frozen off.

For injuries caused by negligence of the superintendent and building committee appointed by the county board to erect a court-house, where the building fell and killed one of the men, and it was not alleged that the defendants were owners of or had exclusive control of the building, or that the defendants had any power over the plans of the building or the character of the material to be furnished, a recovery was denied because there was no statute imposing a liability. *Hollenbeck v. Winnebago County*, 95 Ill. 148, 35 Am. Rep. 151.

In *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 322, in a city case it was said of earlier cases that they "have ever since been considered as having established in this commonwealth the general doctrine that a private action cannot be maintained against a town or other quasi corporation, for a neglect of corporate duty, unless such action is given by statute."

In *Riddle v. Proprietors of Locks & Canals*, 739 L. R. A.

Monks, J., delivered the opinion of the court:

This was an action by appellee to recover damages for the death of his intestate, caused, as is alleged, by a defective approach to a bridge over a watercourse. This action was commenced in Jasper county, and the venue changed to the court below. To the complaint, which is in one paragraph, appellant demurred, for want of facts, which was overruled. An answer of general denial was filed. The cause was tried by a jury. A special verdict was returned, and over a motion for a *venire de novo*, a motion for judgment in favor of appellant on the special verdict, a motion for a new trial, and a motion in arrest, judgment was rendered against appellant for \$6,000. Appellant assigns as error the action of the court in overruling the demurrer to the complaint and the motion in arrest of judgment.

Appellant earnestly insist that "there is no liability by counties for injuries caused by the negligence of its officers in constructing or in repairing, or failing to repair, bridges over watercourses, for the reason that there is no statute imposing such liability; the overwhelming weight of authority is to the effect that the duty imposed upon counties to keep bridges in repair does not carry with it an implied liability to answer in damages for injuries sustained from defective or unsafe bridges, and that such liability can only arise from express statutory enactment; that the case of *Cones v. Benton County Comrs.* 137 Ind. 404, in effect overruled the former holdings of this court in

Mass. 189, 5 Am. Dec. 35, it was said: "These are in the books sometimes called quasi corporations. Of this description are counties and hundreds in England; and counties, towns, etc., in this state. Although quasi corporations are liable to information or indictment, for a neglect of a public duty imposed on them by law, yet it is settled in the case of *Russell v. Devon County*, 2 T. R. 667, that no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute."

In *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302, which was an action against a town for personal injuries from a town hall, it was said that "towns and other municipal corporations, including counties in this state, have power, for certain purposes, to hold and manage property, real and personal; and for private injuries, caused by the improper management of their property as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property." (This was not only a *dictum*, but it is questionable whether this doctrine was ever applied to any county in New Hampshire.)

2. On account of escape from prison.

Counties are not liable for escape of prisoners in the absence of a statute imposing a liability. In some states there is such a statute and the early Ohio cases affirmed an implied liability, but these cases were overruled.

Under the Connecticut statute providing that if any person lawfully committed to gaol shall break such gaol and make his escape, by reason of the insufficiency of such gaol, the damages sustained by persons by reason of such escape shall be paid by the county, and that nothing in this act shall hinder any person from recovering damage of the

such cases." It must be admitted that the decided weight of authority in such cases is as stated by appellant. From the numerous decisions to the effect claimed, we cite the following: *Cones v. Benton County Comrs.* 187 Ind. 404; *Smith v. Allen County Comrs.* 181 Ind. 116; *Morris v. Switzerland County Comrs.* 181 Ind. 285; *Vigo County Comrs. v. Daily*, 182 Ind. 78; *Hollenbeck v. Winnebago County*, 95 Ill. 148, 35 Am. Rep. 151; *Templeton v. Linn County*, 22 Or. 813, 15 L. R. A. 780; *Manuel v. Cumberland County Comrs.* 98 N. C. 9; *White v. Chouan County Comrs.* 90 N. C. 437, 47 Am. Rep. 534; *Wood v. Tipton County*, 7 Baxt. 112, 32 Am. Rep. 561; *Brabham v. Hinds County Supers.* 54 Miss. 363, 28 Am. Rep. 352; *White v. Bond County*, 58 Ill. 297, 11 Am. Rep. 65; *Hedges v. Madison County*, 6 Ill. 567; *Lorillard v. Monroe*, 11 N. Y. 892, 62 Am. Dec. 120; *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730; *Granger v. Pulaski County*, 26 Ark. 87; *Downing v. Mason County*, 87 Ky. 208; *Reardon v. St. Louis County*, 36 Mo. 555; *Swineford v. Franklin County*, 73 Mo. 279; *Clark v. Adair County*, 79 Mo. 586; *Gilman v. Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 290, and note on pages 294 and 295; *Barnett v. Contra Costa County*, 87 Cal. 77; *Scales v. Chattahoochee County*, 41 Ga. 225; *Marion County Comrs. v. Riggs*, 24 Kan. 255; *Fry v. Albemarle County*, 86 Va. 195; *Watkins v. Preston County Ct.* 30 W. Va. 657; *Woods v. Colfax County Comrs.* 10 Neb. 552; *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109; *Baxter v. Winoski Turnp. Co.* 22 Vt. 128, 52 Am. Dec. 84; *Ward v. Hartford County*, 12 Conn. 404;

Niles Trp. Highway-Comrs. v. Martin, 4 Mich. 557; *Adams v. Wiscasset Bank*, 1 Me. 861, 10 Am. Dec. 88; *Mitchell v. Rockland*, 52 Me. 118; *Altnow v. Sibley*, 30 Minn. 186, 44 Am. Rep. 191; *Doddall v. Olmsted County*, 30 Minn. 96, 44 Am. Rep. 185; *Sussex County Chosen Freeholders v. Strader*, 18 N. J. L. 108, 35 Am. Rep. 530; *Cooley v. Essex Chosen Freeholders*, 27 N. J. L. 415; *Young v. Commissioners of Roads*, 2 Nott & M'C. 587; *Farnum v. Concord*, 2 N. H. 392; *Eastman v. Meredith*, 86 N. H. 284, 72 Am. Dec. 303; *Morrey v. Newfane*, 8 Barb. 645; *Heigel v. Wichita County*, 84 Tex. 392, 31 Am. St. Rep. 68, and note on pages 65 and 66; *Ensign v. Livingston County Supers.* 25 Hun, 20; *Albrecht v. Queens County*, 84 Hun, 899; *Smith v. Carlton County Comrs.* 46 Fed. Rep. 340; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Bailey v. Lawrence County*, 5 S. D. 893; *Cooley, Const. Lim.* 6th ed. 301; 1 Dill. Mun. Corp. §§ 25, 26; 2 Dill. Mun. Corp. §§ 996, 997, 999; 4 Am. & Eng. Enc. Law, pp. 364-367, and notes; 15 Am. & Eng. Enc. Law, pp. 1143, 1144, and cases cited in note; 1 Beach, Pub. Corp. § 784; *Tiedeman, Mun. Corp.* § 325. By common law, the inhabitants of a county were required to repair bridges over watercourses. *Carroll County Comrs. v. Bailey*, 123 Ind. 46, 48; *State v. Gorham*, 37 Me. 451; *State, Whitall v. Gloucester County Chosen Freeholders*, 40 N. J. L. 302; *State v. Hudson County*, 30 N. J. L. 137; *Rex v. Oxfordshire*, 16 East, 223. Yet it is settled law that counties were not liable at common law for injuries caused by their negligence in failing to keep such bridges in repair. *Cones*

persons or out of the estate of such persons who shall break or be aiding or assisting in breaking the gaol or who shall escape, a county was liable for an escape, and it was no defense that the escape was effected through the aid of persons outside, or that the plaintiff could have sued those aiding, where they were insolvent, and plaintiff had no knowledge of them at the time of this suit, and it was not shown that the prisoner had an estate, or that the prisoner was recaptured after suit, or that detention would not avail plaintiff. *Clark v. Litchfield County*, Kirby, 318. [Note by reporter: "This decision was afterwards reversed in the supreme court of errors."]

And the county was liable for the escape of a debtor by reason of insufficiency of the gaol, under the Connecticut statute providing that if any person lawfully committed to any gaol shall break such gaol and make his escape, the county shall pay all damages. *Dutton v. Litchfield County*, 1 Root, 450.

So, a county was held liable for special damages caused by the escape of a prisoner through the insufficiency of the "gaol" on execution of the debt. *Staphorne v. New Haven County*, 1 Root, 125; *Hawley v. Litchfield County*, 1 Root, 155; *Dennie v. Middlesex County*, 1 Root, 278; *Murray v. Bishop*, and *Smith v. County Treasurer*, 1 Root, 367.

In *Sheldon v. Litchfield County*, 1 Root, 158, it was said that an action against a county for a prisoner escaping through insufficiency of the gaol was under a statute.

And the county was liable under special damages for the insufficiency of a gaol, whereby a party who had been imprisoned for debt made his escape. *Williams v. New Haven County*, 2 Root, 23.

But a county was not liable for the escape of a prisoner confined for horse stealing, where it was shown the gaol was sufficient, and the prisoner 39 L. R. A.

could not have got out unless he had had assistance from some person outside. *Paul v. Tolland County*, 2 Root, 186.

In *Ward v. Hartford County*, 12 Conn. 404, it was said that the only case in which provision is made for redress against a county is where a debtor escapes from prison through the insufficiency of the gaol. "The creditor, by an application to the county court, may procure an order for payment of his debt. [Conn.] Stat. 256, title 42, § 24."

A mandamus was held to be not the proper remedy for a sheriff to hold the county liable for damages which he was compelled to pay for an escape, under a ca. sa. owing to the insufficiency of the jail. *Governor, Haygood, v. Clark County Inferior Ct. Justices*, 19 Ga. 97.

But it was further held in this case that a county was not liable for the escape of a prisoner under a ca. sa. owing to the insufficiency of the jail. It was said that a county is a corporation of the municipal kind or it is not, and if it is a municipal corporation it is not liable for the conduct of the inferior court in not providing a more efficient jail, where it is not shown that they have funds to make it more secure, and a municipal corporation is not liable for the acts or omissions of its officers. The court held that if it was not a municipal corporation it could not have an agent. *Governor, Haygood, v. Clark County Inferior Ct. Justices*, 19 Ga. 97.

In *Haygood v. Inferior Ct. Justices*, 20 Ga. 845, on the return of this case to the lower court an amendment setting up that the justices of the inferior court had funds on hand sufficient to repair the jail was denied, and it was held that the sheriff could not recover as he was the legal custodian of the jail, and if it was unsafe it was wrong for him to imprison the debtor there, and if the jail was wholly insufficient it was the same thing as if there

v. Benton County Comrs. 187 Ind. 404, and authorities heretofore cited. It is a well-settled proposition that, when subdivisions of a state are organized solely for a public purpose by a general law, no action lies against them for an injury received by anyone on account of the negligence of the officers of such subdivision, unless a right of action is expressly given by statute; that such subdivisions, as counties and townships, are instrumentalities of government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state. *Cones v. Benton County Comrs.* 187 Ind. 404; *Morris v. Switzerland County Comrs.* 181 Ind. 285; *Vigo County Comrs. v. Daily*, 182 Ind. 73; *Smith v. Allen County Comrs.* 181 Ind. 116; *White v. Sullivan County Comrs.* 129 Ind. 396; *Abbott v. Johnson County Comrs.* 114 Ind. 61, cases cited on page 68; *Freel v. Crawfordville School City*, 142 Ind. 27, 87 L. R. A. 301; *Summers v. Daviess County Comrs.* 103 Ind. 262, 58 Am. Rep. 512; *Greene County Comrs. v. Bonnell*, 4 Ind. App. 133; *Edgerly v. Concord*, 62 N. H. 8; *Goddard v. Harpwell*, 84 Me. 499, 30 Am. St. Rep. 373, and note on pages 398-402; *Howard v. Worcester*, 158 Mass. 426, 12 L. R. A. 160; *Larrabee v. Peabody*, 128 Mass. 561; *Clark v. Waltham*, 128 Mass. 567; *Hill v. Boston*, 122 Mass. 344; *Wison v. Newport*, 18 R. I. 454, 48 Am. Rep. 35; *Finch v. Toledo Bd. of Edu.* 80 Ohio St. 37, 27 Am. Rep. 414; *Lane v. Woodbury District Twp.* 58 Iowa, 462; *Flori v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Bigelow v. Randolph*, 14 Gray, 541; *Ford v. Kendall School Dist.* 121

Pa. 548, 1 L. R. A. 607, and all authorities cited on the proposition concerning bridges.

In *Vermillion County Comrs. v. Chipps*, 181 Ind. 56, 16 L. R. A. 228, this court said: "The decided weight of authority is that, in the absence of a statute upon the subject, a county is not liable for a failure to keep its bridges in repair. Elliott, *Roads & Streets*, p. 42." It was held by this court in *Smith v. Allen County Comrs.* 181 Ind. 116, that a county is not liable for an injury to a servant sustained without his fault while engaged in tearing down one of its bridges, although he worked under the immediate charge of its agent, who was known by the board of commissioners to be incompetent, which incompetency was the proximate cause of the injury. The court said: "A county is a civil or political division of the state, created by general laws to aid in the administration of the government, and in the absence of a statute imposing special duties with corresponding liabilities, is no more liable for the tortious acts or negligence of its officers and agents than the state." In *Morris v. Switzerland County Comrs.* 181 Ind. 285, this court held that a county was not liable in an action for damages resulting from a failure of the board of commissioners to keep the jail in a healthy and inhabitable condition. The court said: "The most logical and generally accepted theory is, that political subdivisions, such as counties and townships, are created to give effect to and enable citizens to exercise the right of local self government. *State, Holt, v. Denny*, 118 Ind. 449, 4 L. R. A. 65; *White v. Sullivan County Comrs.* 129 Ind. 396. Such

had been no jail. It was said he ought to have conveyed the debtor to the jail of the adjoining county and delivered him to the jailor there.

In *Brown County Comrs. v. Butt*, 2 Ohio, 348, it was held that a county was liable to a sheriff who had been mulcted in damages for an escape of a debtor owing to the insufficiency of the county jail. It was said that if it was a new question it would have been proper that the action should have been against the county in the first instance to avoid circuitry of action for damages for an escape of a debtor from an insufficient jail. But this case was overruled in *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109.

In *Richardson v. Spencer*, 6 Ohio, 18, where a sheriff was sued for the escape of a prisoner taken on an execution, it was held that where the escape resulted from the insufficiency of the jail the sheriff was liable in the first instance to the plaintiff on execution, and a recovery against him clothed him with power to coerce indemnity from the county.

In *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109, the case of *Brown County Comrs. v. Butt*, 2 Ohio, 348, and the dictum of *Richardson v. Spencer*, 6 Ohio, 18, were overruled.

For prisoner's right of action for imprisonment in unhealthful or unfit prison, see *Shields v. Durham* (N. C.) 36 L. R. A. 233, note.

b. By negligence or wrongful act of employee.

Counties are not liable for personal injuries caused to persons by reason of negligence or tort of employee.

In the case of *HUGHES v. MONROE COUNTY* it was held that the county of Monroe was not liable for injuries caused by the operation of a laundry machine, whereby an employee of the County Insane Asylum was injured, under N. Y. Laws 1363, chap. 82, placing the asylum under the board of super-

visors, authorizing them to elect a warden, and Laws 1870, chap. 633, making it the duty of the trustees to determine whether an inmate was a charge upon the town, or the city of Rochester or upon the county, as the warden and trustees were in no sense the agents of the county but were public officers. It was also held that the county would not be made liable by caring for insane patients not residing in the county under a contract, or by deriving a revenue in small amount from surplus farm products. The county was held to be a quasi-municipal corporation, and the law of 1892, which provided that a county is a municipal corporation, did not apply because the injury was committed before its enactment. This case is in accord with the authorities generally.

So, a county was not liable where injuries were caused to a servant in the employ of the county working under the personal superintendence of one of the board of commissioners in tearing down a bridge, although it was charged that the superintendent was incompetent, inexperienced, and negligent. *Smith v. Allen County Comrs.* 181 Ind. 116.

Nor where a convict in the penitentiary was required to work at a circular saw, and he alleged that the injury was occasioned by the illegal and negligent acts of the defendant in compelling him to approach the saw, and in not providing proper means for the execution of the business of the penitentiary. *Alamancos v. Albany County Supers.* 25 Hun, 551.

Nor where an employee of an independent contractor of defendant while carrying lumber to a bridge was injured by reason of a negligent blast of dynamite. It was said that counties are subordinate political divisions of a state, and are not liable for torts of their officers unless made so by statute. *Smith v. Carlton County Comrs.* 46 Fed. Rep. 340.

subdivisions are instrumentalities of government and exercise authority delegated by the state and act for the state. As the state is not liable for the acts or omissions of its officers, neither should a political subdivision of the state be liable for the acts or omissions of its officers as relating to political powers." *White v. Sullivan County Comrs.* 129 Ind. 396, and *Summers v. Daviess County Comrs.* 103 Ind. 262, are to the same effect. This court held in *Vigo County Comrs. v. Daily*, 182 Ind. 73, that a county is not liable for damages occasioned by the negligence and carelessness of the board of commissioners in the care and control of the court-house. The court said: "It is now well settled that counties are involuntary corporations, organized as political subdivisions of the state for governmental purposes, and not liable, any more than the state would be liable, for the negligence of its agents or officers unless made liable by statute." In *Cones v. Benton County Comrs.* 187 Ind. 404, this court held that a county could not be held liable for personal injuries sustained while traveling upon a free gravel road of the county, and by reason of the defects in the construction and repair of such road. The court also expressly declared that the county was not liable at common law for the negligence of its officers, and that no liability existed by statute with reference to bridges. The court said: "It is quite true that the principle adopted in the bridge cases is in perfect analogy to the case before us, and if we would be consistent, those cases would control the present; but we are fully convinced that the principle there

adopted, of an implied liability, is not in harmony with the great weight of authority, ancient and modern. . . . The liability did not exist at common law, and does not exist by statute with respect to bridges or highways, and the objections to liability are well stated in *Hollenbeck v. Winnebago County*, 95 Ill. 151, 85 Am. Rep. 151, as follows: 'No reason is perceived why a county should be held to respond in damages for the negligence of its officers while acting in the discharge of public corporate duties enjoined upon them by the laws of the state . . . clothed with but few corporate powers, and these not of a private . . . character. . . . In fact, the powers and duties of counties bear such a due analogy to the governmental functions of the state at large that as well might the state be held responsible for the negligent acts of its officers as counties.' . . . It will be found that the authorities upon which cities and towns, as municipal corporations, are held liable for the results of the negligence of official duties make this distinction: That such municipalities are voluntary corporations organized for corporate purposes, and possessing legislative, administrative, and judicial functions not possessed, to the same degree by counties or townships, and that they exercise and enjoy advantages purely local and which are independent of the state, and inure to their benefit as distinguished from that of the state. We are aware that profound jurists do not agree with the doctrine that cities and towns are less governmental subdivisions of the state . . . than counties or townships; but, aside

And a county was not liable for negligence in not appointing a guardian for, and in not confining, a party who had been found by inquisition to be of unsound mind, who was allowed to run at large and kill her husband. *Miller v. Iron County*, 29 Mo. 122.

Nor for damages and unskillful treatment received by an indigent sick person while in the county hospital. *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151.

And no recovery could be had for damages caused by negligence of the county physician for the poor in a surgical operation, where it was not shown that the board of commissioners did not exercise care and diligence in his selection. *Summers v. Daviess County Comrs.* 103 Ind. 262, 58 Am. Rep. 512.

And a county was not liable for injuries caused by one of the guards unlawfully beating a convict in the chain gang, or for the negligence of the rest of the guards in not protecting the convict from the unlawful beating. *Hammond v. Richmond County*, 72 Ga. 188.

But in *Hannon v. St. Louis County*, 62 Mo. 313, a county was held liable for negligence in constructing a sewer to the county insane asylum under the superintendence of the county engineer who was present directing the work, where by neglect of the contractor and of the engineer the edge caved in, killing a son of the plaintiff.

In *Hannon v. St. Louis County*, 62 Mo. 313, it was said: "It would be foreign alike to our purpose and the facts admitted by the demurrer, to question the correctness of the proposition so generally occurred in elsewhere, asserted in *Reardon v. St. Louis County*, 86 Mo. 555, that quasi corporations, created by the legislature for the purposes of public policy, are not responsible for the neglect of duties enjoined on them, unless the action was

given by the statute." It was further said: "In the case at bar, the county of St. Louis was not engaged in the discharge of duties imposed alike by general law on all counties; duties whose performance, if neglected, might have been enforced by appropriate procedure for that purpose; but in the discharge of a self-imposed duty not enjoined by any law. And the test of the latter is this: That the county could not have been compelled to enter on the work for whose performance it contracted."

This injury occurred in 1872, and in 1878 under the Constitution the county of St. Louis became the city of St. Louis or the two corporations were consolidated with double functions, as shown by *State, Beach, v. Finn*, 4 Mo. App. 347.

III. Injuries to real property from public improvements.

a. Generally.

The weight of authority is that a county is not liable for injuries to property by reason of bridges, roads, drains, and the like being improperly constructed or out of repair or creating a nuisance. But some cases allow a recovery where a constitutional right is invaded, as where it can be construed to be a taking of private property without compensation, or where the Constitution provides compensation for property damaged.

The cases denying a liability for damages to real property are as follows, and will be found below under the appropriate subheads:

A county was not liable for a nuisance arising from a defective ditch causing overflow. *Dashner v. Mills County*, 88 Iowa, 401; *Green v. Harrison County*, 61 Iowa, 311; *Nutt v. Mills County*, 61 Iowa, 754.

Nor where the bridge abutment diverted the water and washed away land, prior to the Califor-

from the reasons so stated for the support of the distinction, it is plain to us that counties have no such powers as cities or towns to ordain, in a corporate capacity what improvements shall be made, the free choice of agents to make them, and the discretion as to the rate of levy to be made for the same. Nor have counties the express power, nor the power necessarily implied, to raise a fund to pay damages for injuries, unless we imply this power, not from legislative grant, but from the liability implied in any case. General powers are not extended to counties, but the measure of their privileges must be found expressed by, or necessarily implied from, some statute." The doctrine declared in *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, and the cases following it, is that the laws of this state concerning the building and repair of bridges imposed the duties upon counties to keep public bridges in such repair, that they are reasonably safe for travel, and gave them ample power to provide the means necessary to make such repairs, and that, therefore, there was an implied liability to answer in damages for injuries from a failure to discharge that duty.

But even if the doctrine of implied liability from a duty enjoined, and the provision of means for the performance of that duty, declared and applied in the bridge cases, is a correct and not an erroneous statement of the law, it yet remains for us to determine whether the cases named can be sustained on this ground, to do which we must ascertain whether the legislature has given the boards

of commissioners the power, and provided them with the means and instrumentalities, to cause the bridges in their respective counties to be kept in repair; for, unless this has been done, no liability can be implied, even though the doctrine of implied liability is correct.

The 1st section of the act to provide for the erection and repair of bridges (Rev. Stat. 1881, § 2885; Rev. Stat. 1894, § 3275), provides that, "whenever in the opinion of the county commissioners the public convenience shall require that a bridge shall be repaired or built over any watercourse, they shall cause survey and estimate therefor to be made, and direct the same to be erected." The 2d section (Rev. Stat. 1881, § 2886; Rev. Stat. 1894, § 3276), provides: "If the estimate therefor shall exceed the ability of the road district in which such bridge is to be built, by the application of its ordinary road work and tax, to perform, the county commissioners may make an appropriation from the county treasurer to build or repair the same." The 3d section (Rev. Stat. 1881, § 2887; Rev. Stat. 1884, § 3277), enacts that "such board shall receive and appropriate all donations for the erection and repair of bridges; they shall also aid the same, when of general importance, by advances from the county treasury, and shall make such regulations in reference to payments and kinds of bridges as to them shall seem proper; provided, however, that if the board of commissioners of any such county shall not deem any such bridge of sufficient importance to make an appropriation from the county treasury for the

nia Constitution providing compensation for property damaged. *Crowell v. Sonoma County*, 26 Cal. 313.

Nor where a bridge caused an overflow of plaintiff's land. *Davis v. Ada County* (Idaho) 47 Pac. 93.

Nor where building a jail obstructed a stream flooding plaintiff's premises. *Downing v. Mason County*, 87 Ky. 208.

Nor where a highway was built so as to cause overflow of water on plaintiff's land. *Grimwood v. Summit County Comrs.* 23 Ohio St. 600.

Nor where a dam was injured by the fall of a bridge which washed against it. *Livermore v. Camden County Chosen Freeholders*, 29 N. J. L. 245, 31 N. J. L. 507.

Nor where damages were caused to a mill dam by flooding, and plaintiff depended on the bridge approach to retain water. *Jerne v. Mounmouth County Chosen Freeholders*, 52 N. J. L. 553, 11 L. R. A. 416.

Nor where an overflow was caused by putting an insufficient drain in the road. *Packard v. Voltz*, 94 Iowa, 277.

So, where an obstruction of a stream was caused by the manner in which the contractor built the bridge, the county was not liable. *Smith v. Wilkes and McDuffie Counties*, 79 Ga. 125.

And building a road so as to obstruct a mill race gave no right of action. *Swineford v. Franklin County*, 78 Mo. 279; *Walter v. Wicomico County Comrs.* 35 Md. 385.

A county was not liable for a nuisance arising from the condition of a jail. *Wehn v. Gage County Comrs.* 5 Neb. 494, 25 Am. Rep. 497; *Threadgill v. Anson County Comrs.* 99 N. C. 353.

Nor for a nuisance resulting from a privy being out of repair. *Mobley v. Carter County*, 5 Ky. L. Rep. 604.

And an injunction was refused against a nuisance. *L. R. A.*

sance anticipated from erecting a jail. *Burwell v. Vance County Comrs.* 93 N. C. 73, 53 Am. Rep. 454.

Where a road was vacated no recovery could be had for injury to adjacent property, under Iowa Const. art. 1, § 18, providing that private property shall not be taken for public use without compensation. *Brady v. Shinkle*, 40 Iowa, 576; *Ellsworth v. Chickasaw County*, 40 Iowa, 571.

And where a road was vacated it was held that property was not "taken for public use." *Coffey County Comrs. v. Venard*, 10 Kan. 95.

Trespass in opening a road through plaintiff's land gave no right of action against the county. *Hutchison v. Pulaski County*, 11 Ky. L. Rep. 117.

A county was not liable for a barn damaged by fire through negligence of an employee of a county. *Field v. Albemarle County* (Va.) 20 S. E. 954.

Nor for fire started on the county poor farm. *Symonds v. Clay County Supers.* 71 Ill. 855.

In *Fenton v. Salt Lake County*, 3 Utah, 423, it was held that a county was not liable for injuries to land by the construction of canals diverting a watercourse, where the claim had not been presented to the board.

The cases affirming a liability for injuries to real property by reason of bridges, roads, ditches, and buildings, and for negligence of the county, will be found below under the appropriate subheads.

In *SCHUSLER v. HENNEPIN COUNTY COMBS*, a county was held liable for erecting a dam in a lake, destroying a mill dam without compensation.

And for flooding land by reason of bridge abutments, a county was liable under Cal. Const. 1879, art. 1, § 14, providing that private property shall not be damaged for public use without compensation. *Tyler v. Tehama County*, 109 Cal. 618.

And was liable for damages by building an abutment of a bridge in front of plaintiff's house, un-

erection or repair thereof, the trustee of any township . . . may appropriate any part of the road-tax fund in the township treasury for that purpose, if he shall deem it right and expedient to do so." And § 11 (Rev. Stat. 1881, § 2892; Rev. Stat. 1894, § 3282), provides that "the board of commissioners of such county shall cause all bridges therein to be kept in repair, and shall cause the township superintendent of the proper road district to keep in a conspicuous place, at each end of any bridge in his district whose chord is not less than 25 feet, the following notice in large English characters: 'One dollar fine for riding or driving on this bridge faster than a walk.' And if any person shall ride or drive over any such bridge faster than a walk, for any such offense he shall forfeit and pay \$1, to be recovered by the proper town superintendent before any justice of the peace of the proper county, which shall be applied to the repairs of such bridge."

It will be seen from an examination of these sections, which must be construed together, that the power of the board of commissioners to appropriate the county funds for the repair of bridges is limited to certain cases. While the county is required by the 11th section to cause the bridges in the county to be kept in repair, the expense of the same under § 2, unless too great, must be borne by the road district alone, for the reason that the board of commissioners can only make an appropriation out of the county treasury to repair a bridge in cases where the estimates thereof exceed the ability of the road district, by application of its

ordinary road work and tax, to perform. If the road district is able, by its ordinary road work and tax, to make the repairs, the board of commissioners has no power to appropriate the county funds to pay for repairing the same. In such a case the board is powerless. The supervisor of a road district is a township, not a county, officer, and is not under the control of the county commissioners. He is an independent agent, subject only to the control, in some degree, of the township trustee. Rev. Stat. 1894, §§ 6818-6838. He does not represent the county, and the county is not responsible for his acts. *Dooley v. Sullivan*, 112 Ind. 451, 454, 455; *Vigo Twp. v. Knox County Comrs.* 111 Ind. 170; *Abbett v. Johnson County Comrs.* 114 Ind. 65. Neither has the board of commissioners any power to appropriate the road-tax fund or any other township fund in the hands of the county treasurer, township trustee, or supervisor to pay the expense of said repairs. *Vigo Twp. v. Knox County Comrs.* 111 Ind. 170. The board of commissioners might, perhaps, institute an action, and, by writ of mandamus, compel him to make such repairs. Certainly, the county would not be held liable for the failure of the board of commissioners to institute an action against such supervisor, and, by writ of mandamus, compel him to repair a bridge. Under § 8, the board of commissioners have no power to appropriate county funds for the repair of a bridge, unless they deem it of sufficient importance. If they do not deem such bridge of sufficient importance to make an appropriation out of the county funds for its repair, then they have no power

der Pa. Const. 1874, art. 16, § 8, providing for compensation for property taken, injured, and destroyed in the construction of public improvements. *Chester County v. Brower*, 117 Pa. 647.

And trespass in opening a road through plaintiff's land was held to give a cause of action against the county. *Coburn v. San Mateo County*, 75 Fed. Rep. 520.

And an injunction would be granted in such a case where no compensation for the taking had been made. *McCann v. Sierra County*, 7 Cal. 121.

Where a flood injured a dam by reason of improper construction of a bridge abutment, a recovery was allowed. *Riddle v. Delaware County*, 156 Pa. 642.

Damages were given for a nuisance caused by sewage from a county farm, in *Lefrois v. Monroe County*, 48 N. Y. Supp. 519. (Pending in court of appeals.)

A county was liable for locating a bridge and constructing the same so that it was carried by a flood against a dam, injuring the same. *Harford County Comrs. v. Wise*, 71 Md. 43.

And was liable for trespass in removing a vault which was a fixture. *Rhoda v. Alameda County*, 69 Cal. 523.

b. By construction and operation of bridges.

In regard to injuries from locating and building a bridge under the Constitutions of California and Pennsylvania, a recovery has been allowed, and a recovery was allowed in Maryland and Pennsylvania on an implied liability, but it is generally held that a recovery cannot be had.

A county was liable for the construction of a bridge, the abutment of which turned the water against plaintiff's land, although it was claimed that the bridge was built, not upon the highway, but upon private property, and that the acts of the board of supervisors were unauthorized and unlaw-

ful. It was held that generally an action did not lie against the county, but Cal. Const. 1879, art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation having been first made, authorized a recovery. *Tyler v. Tehama County*, 109 Cal. 618.

In that case it was said that in *Crowell v. Sonoma County*, 25 Cal. 313, the county was not held liable, and under the old Constitution that was doubtless true, but the change in the Constitution from Cal. Const. 1849, art. 1, § 8, providing, nor shall private property be taken for public use without just compensation, to Const. art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation, created a clear distinction between damages to property and damages for personal injuries.

And a county was liable for consequential damages caused by the erection of the abutment to a county bridge some 14 feet above the grade of the street in front of plaintiff's house in the city, under Pa. Const. 1874, art. 16, § 8, providing that municipal corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed in the construction of their work, highways, or improvements, which shall be paid before such taking, injury, or destruction. It was said that prior to the adoption of the Constitution plaintiff would have been without remedy. *Chester County v. Brower*, 117 Pa. 647.

In an action for injury caused to a dam by a bridge being negligently constructed and located, it was held that a sketch and painting of the scene, showing the location of the bridge, the mill dam and county adjacent, made by an artist who never saw the bridge, was competent evidence, as the jury could have gone in person to inspect the locality. *Harford County Comrs. v. Wise*, 71 Md. 43.

to make the appropriation, and cannot rightfully do so. It certainly cannot be claimed that, under these sections, the board of commissioners have any general power to make appropriations of county funds for the repair of bridges. Such appropriations can only be made in certain cases and upon certain contingencies; and in cases where they cannot make such appropriation, no way is provided by which they can compel such repairs to be made by the road supervisors, except, perhaps by expensive and frequent litigation, which was certainly not the intent of the legislature.

This act was considered and construed by this court in *Driftwood Valley Turnp. Co. v. Bartholomew County Comrs.* 72 Ind. 226, which was an action on a contract made by the county to keep the approaches to a bridge in repair. Worden, J., speaking for the court, said: "The mode in which the county is bound to perform that duty is specifically pointed out by statute and a contract which contravenes that mode and substitutes another must be void. If the contract sued on is valid, and has been broken, the damages of the appellant must be paid out of the county treasury. But it was not contemplated that the expense of repairing bridges should be paid out of the county treasury, except upon a contingency. By the 1st section of the act above set out, when a

bridge is to be repaired or built, the commissioners are to 'cause surveys and estimates therefor to be made, and direct the same to be erected.' Why were surveys and estimates to be made? The 2d section answers this question. It is because the appropriation from the treasury depends upon this question whether the estimate exceeds the ability of the road district, by the application to the work of the ordinary road work and tax of the district. It was not contemplated that the expense should be borne by the county treasury, except the excess beyond the ability of the road district. If this contract were to be held valid, the county would have to pay all the expense of the repairs, in the way of damages, no portion falling upon the road district. The contract is in violation of the provisions of the statute and void. The 11th section of the statute, making it the duty of the commissioners to cause all bridges in the county to be kept in repair, must be construed in connection with the 1st and 2d. While the commissioners must cause the bridges to be kept in repair, the expense must be borne by the road district, so far as it is able, according to the 2d section, and the residue by the county. The 3d section provides that the commissioners shall aid in the erection and repair of bridges, when of general importance, by advances from the

In an action for negligently constructing and locating a bridge evidence by an expert who examined the remains of the abutment and foundation and mortar, two years after the bridge washed away, in order to testify as to the material and care of the work, was competent. *Harford County Comra. v. Wise*, 71 Md. 43.

In that case it was held that skilful construction involved putting suitable materials together in the proper manner upon a site adapted to the structure built and the place where the bridge was built could not be disregarded; and a county was liable where a bridge above a mill was carried away by the flood and injured plaintiff's dam, where the location, condition, and construction of the bridge were negligent, and it was carried away for that reason, although the damage was caused by an unusual height of flood.

And a county was liable where a county bridge on a public highway was constructed so that the abutment interfered with the passage of water in time of flood and injured a mill dam, and it would have been practical to have provided for the flow of water. It was further held that the plaintiff was not guilty of contributory negligence in building a dam at that place, where it was built before any bridge was constructed. *Riddle v. Delaware County*, 156 Pa. 643.

Under N. J. Rev. p. 88, § 2, providing that when a township or county which is chargeable by law with the erection, rebuilding, or repairing of any bridge shall wrongfully neglect to erect, rebuild, or repair the same, by reason whereof any person shall receive an injury in his person or property, such person may have his action against such municipal body, a county was not liable where the owner of a mill dam depended upon the abutments of an approach to a bridge to retain water, and by reason of defective planking the earth washed away flooding his mill, but the bridge could still be used. *Jernce v. Monmouth County Chosen Freeholders*, 52 N. J. L. 553, 11 L. R. A. 416.

In *Jernce v. Monmouth County Chosen Freeholders*, 52 N. J. L. 553, 11 L. R. A. 416, the case of *Ripley v. Essex & Hudson Counties Chosen Freeholders*, 40 N. J. L. 45, was distinguished, as in that case the 39 L. R. A.

bridge owed the duty of providing a sufficient draw for safe passage, but in this case the bridge merely rested upon a dam, and it was only incidentally obliged to maintain the dam far enough to secure its own stability, and the dam belonged to the mill owner.

A county was not liable for injuries caused by placing a bridge abutment so as to divert water and wash away land, under Cal. act 1855 (*Wood's Dig.* p. 1850), making it the duty of the board of supervisors to divide the county into road districts and to appoint a road overseer who shall cause bridges to be made when necessary, and to keep the same in good repair. It was said that if the bridge was unlawfully placed in the channel by the overseer, the remedy should be against him by whom the injury is committed. *Crowell v. Sonoma County*, 25 Cal. 313.

But there is now a liability under the present Constitution. See *Tyler v. Tehama County*, 100 Cal. 618.

And no recovery could be had for damages caused by an obstruction in the stream made by the contractor in building a public bridge. It was not the duty of the county authorities to supervise the work done by the contractor in building a free public bridge over a stream dividing two counties, and the counties were not liable to one having a mill on the stream which was damaged by an obstruction caused by the faulty manner in which the work was executed. *Smith v. Wilkes & McDuffie Counties*, 79 Ga. 125.

So, in the absence of statutory liability, a county was not liable for damages sustained by reason of negligence in the construction and maintenance of bridges, causing overflow of plaintiff's land. *Davis v. Ada County (Idaho)* 47 Pac. 93.

Under a statute making counties liable for injuries to travelers on account of bridges they were not liable for other injuries.

A county was not liable for injuries caused to stock running at large on account of a defective public bridge, under Ala. Code 1886, § 1546, and Code 1876, § 1082, requiring that bridges erected by contract with the county commissioners shall continue safe "for the passage of travelers and other

county treasury. The contract cannot be upheld by virtue of this section. . . . The obligation to aid by advances from the county is not unconditional, as is seen by the proviso to the section. It depends upon whether or not the board of commissioners shall deem the bridge to be of sufficient importance to make an appropriation from the county treasury for the erection or repair thereof. The duty of the board in making or withholding advances from the county treasury involves a question of judgment as to the importance of the bridge, and this judgment must be exercised as to the importance of the bridge at the time an advance is made. The board could not, by a contract to make advances in the future, preclude itself or its successors from the right and duty to determine, at the time an advance is sought, whether the bridge has the importance required, in order to justify an advance from the county treasury."

It follows, therefore, that the board of commissioners can only cause bridges to be repaired by an appropriation of county funds to pay the expense when the road district is not able by its road work and tax to make the same, and the commissioners deem the bridge of sufficient importance to appropriate the county funds for that purpose, and in such case the expense must be borne by the road district so

far as it is able, and the residue by the county. If this is a proper construction of said act,—and it was so decided in *Driftwood Valley Turnp. Co. v. Bartholomew County Comrs.* 72 Ind. 226,—the board can in no case pay for repairs out of the county treasury, unless the road district first applies its ordinary road work and tax in making the repairs. Then the board may, if it deem the bridge of sufficient importance, pay the residue out of the county treasury. So that, in all cases where there is a refusal to apply the ordinary road work and tax of the road district in repairing a bridge, the only way they can cause the repairs to be made is by compelling the road supervisors to make such repairs, and no power has been given or adequate means provided by which they can coerce him or any other officer to make such repairs. If it were conceded that when the duty is imposed upon boards of commissioners to cause all bridges to be kept in repair, and they have power to make the appropriations from the county treasury for that purpose, there is an implied liability to respond in damages for an injury resulting from a failure to discharge that duty, yet no such liability could be implied in this state, for the reason that the boards of commissioners have no power to appropriate the county funds for such purpose, except upon a

persons." *Lee County v. Yarbrough*, 85 Ala. 500.

An action could not be maintained against the board of chosen freeholders for injuries sustained by a mill dam by reason of the fall of the county bridge under N. J. Laws 1850, chap. 219, § 21, providing that if any damage shall happen to any person by means of the insufficiency or want of repair of any bridge upon any public road the township or county in which the same shall be situated is or shall be liable to make all repairs, and the person sustaining such damage shall have the right to recover the same; as this act was only to secure the repair of roads and bridges for the benefit of travelers, and was not intended to include real estate. *Livermore v. Camden County Chosen Freeholders*, 29 N. J. L. 245, Affirmed 31 N. J. L. 507.

In New Jersey and Louisiana a county is held liable for negligence in operating a draw bridge, but this liability is denied in New York.

In *Houston v. Police Jury*, 3 La. Ann. 506, where the plaintiff had passed through a draw bridge controlled by the county, and was prevented from returning by the draw not being opened for the passage of plaintiff's boat, through negligence on the part of those for whose act the parish was responsible, the parish was bound to repair the damage caused thereby. It did not appear that the defendant assumed any right to interfere with or obstruct the navigation of the river, and the obligation to have the draw opened whenever necessary for boats to pass was recognized.

And the board of chosen freeholders of the counties E. and H. were liable for injuries caused to a vessel in not keeping a 'drawbridge in proper repair, thereby injuring a vessel, under N. J. act March 15, 1860 (Rev. p. 86, § 9), providing that where a township or board of chosen freeholders is chargeable with the erection, rebuilding, or repair of a bridge, any person injured may recover damages against said township or against said board of freeholders. Under act February 27, 1833, requiring the owner of a vessel to lower his sails when approaching a bridge, the jury were properly charged that it was the duty of the commander in approaching the draw to so control his sails—

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not to take them down, but to lower them—as to enable him to approach the bridge with such diminished speed as would permit the removal of the draw. *Ripley v. Essex and Hudson Counties Chosen Freeholders*, 40 N. J. L. 45.

Where a steamer was detained upon a river in consequence of the defective construction of a bridge a county was not liable in the absence of any statute. *Georgia Const. (Code, § 5152)* providing that justices of the peace have jurisdiction over cases of injuries for damages to personal property, did not give jurisdiction to the justice in this case, as this was not damage to the property, but to the company. *White Star Line S. B. Co. v. Gordon County*, 31 Ga. 47.

And in an action against a county for obstructing navigation of the Tittabawassee river, it was held that the determination that it was necessary to build a bridge across that river, and the whole action of the board in relation thereto, were legislative, and whether any portion was usurpation or not, no action could be maintained against the county for any consequences resulting therefrom, and the same rule would apply as though the bridge was built by the legislature. *Larkin v. Saginaw County*, 11 Mich. 84, 82 Am. Dec. 63.

An action could not be maintained against a county for negligence in operating a drawbridge, by reason of which an approaching tug was injured. No new liability was created by N. Y. Laws 1892, chap. 686, declaring counties to be municipal corporations, as under that law a county could only be sued upon a cause of action for which it was liable. *Godfrey v. Queens County*, 39 Hun, 18.

A county was not liable for injuries to a ferry franchise caused by building a bridge connecting another county, at the same place as the ferry, and placing an abutment in the line of the ferry, where there was no authority to build the bridge, under Ind. act May 14, 1869, providing for concurrent action of both counties to build a bridge, and one refused to co-operate. It was held that a county could not be held liable for an unauthorized action resulting in damages. *Browning v. Owen County Comrs.* 44 Ind. 11.

contingency over which they have no control, and then only when, in their judgment, the bridge is of sufficient importance. It was said in the case of *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, that "cities are held liable for failing to keep their streets in repair, though no statute expressly provides for such liability; and in our opinion the principles will apply as well to a county as a city." There is a wide difference, however, between the powers of boards of commissioners with reference to bridges and the powers of cities over the streets. Cities may ordain what improvements shall be made, and how the expense of the same shall be paid, and may choose the agents to make them. The city council may fix the date of its meetings, and may be called in special session by the mayor or five councilmen at any time. The city has officers whose duty it is to keep all the streets in repair, and who have ample authority at all times to act for the city in making such repairs, and who have constant supervision over the streets. The board of commissioners meet in regular session only four times a year,—in March, June, September, and December,—and have no power to meet at any other time except when called in special ses-

sion by the county auditor, when the public interest requires it; and he is the sole judge of the necessity of such special sessions. Rev. Stat. 1881, §§ 5736, 5737 (Rev. Stat. 1894, §§ 7821, 7822). The auditor is an independent public agent, who does not act for or represent the county, and for whose conduct the county is in no way responsible. *Vigo Twp. v. Knox County Comrs.* 111 Ind. 170; *Dooley v. Sullivan*, 112 Ind. 451, 454, 455; *Abbott v. Johnson County Comrs.* 114 Ind. 65. So that whether the board shall meet in special session to cause a bridge to be repaired depends upon an officer who does not represent the county, and for whose acts the county is not responsible. A county board cannot make a valid contract for the repair of a bridge except when in legal session as a board. Their powers are created and defined by statute. They are agents with limited powers, and for any act done by them not within the scope of their powers the county is not liable. *McCabe v. Fountain County Comrs.* 46 Ind. 880, 383; *Cass County Comrs. v. Ross*, 46 Ind. 404; *Campbell v. Brackenridge*, 8 Blackf. 471; *Potts v. Henderson*, 2 Ind. 327; *Tiedeman, Mun. Corp. S.* They are authorized by statute to appoint a superintendent to erect a bridge, but

An action could not be brought against the board of county commissioners for injuring plaintiff by depriving him of a bridge and ferry franchise in laying off a public road on his land and erecting a bridge near where plaintiff's bridge was, as under Ga. Const. § 5222, providing that each county shall be a body corporate, and all suits by or against a county shall be in the name of the county, it was held that the action must name it, and not its agent, as defendant. *Arnett v. Decatur County Comrs.* 79 Ga. 732.

c. By roads.

Counties are not held liable for damages caused by vacating a public highway or for consequential injuries to a mill dam in building a road. As to whether a county is liable for trespass committed by a road officer, there is some conflict. A county is not held liable for damages for opening a shunpike road injuring a turnpike company.

Where the board of supervisors vacated a highway, an owner of land situated on the highway, but not upon the part vacated, which commenced about 30 rods from his farm, could not recover damages, under Iowa Const. art. 1, § 18, providing that private property shall not be taken for public use without first compensating the owner therefor. Iowa Code, §§ 941, 946, providing for establishing and vacating roads conditioned upon payment of damages, did not impose a liability as they simply prescribed the proceedings to recover. It was held that a citizen might not be deprived of the right to use an existing highway, but his right to its continuation would be held subject to the exercise of lawful authority, and the citizen had no right to the continuation of the road except such as he held in common with the public. *Brady v. Shinkle*, 40 Iowa, 576.

And in *Ellsworth v. Chickasaw County*, 40 Iowa, 571, it was held that an abutting owner could not recover in such a case.

Under Kan. Gen. Stat. (1888), 897, chap. 89, authorizing a county to vacate county roads, a county was not liable to a person who was injured by reason of the commissioners' vacating a county road, as neither the county nor its officers committed any wrong by so doing, nor did they

take any person's property. *Coffey County Comrs. v. Venard*, 10 Kan. 96.

A county was not liable for injuries caused to the owners of a mill by reason of filling up a mill race which crossed a road, in order to prevent injury to the county road. *Swineford v. Franklin County*, 73 Mo. 279.

In *Swineford v. Franklin County*, 73 Mo. 279, the case of *Hannon v. St. Louis County*, 62 Mo. 313, was distinguished, as in that case the county had entered into a contract for the work which resulted in injury to the plaintiff; but if no contract had been made the county could not have been held liable in that case.

A county was not liable for injuries caused to a mill and dam from back water in building a road, where such road was built by a county from which the defendant had been detached, and there was no allegation that the defendant had notice to remove the nuisance or neglected or refused to do so. *Walter v. Wicomico County Comrs.* 36 Md. 385.

And no recovery was allowed for injuries caused to a mill and dam from back water by reason of a road being built below the same where there was no negligence in the care or construction of the highway, as, when necessary and proper repair on public highways is reasonably and judicially done, the counties are exempt from any action for consequential damages. *Walter v. Wicomico County Comrs.* 36 Md. 385.

And where damages resulted from the negligent construction of an embankment, in grading a highway, causing the water to overflow plaintiff's land, it was said that Ohio act March 30, 1868 (S. & C. 89), amending act March 12, 1863, § 7 (S. & C. 244), providing that the board of county commissioners may sue for damages done to the property of the county, does not give any liability, and a recovery was denied. *Grimwood v. Summit County Comrs.* 23 Ohio St. 600.

And a county was not responsible for a trespass committed by a surveyor appointed by the county court, where such surveyor opened a public road through plaintiff's land, throwing his fences, cutting his trees, and destroying his fruits. It was held that neither the state nor its integral counties could be sued for any trespass of their respective

not to keep bridges in repair. Rev. Stat. 1881, § 2888 (Rev. Stat. § 1894, § 3278). When the board is not in session, no one is or can be authorized, as the law now stands, to represent or act for or bind the county in keeping bridges in repair, or in contracting for the repair of the same. *Driftwood Valley Turnp. Co. v. Bartholomew County Comrs.* 72 Ind., on pages 239, 240; *Potts v. Henderson*, 2 Ind. 827; *People v. St. Clair County Officers*, 15 Mich. 85. So that, if the board of commissioners had the power to appropriate the county funds to pay for the expense of repairing bridges in all cases, without any limitations or conditions whatever, they could not exercise that power when not in session; and, as neither they nor anyone representing or acting for the county can call them in special session, most certainly it could not be said, even in that case, with all the powers named, that they had been given the power or provided with the means and instrumentalities necessary to keep the bridges of the county in repair, unless they also, at least, had the power to meet as a board at any time of their own volition.

The authority of the board of commissioners, acting as a board of turnpike directors, in respect to free gravel roads, is much more like

the power cities have in regard to streets than is that of the board of commissioners in regard to bridges; and there is therefore much greater reason for holding that the doctrine of implied liability applies to counties with reference to free gravel roads than with respect to bridges. The board of commissioners is by statute constituted a board of turnpike directors, having exclusive management and control of the free gravel roads of the county. The board is required to divide the county into three districts, as nearly equal in number of miles of free gravel road as practicable; and each member is given personal control and supervision over one of such districts, and has the power to keep the same in repair, subject to the rules and regulations of the board. The board fixes the time of its meetings, and is empowered to appoint persons to superintend the work of repairs, and let contracts therefor,—contract for, or condemn and take material for, the repair of such roads, and issue certificates therefor; to cause to be levied and collected taxes to pay for the expense of keeping such roads in repair. These powers have been changed to some extent by the amendment of 1895. Rev. Stat. 1894, §§ 6868-6875, 6912, 6933, 6935, 6950, 6958; Acts 1895, p. 303. Yet, as we have seen,

officers. *Hutchison v. Pulaski County*, 11 Ky. L. Rep. 117.

An action would not lie against a county for damages sustained by a turnpike company in laying off a shun-pike public road, a nuisance to plaintiff's rights, the use of which was enjoined. Tenn. Code, § 403, providing that suits may be maintained against a county for any just claim, as against other corporations, did not create any liability, but simply provided the remedy if a liability existed. *White's Creek Turnp. Co. v. Davidson County*, 14 Lea, 73.

In *White's Creek Turnp. Co. v. Davidson County*, 14 Lea, 73, it was said that the intimation in *Franklin & C. Turnp. Co. v. Maury County Ct.* 8 Humph. 355, that an action would lie against a county court in case of a shun-pike, was only a *dictum*.

In *Franklin G. Turnp. Co. v. Maury County Ct.* 8 Humph. 342, which was an action for an injunction against a shun-pike, it was said that the county would be liable in damages for an action on the case on the part of the corporation.

But where a county claimed that a road had been opened through private property by prescription and use for forty years, and endeavored by the county records to make it of record a public road, and one of the board of supervisors committed trespass in tearing down plaintiff's gate and endeavoring to maintain a road, and the board of supervisors impliedly recognized his actions and approved them by afterwards at his instance declaring such road to be public, an injunction was granted against further trespass, and the county was held liable for damages. *Coburn v. San Mateo County*, 75 Fed. Rep. 520.

In this case the defendant denied that it had ever ratified the trespass, and the court held that it had, and in its opinion quotes the doctrine from another case that property cannot be taken without compensation, but the judgment is really for enjoining further trespass and for damages.

An injunction was granted against the opening of a road through plaintiff's property by the county, where no proceedings were taken to condemn the same. *Cummings v. Kendall County*, 7 Tex. Civ. App. 164.

In an action against a county for injury caused by the board of supervisors running a street or 89 L. R. A.

thoroughfare through plaintiff's property without making any compensation, which was an action for damages, and for injunction, it was held that under Cal. act March 20, 1855, providing that no person shall sue a county in any case unless his claim has been first presented to the board of supervisors, an action did not lie. It was further held that the claim for damages could not be joined to a bill for injunction. It was said that under the Constitution of California providing that private property shall not be taken for public use without just compensation, an injunction might be granted. *McCann v. Sierra County*, 7 Cal. 121.

d. By ditches, canals, and dams.

In *SCHUSSLER v. HENNEPIN COUNTY COMRS.* where the county, by erecting a dam in a lake, destroyed the use of a mill, and pleaded that its acts were lawful under a power given by a special statute, and the attorney for the county claimed the act was unconstitutional, and that the acts complained of were *ultra vires*, but the board of commissioners upheld and ratified the acts from which the injury arose, the court declined to pass upon the unconstitutionality of the act, but based the opinion upon the concession of the defendant's counsel, and the county was held liable. The court says: "If valuable property rights can thus be taken, destroyed, diverted, and injured without compensation, there will be but little safety in the private ownership of property," and held that the county was liable where it had adopted, assumed, and ratified the act complained of, and granted a mandatory injunction lowering the dam, and a judgment for damages already accrued. This case can be sustained on the theory of liability for taking property without due compensation.

It is generally held that counties are not liable for damages to real property caused by ditches affecting adjoining property.

A county was not liable for damages from a ditch which had been abandoned and become a nuisance and caused overflow of plaintiff's land, which ditch was constructed under Iowa Code, § 1207, authorizing the construction of ditches whenever the same will be conducive to the public health and convenience or welfare. It was said that a county was not liable for negligently constructing or falling

this court held in *Cones v. Benton County Comrs.* 137 Ind. 404, and we think correctly,—that there is no implied liability against the county in favor of one injured by reason of a failure to keep a free gravel road in repair. It is the duty of township trustees and road supervisors at all times to keep the bridges in repair, and protect them from injury, Rev. Stat. 1894, §§ 6818, 6832-6838; *Carroll County Comrs. v. Baily*, 122 Ind., on pages 49, 50. They also have the power to construct bridges, Rev. Stat. 1894, §§ 3276, 3277, 6838 (Rev. Stat. 1881, §§ 2896, 2887); Acts 1885, p. 202, § 8. And the township trustee has the power to levy an additional road tax, and expend the same, as well as the ordinary road tax, in the construction and repair of bridges, Rev. Stat. 1894, § 6834; Acts 1885, p. 202, § 4. The township trustee had no power to levy an additional road tax to be used for the construction and repair of bridges until the act of 1885 was passed. Prior to that date, only the ordinary road tax was used for that purpose, Rev. Stat. 1894, §§ 3276, 3277 (Rev. Stat. 1881, §§ 2886, 2887). For each failure of the road supervisor to perform his duty as required by law, he is liable to a penalty of \$10, to be recovered by the township trustee, and all sums

are for the benefit of the road district for which he was supervisor. Rev. Stat. 1894, § 6838.

It will be seen by an examination of these statutes that subsequent legislation has somewhat enlarged the powers and duties of township trustees and road supervisors in regard to bridges, and thus to some extent removed the reasons upon which the case of *House v. Montgomery County Comrs.*, and the cases following it were predicated. *Carroll County Comrs. v. Baily*, 122 Ind., on pages 49, 50. In the case last cited, Mitchell, J., speaking for the court, said: "The duty of erecting and repairing bridges over watercourses is imposed upon the board of commissioners, while the general duty of keeping highways and bridges in repair is laid upon township trustees and road supervisors." It is a principle established by all the authorities that, where a person or corporation is free from fault, there is no liability for the negligence of a person not voluntarily chosen by such person or corporation to perform an act. *Dooley v. Sullivan*, 112 Ind. 451, 454, 455; *Abbott v. Johnson County Comrs.* 114 Ind. 65. It is clear, however, from a consideration of all the statutes concerning the powers and duties of boards of commissioners and other officers, and especially those in re-

to keep open a ditch constructed under that section, as the cost of the ditch was to be apportioned from adjoining owners and was not payable out of the general fund of the county. It was further held that the rule that has been held to apply to bridges would not be applied to ditches, as there was a clear distinction between the two. It was said that inasmuch as the ditch had been adjudged to be a nuisance, and the county ordered to abate the same by repairing or reconstructing, the plaintiff had the remedy to compel the levy of a tax for the purpose of having the ditch put in proper condition. *Dashner v. Mills County*, 88 Iowa, 401.

And where overflow of a public ditch injured an adjoining crop a county was not liable. The distinction was made as to the liability for negligence in the maintenance of county bridges, holding that the ditch was made for the benefit of abutting owners. *Green v. Harrison County*, 61 Iowa, 311; and in *Nutt v. Mills County*, 61 Iowa, 754, the opinion in *Green v. Harrison County* was adopted as the law in a similar case.

In *Fenton v. Salt Lake County*, 3 Utah, 423, a right of action for injuries to land caused by the construction of canals and diverting a natural watercourse was denied, where the claim had not been presented and audited under the statute.

A county was not liable for taking out a small culvert in the highway and substituting an insufficient drain, thereby causing a nuisance and overflow on plaintiff's land. *Packard v. Voltz*, 94 Iowa, 277.

In that case it was said that the rule announced in *Wilson v. Jefferson County*, 13 Iowa, 181, in regard to liability for bridges, has been doubted, and it was held not applicable to a defective drain causing overflow. The reporter's syllabus says that the *Wilson Case* was overruled, but the opinion simply refuses to apply the doctrine of liability for defective bridges, which is well recognized in Iowa, although the principle in that case is doubted.

e. By buildings.

Counties are not liable for injuries caused to real property on account of the condition of its buildings. But a county was held liable for nuisances on a farm connected with its buildings, where the

farm was not essential to the management of a public institution.

So, a county was not liable for an injury resulting from the negligence of the county in failing to keep in repair a privy owned and kept by the county for public use. *Mobley v. Carter County*, 5 Ky. L. Rep. 694.

And for injuries to a resident caused by reason of the erection of a county jail in that vicinity, by reason of the jail being kept in such a condition as to become a nuisance, under Neb. act February 27, 1873, making it the duty of the board of county commissioners of each county to erect a suitable jail and to keep the same in repair, the county was not liable, as in building the jail the county simply obeyed the command of the law-making power of the state in a matter of public concern, and for which it could not be held liable. The court held that the liability was a personal one of the jailor if the jail was a nuisance. *Wehn v. Gage County Comrs.* 5 Neb. 494, 25 Am. Rep. 497.

And a county was not liable for injuries caused to adjacent property by the filthy condition of the jail, under N. C. Code, § 707, subs. 5, authorizing the county board to make such orders respecting the corporate property of the county as may be deemed expedient, and the complaint nowhere alleged that the board failed to use the means at their disposal to prevent the accumulation of filth. *Threadgill v. Anson County Comrs.* 99 N. C. 352.

And for injuries caused to property in unlawfully, carelessly, and negligently changing and obstructing a stream so as to flood plaintiff's premises, while the county was building a jail, a recovery was denied. *Downing v. Mason County*, 87 Ky. 208.

An injunction was refused against the erection of a county jail in the proximity of plaintiff's property, although it was alleged that its erection would injure the property by reason of the emission of noxious vapors and gases. *Burwell v. Vance County Comrs.* 68 N. C. 73, 53 Am. Rep. 454.

But in *Lefrois v. Monroe County*, 48 N. Y. Supp. 519, it was held that where the sewage from a farm used in connection with county buildings flowed into a stream injuring a dairy farm belonging to plaintiff, an injunction was granted, and damages were awarded as compensation. The distinction

gard to bridges, that the same did not then, and do not now, give any support to the assumption in those cases that the board of commissioners had been given either the unconditional power to contract for the construction or repair of bridges, and appropriate the county funds to pay therefor, or provided with the means and instrumentalities necessary to cause or compel the same to be done. There is no provision in the statute which confers a right of action against the county for the negligent acts of the county or its board of commissioners in the management of the affairs of the county. No authority has ever been given the board of county commissioners to appropriate the county funds to pay damages in such cases, nor to levy and collect taxes for any such purposes. No fund has ever been provided, nor has any provision been made, for raising money, by taxation or otherwise, to pay such damages. *Cones v. Benton County Comrs.* 137 Ind., on page 408. The power to allow claims against the county, and pay judgments against the county, creates no liability, and gives no right of action to anyone. Such powers were given that the board of commissioners might pay just claims against the county, and not to create a liability in favor of anyone.

was made between the obligations incurred in the management of an alms house or other public institutions and those which are involved in the ownership of a farm, although the latter may be an adjunct or accessory to the former. It was held that for a tort committed upon premises which the county had acquired for its mere convenience, advantage, or profit, and not because their possession was absolutely essential to the proper discharge of a public duty, it was liable to an adjoining owner of land whose premises were injured thereby. In this case it was said that a county in the management and care of its paupers and criminals was engaged in the performance of a public duty delegated to officers, and consequently for an injury which resulted from their lack of skill, or even from their negligence while actually engaged in the performance of their duty, no action will lie against the county which they represented. (The cases cited by the court to sustain the liability in this case were those of torts on premises controlled by cities. This case is now in the court of appeals.)

IV. Other wrongful and negligent acts affecting persons or property.

a. Generally.

Generally a county is not liable for injuries caused by torts or negligence of its officers, and a recovery was refused for wrongful attachment. But it was held liable for damages on an injunction bond, and was liable for extorting money by sale of a ferry license; but this latter case may be sustained upon the principle of money wrongfully received for plaintiff's use.

So, a county was not liable where it sold by mistake or wrongfully a tract of land for taxes to the plaintiff, and he brought suit to recover 30 per cent penalty, which money he would have been entitled to if the sale had been valid and the land had been redeemed, as *Iowa Rev. Stat. § 786*, providing that where by mistake or wrongful act of the treasurer land has been sold on which no taxes are due, the county is to hold the purchaser harmless, by paying him the amount of the principal, interest, and cost, did not authorize a judgment for the penalty. *Coulter v. Mahaska County*, 17 Iowa, 92.

In the absence of any statute a county was not

The principle asserted in *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, and the cases following it, in regard to the implied liability of counties, cannot be reconciled with those cases, in this and other states, which affirm the rule that a county is a subdivision of the state for governmental purposes, and is not liable for the negligence of its officers, unless a right of action is expressly granted by the statute. But it is earnestly contended by appellee that, if the rule of implied liability declared in the bridge cases was erroneous, the doctrine of *stare decisis* should be invoked to protect it, and the same should only be changed by legislation. While the rule of *stare decisis* is a salutary one, yet it is not to be applied in all cases. If a decision or series of decisions are clearly incorrect, either through a mistaken conception of the law, or through a misapplication of the law to the facts, and no injurious results would follow from their overthrow, and especially if they were injurious or unjust in their operation, it is the duty of the court to overrule such cases. 6 Alb. L. J. 329; *Church v. Brown*, 21 N. Y. 395. But if a principle of law, doubtful in its character or uncertain in the subject-matter of its application, has been set-

liable for the tortious acts of its officers in levying an illegal tax and selling plaintiff's property, causing a cloud on his title. *Pitkin County Comrs. v. Ball*, 22 Colo. 125.

And a county was not liable for negligence of the board of supervisors in failing to issue railroad bonds. It was said that for the neglect or refusal to perform a duty imposed on him by law a supervisor was made personally liable under Cal. Pol. Code, § 4088. *Santa Cruz R. Co. v. Santa Clara County*, 62 Cal. 180.

So, where a county failed to sell bonds, or to issue warrants, as required by law, it was held that it was not liable on account of such neglect, although it was a case of money "withheld by a reasonable and vexatious delay," and *Mont. Comp. Stat. § 1237*, provides in such a case for paying 10 per cent, but it was held that a county could not be held liable for a violation or neglect of duties by its officers, and it would not be responsible for a breach of duty imposed upon commissioners, or for their nonfeasance or misfeasance in relation to such duty. *Territory v. Cascade County Comrs.* 8 Mont. 396.

In *Montgomery County Comrs. v. Fullen*, 111 Ind. 410, where the question was as to the right of a county to make a further assessment for a gravel road after the original assessment proved to be insufficient, and the board had failed to ascertain the cost in advance, under *Ind. Rev. Stat. 1881, § 5095*, providing that no bid shall be accepted which exceeds the estimated cost, it was said that the commissioners were not acting as agents of the county while exercising their powers, and it was impossible to conceive any valid reason why the county should sustain any loss because of their errors, negligence, or wrongs, and the county would not be liable for the failure of the commissioners to do their duty in the first instance, but the cost should be paid from the property.

And a county was not liable to a party furnishing material for a bridge where the county failed by reason of negligence to require a bond from the contractor, under *Ind. act March 14, 1877*, providing that no bid for building or repairing a bridge or building shall be received unless such bid shall be accompanied by a good and sufficient bond, which shall guarantee that the contractor

tled by a series of decisions, until it has become an established rule of property or the basis of contracts, it should not be overthrown except from the most urgent considerations of public policy. *Hines v. Driver*, 89 Ind. 389; *Grubbs v. State*, 24 Ind. 295; *Harrow v. Myers*, 29 Ind. 469; *Rockhill v. Nelson*, 24 Ind. 422, 424. To that extent only are courts ordinarily restrained from correcting mistakes which they may have made. It must not be understood, however, that a previous line of decisions affecting even property rights can in no case be overthrown. If the evil resulting from the principle so established is greater than the mischief to the community could possibly be from a disregard of former adjudications, they should be overruled, and a new rule declared. *Boon v. Bowers*, 80 Miss. 246, 64 Am. Dec. 159.

What was declared by this court on this question in *Paul v. Davis*, 100 Ind. 422, is applicable here. Elliott, J., speaking for the court, said: "A judicial decision does not make unalterable law, nor is it law in the sense that statutes are law. It was justly said by Senator Platt in *Yates v. Lansing*, 9 Johns. 415, 6 Am. Dec. 290, that 'the decisions of courts are not the law; they are only evidence of the law.'

shall promptly pay all debts incurred by him for labor and materials. *Pike County Comrs. v. Norington*, 82 Ind. 190.

In *Isley v. Essex County*, 7 Gray, 465, which was an action for tort under Mass. Stat. 1855, chap. 95, providing a penalty against a county in case the county commissioners shall neglect to erect bounds at the termination or angles of a county road for the space of one month after being notified so to do, a notice to the chairman of the board was held not sufficient.

The surety of a school-land mortgage was not released by reason of injury caused by the county court in bidding in the property without authority and then putting it up after it had decreased in value and selling it at a second sale. It was held that a county would not be liable for the negligence or omission of those to whom she was compelled to confide the management of her pecuniary concerns. *Ray County v. Bentley Common School Fund*, 49 Mo. 236.

And a county was not liable for damages arising from wrongful attachment to property in an action brought by the county, as the officers in the suit were engaged in the performance of those public duties which were enjoined on them by the direct authority of the state, and not undertaken for the private benefit or emolument of the county. *Reed v. Howell County*, 125 Mo. 58.

But where the plaintiff had a ferry license, and the county unlawfully gave notice that it would grant the ferry franchise to anyone donating the largest amount of money, and the plaintiff was required to advance \$500 to retain his privileges under his license and the commissioners had no discretion except an annual tax on the ferry not exceeding \$100, the amount thus illegally extorted could be recovered with interest. It was also held that plaintiff was not *particeps criminis*. *La Salle County v. Simmons*, 10 Ill. 530.

And where a county was entitled, under Miss. Code, § 897, to all actions and remedies to which individuals are entitled, it was held that it could not escape liability for costs and damages which it had caused by the wrongful suing out of an injunction. *Freeman v. Lee County Supers*, 66 Miss. 1.

And in *People, Burrows, v. Orange County Supers*, 17 N. Y. 235, the supervisors of a county 89 L. R. A.

In another case it was said: 'I hope we shall consider what a decision really is, and treat it accordingly; not as the law, nor as giving the law, but simply as evidence of the law; and not conclusive evidence, but only *prima facie* evidence of what the law is.' *Henry v. Bank of Salina*, 5 Hill, 535. Chancellor Kent says: 'Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it.' Again he says: 'It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.' 1 Kent, Com. 477. The lord chancellor of England said to the House of Lords: 'You are not bound by any rule of law which you could lay down, if, upon a subsequent occasion, you should find reason to differ from that rule; that is, like every court of justice, and I regard this as a court of

were compelled to levy a state tax where they had neglected and refused to levy the same, and claimed that N. Y. Laws, 1855, chap. 335, providing for such tax, was unconstitutional, under N. Y. Const. art. 7, § 13, providing that every law which imposes, continues, or revives a tax shall distinctly state the tax and the object, and it shall not be sufficient to refer to any other law to fix such tax. It was also held that the act was constitutional.

1. Affecting property.

Generally a county is not liable for injuries to property caused by wrongful acts of its agents, but there is a Michigan case which implies that a county would be liable where a county official returned to plaintiff a hog in a diseased condition, causing loss to his other stock.

So a county was not liable for damages for a horse killed from being overdriven while in the service of the county, as the judge of the superior court, or the sheriff, had no power to make the county responsible for the loss of a horse used by an officer. *Dougherty County v. Kemp*, 55 Ga. 252.

So, where injuries were caused to a horse by being overdriven by a sheriff who used the same in making an arrest, the county was not liable. *Randles v. Waukesha County (Wis.)* 71 N. W. 1084.

And where an employee of the county, who was working in repairing a road, occupied a barn of plaintiffs, and negligently destroyed the same by fire, no recovery could be had against the county. *Fieid v. Albemarle County (Va.)* 20 S. E. 954.

So, a county was not liable for damages where the agent of the poor farm in attempting to clear a portion of land, and in burning the brush, started a fire which ran onto other land, injuring other parties. It was held there was no liability in the absence of a statute imposing one. *Symonds v. Clay County Supers*, 71 Ill. 355.

A county was not liable generally for damages done to sheep by dogs, nor for neglect to levy a tax on dogs for the year 1893, where no such tax could be levied until an assessment of dogs should be made, as no special provision was made for assessments as a basis for levying taxes in and for the year 1893, under Pa. act May 25, 1893 (Pub. Laws, 138), providing for the taxation of dogs and protection of sheep. It was not shown that any money had been

justice; it is inherent in the nature of every court of justice that it should have liberty to correct any error into which it may have fallen.' *Bright v. Hutton*, 12 Eng. L. & Eq. (vide p. 15). In the case cited the earlier case of *Hutton v. Upfill*, 2 H. L. Cas. 674, was overruled, although it was a case growing out of the same subject-matter, and involving the same principle and substantially the same interests. The law is a science of principles, and this cannot be true if a departure from principle can be perpetuated by a persistence in error. If it be correct to affirm that there can be no departure from former decisions, then it would be true, as it has been well said, that 'in such cases *summum jus* might be *summa injuria*.' Ram, Legal Judgm. 201. The supreme court of California, in discussing this general subject, said: 'But it is a *solecism* to say that causes should be tried upon wrong principles,—be decided against the law whether it be for the purpose of justice or not, so to decide them. The law is not so false to itself as to require its own permanent overthrow, unless the subversion be necessary to the public interests; and whether it be so necessary in a given case or not is for the court to decide, as a matter of legal discretion, whenever the

rule is invoked.' *Hart v. Burnett*, 15 Cal. 580 (vide opinion, 607). Consistency purchased by adherence to decisions at the sacrifice of sound principle is dearly bought. But we deem it unnecessary to further pursue this discussion, for we know quite well that there is not a court in England or America that has not corrected erroneous departures from the principles of justice by overthrowing previous decisions. . . . Much as we respect the principle of *stare decisis*, we cannot yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions we cannot yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none. We have preferred the censure that sometimes falls upon us rather than undertake to distinguish, and thus make 'confusion worse confounded,' where there is no room to limit or distinguish."

The case of *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, and cases following, do not involve property rights, nor has the rule which they declare in any sense become a rule of property or a basis for con-

claims to the county board. *Rhoda v. Alameda County*, 52 Cal. 350. But in *Rhoda v. Alameda County*, 69 Cal. 523, an amended complaint showing a compliance with the statute by the proper presentation of the claim to the commissioners of the county board stated a cause of action.

paid into the county treasury as a part of the county stock under said act. But the county was liable for injury done to sheep in 1893, where it was shown that a fund was raised and collected in 1894, although the 2d section of the act implies that the damages are to be paid only out of the taxes of the current year, where the act provides that it "shall annually levy a tax upon each dog so returned, and within the discretion so given to such commissioners, etc., to such an amount as will in their judgment create a sufficient fund from which all loss or damage caused to sheep within the respective counties or cities, by a dog or dogs, during each current year, may be paid, together with all necessary expenses incurred in the adjustment of claims as hereinafter provided." Section 5 provides for the payment of damages out of the fund raised or to be raised, and this does not limit the right of payment for such damage only out of the fund of any current year. *Morgan v. Tloga County*, 17 Pa. Co. Ct. 246.

But where the plaintiff sued the superintendents of the poor of the county, and charged that by reason of their negligence a boar of the plaintiff became diseased and was returned to plaintiff in that condition, whereby other stock was injured, and the defendants objected to the introduction of any evidence, first, because an action against the superintendents of the poor in their name of office was in reality against the county, which was a quasi corporation; second, because the superintendents of the poor were in no sense agents of the county; and, third, because the superintendents of the poor were a quasi corporation for the benefit of the general public, and could not be liable because the declaration did not allege that the defendants were operating a county poorhouse in pursuance of their corporate duties, and did not state any facts which showed them liable in a corporate capacity or made the county liable for their acts or negligence,—it was held that the court erred in excluding the evidence offered, and the case was reversed for a new trial. *Rowland v. Kalamazoo County Supers. of Poor*, 40 Mich. 553.

A complaint alleging a trespass by the county in tearing down a wall and removing a vault was held defective in failing to show that plaintiff had complied with the statute in regard to presenting

claims to the county board. *Rhoda v. Alameda County*, 52 Cal. 350.

But in *Rhoda v. Alameda County*, 69 Cal. 523, an amended complaint showing a compliance with the statute by the proper presentation of the claim to the commissioners of the county board stated a cause of action.

V. Infringement of patents.

The weight of authority is that a county is liable for infringement of a patent, but there are two cases to the contrary whose authority has been denied. Some cases require the claim to be presented to the county board for auditing before suit could be brought.

A county in Kentucky was held liable for an infringement of a prison device, as counties in that state are corporations and can contract and sue and be sued, and Ky. Gen. Stat. chap. 23, art. 16, provides that county courts may erect and keep in repair county buildings, while art. 17 provides that the county court shall cause to be erected and keep in repair a good and sufficient jail. *May v. Mercer County*, 30 Fed. Rep. 246.

In *May v. Mercer County*, 30 Fed. Rep. 246, for the infringement of a patent in the use of an improvement in the construction of a county jail, a recovery was allowed under U. S. Rev. Stat. § 4919, by an action on the case, and the complaint, whether called a declaration or a petition under the Code, containing all the allegations material to make an action on the case, would be sufficient.

In that case it was said that the reasoning in the case of *Lawrence County v. Chattahoochee R. Co.* 81 Ky. 225, to the extent that public buildings belong to the county as a corporation, and the county may sue for an injury done to them in an action on the case, implied that counties were liable for property taken and used in the erection of public buildings, even though the property was wrongfully taken.

So, a county was liable for an infringement of a patent under U. S. Rev. Stat. § 4919, providing that damages for the infringement of any patent may be recovered by an action on the case in the name of the party interested, and a county is liable although it is only a quasi-municipal corporation and cannot be exempted by the state-

tracts. The overruling of those cases will not produce uncertainty in titles, or introduce doubt and confusion in questions of property or contracts. Under such circumstances, it is the duty of the court to correct its own errors, and the doctrine of *stare decisis* cannot be successfully invoked to perpetuate them. *Paul v. Davis*, 100 Ind. 422; *Rockhill v. Nelson*, 24 Ind. 422, 424; *Hines v. Driver*, 89 Ind. 339; *Linn v. Minor*, 4 Nev. 462; *McDowell v. Oyer*, 21 Pa. 423. This case is within the principle established in *Hines v. Driver*, 89 Ind. 339, and *Paul v. Davis*, 100 Ind. 422.

It is urged by appellee that, by holding the county liable in such cases as this, the boards of commissioners will be convinced that it is cheaper to keep the bridges in repair than to pay damages for injuries. The enforcement of the penal statutes, and the creation of personal liability, if it does not now exist, for injuries caused by neglect of official duty, would probably be more convincing to the officer than taking the public funds to pay such damages. While the doctrine declared in the bridge cases

might be properly overruled on other grounds stated in this opinion, we prefer to base our action on the broad ground that counties, being subdivisions of the state, are instrumentalities of government, and exercise authority given by the state, and are no more liable for the acts or omissions of their officers than the state. The case of *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657, and the cases following it, so far as they declare the doctrine of implied liability of counties for negligence of their officers in erecting or keeping bridges in repair, are overruled.

It follows that the court erred in overruling the demurrer to the complaint and the motion in arrest of judgment. There are other reversible errors in the record, but it is not necessary to consider them.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not in conflict with this opinion.

All concur.

from liability for infringement of letters patent. *May v. Ralls County*, 31 Fed. Rep. 478.

In *May v. Johnson County*, Fed. Cas. No. 9, 384, a county was held liable for an infringement of a patent in the construction of a jail. The liabilities of counties as such were not discussed, and do not seem to have been questioned, the court saying, however, that "if the subject-matter of a patent possesses the requisites of novelty and utility it is protected against the encroachments of society, and no one has the right to use it without paying for it."

And in *May v. Fond du Lac County*, 27 Fed. Rep. 665, a county was held liable for an infringement of a patent in the construction of a prison. No question seems to have been made as to the county's liability, but the question was as to the infringement, novelty, etc.

In *May v. Logan County Comrs.* 30 Fed. Rep. 250, and *May v. Saginaw County*, 32 Fed. Rep. 629, it was held that an assignment after an infringement of all right, title, interests, claims, and demands under a patent made by an administrator or patentee, approved by a court of competent jurisdiction, authorized a suit against the county by the assignee, for an infringement of the patent, denying *May v. Juneau County*, 30 Fed. Rep. 241, on the ground that the cases on which this decision was made do not sustain the doctrine deduced.

In *May v. Logan County Comrs.* 30 Fed. Rep. 250, *Jacobs v. Hamilton County Comrs.* 1 Bond, 500, was disapproved, and it was held that the state could not exempt counties from liability for an infringement of patents, nor has it attempted to do so, as the patentee's rights are defined by Congress, which has exclusive control.

In *May v. Saginaw County*, 32 Fed. Rep. 629, the cases of *May v. Buchanan County*, 29 Fed. Rep. 469, and *May v. Cass County*, 30 Fed. Rep. 763, were distinguished on the point that the remedy was by demand of the board of supervisors, under Michigan Constitution providing that exclusive power is vested in the board of supervisors to adjust all claims against their respective counties, and the sum so fixed shall be subject to no appeal, as this did not apply to torts and as the statutes in those cases were different.

But in *May v. Buchanan County*, 29 Fed. Rep. 469, it was held that Iowa Code, § 2610, providing presentation of claim to the board of supervisors before bringing an action, applied to a suit for infringement of a patent by a county, and a petition

for an infringement should show such action. It was said that if the Iowa laws did not confer on the county the right to sue and be sued, the plaintiff would be without remedy.

So, in holding that a county was liable for the infringement of a patent in the use of an improvement in the construction of prisons, it was also held that the Iowa Code, § 2610, providing that before suit is brought upon an unliquidated claim the same must be presented to and demand for payment be made of the board of supervisors, should be enforced in United States courts, and a recovery could not be had where such claim was not so presented and acted on. *May v. Jackson County*, 35 Fed. Rep. 710; *May v. Cass County*, 30 Fed. Rep. 762.

But in *May v. County of Juneau*, 30 Fed. Rep. 241, it was held that a county was not liable for the infringement of a patent where its officers had no knowledge of any infringement, and the actual use did not occur until after the expiration of the patent. It was further held that the assignment in this case did not authorize a recovery for past infringements. It was said that the county would not be liable in any case, following *Jacobs v. Hamilton County Comrs.* 1 Bond, 500. But see *May v. Logan County Comrs.* 30 Fed. Rep. 250.

And in *Jacobs v. Hamilton County Comrs.* 1 Bond, 500, a county was not held liable in damages for infringement of a patent in the construction of a county prison. It was said that the contractor would be liable. But see *May v. Logan County Comrs.* 30 Fed. Rep. 250.

VI. Damages by defaulting officer.

It is generally held that a county is not liable for damages caused by a defaulting officer where the county has not received the benefit of the money or it has not been paid into the county treasury; but a county was held liable for money collected by its attorney authorized to collect taxes, and also in some cases arising under particular statutes.

So, a county was not liable for the tortious act of its treasurer in collecting excessive taxes from the plaintiff, and appropriating them to his own use. *Estep v. Keokuk County*, 18 Iowa, 199.

A county was not liable to a city for money collected and embezzled by the county treasurer where he acted as agent of the city in collecting such money. The court said that "it is intimated, but not proved, that he applied the moneys to county purposes, but it was conceded that he never

MINNESOTA SUPREME COURT.

Peter SCHUSSLER, *Resp't.*,
v.
HENNEPIN COUNTY COMMISSIONERS,
Appls.

(.....Minn.....)

***As a general rule, a municipal corporation is not responsible** for the unauthorized and unlawful act of its officers, though done *colore officii*; but when such corporation itself expressly authorizes such act, or when done, adopts and ratifies it, and retains and enjoys its benefits, it is liable in damages.

(February 9, 1897.)

A PPEAL by defendants from a judgment of the District Court for Hennepin County in favor of plaintiff in an action brought to re-

*Headnote by BUCK, J.

accounted to the county, and was a defaulter for a large amount." Under Mich. Pub. Acts 1875, chap. 278, § 13, providing that all moneys collected by any treasurer under the liquor tax act except his fees shall be placed by him to the credit of the contingent fund of the township, village, or city from which the same was collected, the county treasurer was the agent of the municipalities, and not of the county. *Marquette County v. Dillon*, 49 Mich. 244.

When the owner paid, as he supposed, redemption money for his land to the treasurer, but the purchaser had repudiated the purchase, it was held that the nominal redemption to the extent of the amount due for taxes and penalty was in effect but a mere payment, and beyond this it was an unauthorized exaction, and was no claim against the county but against the treasurer. *State, Myers, v. Richardson County Comrs.* 11 Neb. 403.

And a county was not held liable for money paid to a county treasurer for redemption, where it was not shown that such money was paid into the treasury, 'as under Neb. Gen. Stat. § 66, the moneys are to be paid to the purchaser, his agent, or attorney, and no warrant of the county commissioner is necessary for its repayment where it was not paid into the county treasury. In this case the petition failed to show that any part of the money had ever been paid into the county treasury. *Richardson County v. Meyer*, 11 Neb. 357.

So, a county was not liable for money collected by a county treasurer for a redemption of land sold for taxes, under Neb. Rev. Stat. p. 329 (Revenue Law 1866, § 68) providing that on the redemption by an owner or occupant by payment to the county treasurer, he shall give receipt therefor to the person redeeming the same and file a duplicate with the county clerk, and hold the money paid subject to the order of the purchaser, his agent or attorney, where it was not shown that the money was paid into the county treasury. *Eaton v. Cass County Comrs.* 11 Neb. 229. In this case the plaintiff claimed that he was ignorant for several years that the money had been paid, and there evidently had been a change in the county treasurers.

And the sureties of a sheriff could not defend their bond in an action for a balance due from the sheriff by showing that after the balance was ascertained the county commissioners had given the sheriff checks to an amount exceeding the balance, as the public is not chargeable with the negligence of its officers in such cases, even as against sureties. *Com. v. Brice*, 23 Pa. 211, 60 Am. Dec. 79.

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cover damages for alleged wrongful interference with plaintiff's riparian rights. *Affirmed.* The facts are stated in the opinion.

Mr. A. H. Nunn, for appellants:

Lake Minnetonka is a navigable body of water. It is wholly within the state, and the state has exclusive sovereignty over it.

Those buying upon that lake buy subject to the superior rights of the sovereign to absolutely and at its pleasure control the waters within natural high-water mark, regardless of the effect it may have upon riparian owners.

Morrill v. St. Anthony Falls Water Power Co. 26 Minn. 222, 37 Am. Rep. 399; *State v. Minneapolis Mill Co.* 28 Minn. 231; *Page v. Mille Lacs Lumber Co.* 53 Minn. 500; *Lamprey v. State*, 52 Minn. 198, 18 L. R. A. 671; *Falls Mfg. Co. v. Oconto River Improv. Co.* 87 Wis. 134; *Wisconsin River Improv. Co. v. Manson*, 43 Wis. 255, 28 Am. Rep. 542; *People, Loomis, v. Canal Appraisers*, 38 N. Y. 461; *Com. v. Boston & M. R. Co.* 3 Cush. 53; *Treat v. Lord*,

A county was not liable where a judgment had been obtained against the sheriff in the name of the people for money belonging to the state which the county treasurer had received and neglected to pay over, and the treasurer gave a note to a bank and paid the proceeds over to the state. It was not shown that the county treasurer was in any manner authorized to borrow the money, and his contract for its repayment could not be binding upon the county. *First Nat. Bank v. Saratoga County Supers.* 108 N. Y. 488.

In *Cedar Rapids, L. F. & N. W. R. Co. v. Cowan*, 77 Iowa 538, which was an action on the treasurer's bonds for money belonging to a railroad company appropriated by him to his own use, it was said that the county was not liable for such money.

But in *Conway County v. Little Rock & Ft. S. R. Co.* 30 Ark. 50, it was held that a county was bound by a payment made to an attorney employed by the county to collect taxes, where such attorney collected the same and never accounted to the county for the money. This liability was applied on the ground that a collection by an attorney who obtained the judgment was binding, and the further ground that where "one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

And under Ind. Stat. § 1 Gavlin & H. 113, providing that a county shall be liable for all losses to the state sustained by the default of the county treasurer, and such losses shall be added to the next year's taxes of such county, a county was required to add to the tax list an amount lost through the defalcation of a county treasurer. *State, McCarty, v. Montgomery County Comrs.* 28 Ind. 523.

Under Pa. act April 29, 1844, providing that the several counties of a state are liable for the state taxes assessed upon the property within them respectively, a county was held liable to the state where the county treasurer had defaulted. It was held that it was no defense that the bond taken from the county treasurer was approved by the court of quarter sessions where the same was insufficient, as the state would not be prejudiced by the neglect of the agents of the state, even if the judges in taking the bond acted as state agents, as full power was given to the county commissioners to enforce the giving adequate security. *Schuylkill County v. Com.* 36 Pa. 524.

VII. *By misapplication, conversion, or taking property.*

It is generally held that counties are liable where

42 Me. 552, 66 Am. Dec. 298; *Fletcher v. Phelps*, 28 Vt. 257; Gould, Waters, § 56; *South Carolina v. Georgia*, 98 U. S. 9, 23 L. ed. 783.

The county is not liable in damages on account of the acts of its officers.

Doodall v. Olmsted County, 30 Minn. 96, 44 Am. Rep. 185; *Snider v. St. Paul*, 51 Minn. 466, 18 L. R. A. 151; *Gullikson v. McDonald*, 62 Minn. 278; *Altnow v. Sibley*, 30 Minn. 186, 44 Am. Rep. 191.

The complaint failed to allege that the act was authorized by law, and the court expressly finds that the construction and maintenance of the dam were without authority. The county, therefore, is not liable for this act of its officers.

Kreger v. Bismarck Twp. 59 Minn. 8; *Weltsch v. Stark*, 65 Minn. 5; *Pitkin County Comrs. v. Ball*, 22 Colo. 125; *Johnson County Comrs. v. Hemphill*, 14 Ind. App. 219; *Crandon v. Forest County*, 91 Wis. 239.

There is no contention that the act of 1891, under which the commissioners of Hennepin county constructed and maintained the dam,

they are benefited by misappropriation of money or property, as in an action of assumpsit for money had and received or for conversion. There seems to be an exceptional case in North Carolina, but in that case it was held that the treasurer was also the treasurer of plaintiff, and that he should have refused to honor the warrants of the county against the fund.

So, where a county treasurer misappropriated taxes assessed on a railroad corporation, and applied the same to the payment of county and state taxes instead of to the payment or redemption of bonds of a town, the county was liable in an action as for money had and received for the money so misappropriated. *Strough v. Jefferson County Supers.* 119 N. Y. 212.

And where the county unlawfully appropriated moneys collected from a town to its own use, it was required to refund them to the town in an action for money had and received. *Bridges v. Sullivan County Supers.* 92 N. Y. 570.

And under the Indiana Constitution, requiring counties to bear the expense of protecting, investing, and collecting the school funds, an action could be maintained against a county by the state for moneys paid out to its officers for managing the school fund. It was held the statute of limitations was not in defense, as it was for a trust fund. *Rush County Comrs. v. State*, Hord, 103 Ind. 497.

And a county was liable for township taxes received by the county treasurer and not paid to the township by the treasurer. It was held that the omission of the county to charge these taxes in the account with the treasurer did not release the county. *Potter County v. Oswayo Twp.* 47 Pa. 162, citing *Lycoming County v. Huling*, MSS.

Under N. Y. Laws 1874, chap. 63, § 1, amended by Laws 1892, chap. 60, § 3, providing that excise moneys received for license issued to the residents of a village shall be paid over to its treasurer to be used for the expenses of the village, a county was held liable to a town for such funds collected by the county treasurer and misappropriated by him to other county purposes. *Port Richmond v. Richmond County*, 11 App. Div. 217.

So, under N. Y. Laws 1869, chap. 907, § 4, amended by Laws 1871, chap. 283, providing that certain taxes assessed against a railroad in a town shall be paid to the treasurer of the county and used by him to purchase bonds, issued by the town in aid of the railroad, a county was liable to a town for moneys so collected by the treasurer and misappropriated

conferred any authority or power upon the board. The act was unconstitutional.

The acts of the commissioners of Hennepin county done *colore officii* under this unconstitutional law were *ultra vires* and did not bind the county or render it liable in damages to anyone thereby injured. It is not different from any *ultra vires* act of a public board or officer.

Albany v. Cunliff, 2 N. Y. 165; *Browning v. Owen County Comrs.* 44 Ind. 11; *Rowland v. Gallatin*, 75 Mo. 134, 42 Am. Rep. 895; *Spaulding v. Lowell*, 23 Pick. 71; *Schumacher v. St. Louis*, 3 Mo. App. 297; *Cuyler v. Rochester*, 12 Wend. 165; *Anthony v. Adams*, 1 Met. 284; 2 Dill. Mun. Corp. §§ 766-768; *Haag v. Vanderburgh County Comrs.* 60 Ind. 514, 28 Am. Rep. 654; *Seale v. Deering*, 79 Me. 343; *Morrison v. Lawrence*, 98 Mass. 219; *Cushing v. Bedford*, 125 Mass. 526; *Lemon v. Newton*, 134 Mass. 476.

Messrs. Young & Fish, for respondent:

There is a distinction firmly fixed by the decisions, but not well founded in reason, be-

by him to other county purposes. *Kilbourne v. Sullivan County Supers.* 137 N. Y. 170; *Vinton v. Cattaraugus County Supers.* 89 Hun. 582; *Crowninshield v. Cayuga County Supers.* 124 N. Y. 583.

But the county was entitled to credit for any moneys paid to the railroad commissioners of the town during that time. *Vinton v. Cattaraugus County Supers.* 89 Hun. 582.

Where a special assessment for a gravel road was enjoined, the holders of bonds issued to pay for the road, who were not parties to the injunction suit, could maintain an action against a county for money received from the sale of bonds misappropriated to the use of the county. It was said that a county could not be made accountable for any loss resulting from the error or neglect of its officers; but this case was only to recover money which was alleged to have gone into the general fund of the county, and it should be applied to the payment of the bonds. *Spidell v. Johnson*, 128 Ind. 235.

A petition alleging that the county treasurer had wrongfully taken possession of money belonging to an insane person, and placed the same in the county treasury, that the county wrongfully accepted and received said money and converted the same to its own use, and still retained the same, stated a cause of action. It was further held that the county was liable for taxes illegally assessed, which were claimed in another paragraph of the complaint. *Hennel v. Vanderburgh County Comrs.* 132 Ind. 32.

Where an action was brought for taking dirt from plaintiff's land, and the plaintiff told the superintendent that if the dirt was taken he would claim pay for it from the county, and it was contended that an action could not be maintained as this was a tort, it was held that the tort could be waived and suit would lie as upon contract. It was further held that if the officers of the county committed a trespass whereby the county received certain benefits the county would be liable on an implied contract for the value of the dirt; and further, that a contract to donate and perform all labor was not an agreement to donate the dirt and would not prevent a recovery, but if it was the county could not go upon plaintiff's land against his will and take his dirt. *Rush County Comrs. v. Trees*, 12 Ind. App. 479.

But in *Bladen County Bd. of Edu. v. Bladen Comrs.* 113 N. C. 379, where the county commissioners misapplied a fund belonging to the board of

ween municipal corporations proper and quasi-municipal bodies, such as towns, counties, school districts, etc., in respect to their liability for damages for mere negligence. The former are held liable, the latter are not.

Altnow v. Sibley, 30 Minn. 186, 44 Am. Rep. 191.

There is nothing in the decisions of this court necessarily committing it to any extension of this untenable distinction to wrongs other than negligence. Indeed, the tendency is the other way.

Peters v. Fergus Falls, 35 Minn. 549; *Weltsch v. Stark*, 65 Minn. 5; *Woodruff v. Glendale*, 23 Minn. 537; *Thompson v. Polk County*, 38 Minn. 130; *Gould v. Sub-District No. 3*, 7 Minn. 203.

Towns and counties are liable for the improper exercise of powers which are within the general scope of their duties, but not for mere negligence or failure to perform the duties imposed by law.

Altnow v. Sibley, 30 Minn. 186, 44 Am. Rep. 191; *Snider v. St. Paul*, 51 Minn. 466, 18 L. R. A. 151.

education by directing the disbursements under a mistake of the law, it was held that the county was not liable, as it would follow that the courts would be required to enforce a levy of a sufficient tax upon the property of the county to replace the amount belonging to the school fund, which had already been wrongfully but honestly expended for the support of the poor. It was further held that all the money collected for educational purposes should have been paid over by the sheriff to the county treasurer in his capacity as treasurer of the board of education, and held by him subject to the orders of the board, and he should not have paid out the fund on the order of a county commissioner; and it was held that the treasurer was the one who made the misapplication. It was said that a recovery could not be had even against him.

VIII. Presentation of claims before county board as a condition precedent to suit.

There is some conflict as to whether it is requisite that a claim for tort or negligence shall be presented to the county board for auditing before a suit can be maintained for damages, some cases holding that it is absolutely essential, and others holding the contrary, and that it would be improper to allow the county officials to pass on matters involving their own actions.

An action could not be maintained against a county for injuries from the falling of a public bridge, where the claim had not been presented to the county board for allowance, under Ala. Code 1876, § 2903, providing that suit must not be brought against a county until the claim has been presented to the court of county commissioners and disallowed or reduced, and § 827, requiring claims to be itemized and sworn to, and § 832, providing that claims not presented within twelve months after they accrue are barred. *Schroeder v. Colbert County*, 66 Ala. 137.

So, a county was not liable for damages from a defective bridge where the claim had not been presented to the county commissioners and disallowed under Ala. Code 1876, § 2903, providing for presentation of claims and demands to the commissioners' court. Such claim should be itemized and sworn to under § 827, prohibiting the commissioners from allowing any claims not itemized or sworn to. *Schroeder v. Colbert County*, 66 Ala. 137.

And a county was not liable for the falling in of

It has not been decided in this state that a town or county is not liable for damages arising from a trespass or other active wrong done by its official board *colore officii*.

Gould v. Sub-District No. 3, 7 Minn. 203, cited in *Bank v. Brainerd School Dist.* 49 Minn. 106; *Dossall v. Olmsted County*, 30 Minn. 96, 44 Am. Rep. 185.

In this case the county answers and avers that it has built and maintained the dam lawfully. The defense failing, it is certainly proper that the mischief which has been committed should be undone and its further commission restrained.

The county does not plead *ultra vires* as it might do if sued on an authorized contract. It ratifies and confirms the *ultra vires* acts of its official board and so becomes itself the aggressor. *Salt Lake City v. Hollister*, 118 U. S. 256, 30 L. ed. 176; *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157.

The dam in question is a nuisance, and no sort of a municipal or public corporation has a right to maintain it.

a bridge where there was no evidence that the plaintiff ever presented his claim to the court of county commissioners to be passed upon or allowed by Ala. Code 1886, § 902, requiring presentation of claims. *Roberts v. Cleburne County (Ala.)* 22 So. 545.

And Ala. Code, § 775, 2141, providing that no action can be brought against the county until the claim or demand has been presented within twelve months after it accrues or becomes payable, applies to suits for damages for injuries from defective bridges under a statutory liability. *Barbour County v. Horn*, 41 Ala. 114.

And under Iowa Code, § 2810, providing that no action shall be brought against any county on an unliquidated demand until the same has been presented to the board of supervisors and payment demanded, where a claim had been presented to the county of \$500 damages for injuries received on account of a defective bridge, and an action was brought for that amount and increased by an amendment, no recovery could be had for a greater amount than that presented to the board of supervisors. *Marsh v. Benton County*, 75 Iowa, 469.

Under Iowa Code, § 2810, it was sufficient if the board was informed of the amount of the claim and the grounds on which it was made, sufficiently to enable it to understand the claim. *Dale v. Webster County*, 76 Iowa, 379.

And under Iowa Code, § 2810, the plaintiff was not required to produce his evidence in making his claim before the county board, but it was sufficient if his claim was presented with sufficient clearness to enable it to investigate the facts. *Homan v. Franklin County*, 98 Iowa, 692.

And damages for future loss, pain, and suffering were properly allowed where the claim presented to the board stated that the plaintiff was seriously and permanently injured, and the petition was for permanent disability. *Homan v. Franklin County*, 98 Iowa, 692.

Where the petition alleged that the claim was duly verified and presented to the county board, it was held that under the general issue it was for the court to determine whether plaintiff had the right to bring an action, and it was not necessary to submit this to the jury. The presentation of the claim for injuries from a bridge to the county board was held to be a "demand," and that some of the injuries in the trial were a little greater than those in the statement was immaterial. *Homan v. Franklin*

1 Dill. Mun. Corp. § 374, note; *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 357; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *Harper v. Milwaukee*, 80 Wis. 365; *Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Hannibal v. Richards*, 82 Mo. 380; *Wood, Nuisances*, § 742.

Buck, J., delivered the opinion of the court:

The board of county commissioners of Hennepin county in the year 1893 erected a dam across Minnehaha creek, the natural outlet of Lake Minnetonka, and about 8½ miles below said lake, under the supposed authority of Special Laws 1891, chap. 381, for the purpose of raising and maintaining a uniform height of water in the lake, in aid of navigation. The plaintiff at the time of the erection of the dam, and for many years prior thereto, owned a piece of land about 8½ miles below this dam, upon which he had erected and used a grist-mill operated by the water of this stream; and, to this end, plaintiff had provided the necessary wheels, pond flumes, and raceway power, and,

until interfered with by the defendant's erection of the dam, he was enabled to store and use the waters of this stream, by means of said pond and other facilities possessed by him, and whereby said mill was propelled and operated for his use and profit. The defendant erected said dam about 5 feet in height, and, ever since its erection, has maintained the same, whereby said stream has been obstructed and held back except at times when the stage of water in Lake Minnetonka is sufficiently high to flow over said dam. The dam so erected and maintained is 5 inches above the natural bed of the stream, and the sole purpose of defendant in erecting the dam and obstructing the natural flow of the stream was to hold back and retain the water in Lake Minnetonka for the purpose of increasing the volume of water therein, and maintaining a uniform quantity and stage of water in aid of navigation, the lake being an inland, navigable one. The action is one to recover damages alleged to have been sustained by plaintiff by reason of the construction and maintenance of said dam, and for an injunction restraining and

County, 98 Iowa, 692. See former appeal, 90 Iowa, 185.

Under Iowa Code, § 2610, providing for presentation of claims to the board of supervisors before bringing an action, a suit for an infringement of a patent was within the provisions of such section, and a demand was held to be a necessary condition precedent. *May v. Buchanan County*, 29 Fed. Rep. 469; *May v. Jackson County*, 35 Fed. Rep. 710; *May v. Cass County*, 30 Fed. Rep. 762.

And under Utah Sess. Laws 1878, p. 4, providing that no action shall be commenced against any county until the claim, demand, or right of action shall be disallowed, an action for injuries to land by constructing canals near the same and diverting a natural watercourse, and for equitable relief, was dismissed because it was not shown that the statute was complied with. *Fenton v. Salt Lake County*, 3 Utah, 423, 4 Utah, 469.

And under Cal. act March 20, 1855, § 24, providing that no person shall sue a county in any cause for any demand unless he shall first present his claim to the board of supervisors for allowance and the same shall be rejected, an action would not lie for extending a street through the land of plaintiff without providing any compensation unless the claim had been presented for auditing. *McCann v. Sierra County*, 7 Cal. 121.

And under Cal. Pol. Code, 4072, prohibiting the board of supervisors from allowing an account unless properly made out, itemized, and verified, where an action was brought against a county for tearing down an inner wall of plaintiff's building and severing from the same a permanent fixture, to wit, a metallic vault, the complaint was held defective in not alleging the manner in which plaintiff complied with this section of the Code. *Rhoda v. Alameda County*, 62 Cal. 360.

But in *Rhoda v. Alameda County*, 760 Cal. 523, an amended complaint showing a compliance with the statute by the presentation to the board of county commissioners stated a cause of action.

And Ind. act March 9, 1885 (Elliot's Supp. § 1948), providing that on the rejection of a claim by the board of county commissioners the plaintiff may apply or at his option bring an action against the county, applies to claims sounding in tort. *Allen County Comrs. v. Creviston*, 133 Ind. 39.

In *Posey County Comrs. v. Stock*, 111 Ind. App. 167, it was held that under Ind. Rev. Stat. 1894, § 7858, providing for an appeal on disallowance of 89 L. R. A.

a claim by the board of commissioners, the claimant might maintain an independent action without taking the appeal, but the complaint to recover for injuries caused by a defective bridge should show that the county had notice, prior to the time of the accident, that the bridge was unsafe.

In *Jackson County Comrs. v. Nichols*, 139 Ind. 611, which was an action for personal injuries sustained by a defective bridge, it was held that it was not necessary to prove that the plaintiff had filed a claim with the county board before he had filed the complaint in this case.

And it was not necessary for the plaintiff in an action for injuries from a bridge to show that his claim had been disallowed before bringing his action. *Sullivan County Comrs. v. Arnett*, 116 Ind. 438.

In *Hancock County Comrs. v. Leggett*, 115 Ind. 544, where the plaintiff stated that he had filed his claim before the board, and they had disallowed the same, and it was contended that his bill of complaint was insufficient, it was held that it was for the defendant to show whether or not the claim had been properly presented under Ind. Rev. Stat. 1881, §§ 5758-5760, providing that no court shall have jurisdiction of any claim against a county unless the claimant shall file his claim with the board of commissioners and have the same disallowed.

In *Fulton County Comrs. v. Maxwell*, 101 Ind. 288, where the county was sued for injuries caused by a defective public bridge on the highway, it was held that Ind. Rev. Stat. 1881, § 5760 (Acts 1879, p. 106), providing for filing claims against counties and presenting the same to the board of county commissioners, and § 5760, providing that no court shall have jurisdiction of any claim against any county except as provided in this act, repeal Rev. Stat. 1881, § 5771 (act of 1852), providing for bringing an original action on disallowance of claim, instead of appealing.

After this case was reversed, and on the 27th of March, 1886, plaintiff began another action, and it was held that Ind. Acts 1885, p. 80, providing that if a claim is disallowed the party may appeal or bring an action, was not retrospective, and the only remedy for this plaintiff was to appeal from a disallowance of his claim by the commission. *Maxwell v. Fulton County Comrs.* 119 Ind. 20.

But in *May v. Saginaw County*, 32 Fed. Rep. 629, it was held that the Nebraska Constitution providing that exclusive power is vested in the board of

enjoining the defendant from maintaining the same so as to interrupt the natural flow of the water in the stream mentioned. The trial court, among its other findings of fact, also found "that the plaintiff, by reason of the construction and maintenance of the dam as above stated by the defendant, and the consequent obstruction of and interference with the natural and customary flow of the waters of said Minnehaha creek, has been deprived of the natural use of said waters, and is thereby subject to hindrance and great inconvenience in and about the operation of his said mill, to his damage in the sum of \$500. And as conclusions of law: (1) That the plaintiff is entitled to judgment herein for the abatement of said dam so erected and maintained by the defendant board, so far as said dam obstructs the natural flow of said stream. (2) For a perpetual injunction ordering and requiring defendant to lower said dam 5 inches from the top thereof, and for such a width as was the natural width of the original bed of said stream.

supervisors to adjust all claims against their respective counties, and the sum so fixed and defined shall be subject to no appeal, did not prevent an action against a county for infringement of a patent, as this provision had no application to claims for torts.

It was held that under Neb. Comp. Stat. 1889, chap. 18, § 37, providing for presentation of claims to the county, this claim was not required to be presented, as unliquidated demands from a tort did not have to be presented, as § 4 of the Statute of 1889, providing that the person sustaining a damage from a defective bridge may recover, and that action should be brought within thirty days, did not contemplate presenting the claim to the county board. *Hollingsworth v. Saunders County*, 36 Neb. 141.

And where an action for damages to realty was brought against the county within twelve months from the time the cause of action arose, the action was not barred because plaintiff failed to present the same for auditing. It was held that the bringing of the suit within the time limited was a sufficient presentation of the claim within the meaning of Ga. Code, § 507, providing that all claims against counties must be presented twelve months after they accrue or become payable, or the same are barred. *Dement v. De Kalb County*, 97 Ga. 733.

But in *Maddox v. Randolph County*, 65 Ga. 216, a county was held not liable for injuries received from a defective bridge, where the claim was not presented to the ordinary for auditing within twelve months from the time of entry, under a statute requiring all claims against counties to be presented within twelve months after they accrue or the same are barred.

In *Dement v. De Kalb County*, 97 Ga. 733, the case of *Maddox v. Randolph County*, 65 Ga. 216, was distinguished, as in that case the action was commenced after the expiration of the twelve months with no previous presentation of the claim, and this identical question had never been definitely decided by this court. It was said that Code, § 506 (act December 15, 1871), merely directed the county officials as to what they should do with such claims when presented, and did not change the pre-existing law contained in § 507, or impose upon claimants any additional burden.

In *Arnett v. Decatur County Comrs.* 75 Ga. 732 the court refused to decide whether or not an action was barred because of failure to present the claim to the board of county commissioners, under Ga. Code, § 507, providing for presentation of claims and barring the same unless suit is brought
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(3) For the recovery of \$500 as damages, and for the costs and disbursements in this action."

While the plaintiff had no property interest in the water itself, he had an interest in it as it passed along through his land as it was wont to run, and a wrongful and unlawful interference so as to materially interrupt or diminish the natural flow of the stream to plaintiff's damage would constitute a cause of action. The county attorney, representing the defendant, conceded that the acts of the board were unlawful, and that the Special Laws of 1891 (chap. 381) relating to the improvement of the navigation of Lake Minnetonka, and establishing and maintaining a uniform height of water in said lake, under which they assumed to act, was unconstitutional, and insisted that such acts were *ultra vires*, and hence no action against the county could be maintained. Upon this concession of appellant's attorney, and certain allegations in the answer, the question to be determined is the liability of the defendant.

within twelve months, as that question was not passed upon by the court below.

Under Miss. Rev. Code, 419, art. 34, providing that any person having a just claim against any county which is disallowed may bring suit against the board of police, it was held that it was questionable whether a demand for damages arising out of a tort was "a claim" within the meaning of this section. *Sutton v. Carroll County Bd. of Police*, 41 Miss. 236.

In *Brabham v. Hinds County Supers.* 54 Miss. 363, 28 Am. Rep. 352, it was held that the Mississippi statute, providing for "demands," "accounts," and "claims" to be audited and allowed, were such liabilities of the county as were provided for by some statute.

In *Chick v. Newberry & Union Counties*, 27 S. C. 419, it was held that a claim for damages caused by the sinking of a county ferry boat was not such a claim as should first be presented to the county commissioners and then into court by means of appeal, as an action for damages for alleged negligence on the part of the county commissioners should not be left for them to be judges in their own case.

In *Prady v. New York City & County Supers.* 2 Sandf. 460, Affirmed in 10 N. Y. 260, it was said that 1 N. Y. Rev. Stat. 386, § 4, providing that accounts for county charges of every description shall be presented to the board to be audited by them, and 1 Rev. Stat. 384, tit. 3, § 1, providing that where any "cause of action" shall exist between a county and an individual such proceedings shall be had at law or in equity for trying and finally settling the same, in like manner and with like effect as in similar suits or proceedings between individuals and corporations, were "intended to provide a remedy against a county for such causes of action, and no other, as could not be presented to and examined and allowed by the board of supervisors, as county charges of this class would be claims for the malfeasancess of county officers and claims arising from torts for which the county may be liable."

In *Newman v. Livingston County Supers.* 45 N. Y. 689, it was said that claims growing out of malfeasancess of county officers and claims for which the county may be liable arising from torts are not necessarily to be presented for examination and allowance.

Where a county treasurer had misappropriated town moneys, and used the same for the benefit of the county, it was said: "While this has been styled an action for money had and received by the

The stream, dam, and property in question are all situated in the county of Hennepin, and whatever was done by the county commissioners was done in pursuance of apparent legislative authority, and under a legislative act in terms conferring the power to act in the manner admitted and proved. Some of these acts were done pursuant to legislative enactments prior to the passage of chapter 881, Special Laws 1891, but the dam in question was erected subsequent to the passage of that act, and by virtue of its apparent authority; and it is this act which appellant's counsel concedes to have been unconstitutional, and hence he asserts that, the acts of the board of county commissioners being tortious and unauthorized, the defendant is not liable in damages for whatever the members of the board may have done in the premises,—in other words, that Hennepin county had no right to

build the dam in question, and therefore the county is not liable for the resultant damages. But this contention is inconsistent with defendant's defense as alleged in its answer. There it expressly affirms the doings of its official board; alleges that its acts were lawful, and that it did no more than it had a legal right to do, in the erection and maintenance of said dam. It not only fails to plead that the acts complained of were *ultra vires*, but it adopts, assumes, and ratifies the acts complained of, and, by its pleadings, insists that such acts were right, proper, and legal, and also insists that such acts were performed under a public necessity. This is therefore not a mere act of negligence of the board of county commissioners in the performance of an official duty, but an active and affirmative tort, done under claim of statutory authority and duty, and justified upon such ground by de-

county to and for the use of the town it is really an action based upon wrong,—the misappropriation of the money by the county through its agent the treasurer;" and it was held that where a claim against a county is one based upon the wrong committed by or attributable to it, the claimant is not bound to submit it to the board of supervisors for audit and allowance. *Kilbourne v. Sullivan County Supers.* 187 N. Y. 170.

In *McClure v. Niagara County Supers.* 50 Barb. 594, which was an action under the statutory liability for damages by mobs, it was held that it was not necessary to present the claim to the board of supervisors of the county for allowance before the action was commenced.

In *MARKET V. QUEENS COUNTY* it was contended by the respondent that the claim should have been presented to the county for auditing before suit. The court of appeals did not refer to this question in the opinion, which denied any recovery for injury from a defective bridge.

But in *Albrecht v. Queens County*, 84 Hun, 399, it was said that if a claim for damages for a defective bridge could be maintained it should first be submitted to the board of supervisors, under N. Y. Laws 1892, chap. 686, art. 2, § 12, subs. 2, providing that the board of supervisors shall annually audit all accounts and charges against the county.

IX. Summary.

In summarizing the foregoing cases it may be said that the weight of authority is conclusive against imposing any implied liability on counties for negligence in the construction, care, and use of public property, or for torts or negligence of county employees, and as the authorities are so many and set forth in the above note, they are not recapitulated.

The exceptional cases imposing implied liability for injuries caused by defective bridges may be resolved into those of four states, Maryland, Pennsylvania, Iowa, Indiana, but the recent Indiana cases have overruled all the former cases and are now in line with the weight of authority, and in Iowa the exceptional rule is not applied to small bridges.

In regard to roads, Maryland, which makes an exception and applies the same rule as that governing bridges, stands alone.

In regard to personal injuries from negligence of an employee, in a Missouri case, a liability was affirmed on the ground that the injury arose in discharge of a self-imposed duty not enjoined by any law, which is a very fine-drawn distinction.

For injury from operating a drawbridge we have a Louisiana case and a New Jersey case.

For injuries to real property from locating dams or bridges, there is some conflict. Some of the affirmative cases can be sustained on the theory of taking or damaging property without compensation.

For infringement of patent the weight of authority is in favor of imposing a liability, and this is worked out through the Federal statute.

The reasoning in the negative cases, which accept *Russell v. Men of Devon* as the leading case, generally is based on the doctrine that a county is a subordinate political division of the state, and stands in the same attitude as a state, which cannot be sued without a statute authorizing such an action. A distinction is also made in nearly all the cases between counties and cities by denying the same liability against counties that is applied to cities; but many cases, whilst following the rule denying a liability, affirm that there is no distinction in principle between the two corporations. Of course in this summary no attention is paid to cases where the liability is imposed by statute, and it may be said in conclusion, without admitting the soundness of the principle evolved in so many cases, that the mass of authorities deny the liability of counties for negligence or tort of its officials, and refuse to apply the same liability as in city cases.

The exceptional cases in the above note imposing an implied liability on counties for negligence or torts of counties are as follows:

For injuries to persons from defective bridges: *Park v. Adams County Comrs.* 3 Ind. App. 536; *Morgan County Comrs. v. Pritchett*, 85 Ind. 68; *Pritchett v. Morgan County Comrs.* 62 Ind. 210; *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 657; *Bonebrake v. Huntington County Comrs.* 141 Ind. 62; *Fulton County Comrs. v. Rickel*, 106 Ind. 501; *State, Roundtree, v. Gibson County Comrs.* 80 Ind. 478, 41 Am. Rep. 421; *Jackson County Comrs. v. Nichols*, 139 Ind. 611; *Vaught v. Johnson County Comrs.* 101 Ind. 128; *Gibson County Comrs. v. Emmerson*, 95 Ind. 579; *Patton v. Montgomery County Comrs.* 96 Ind. 181; *Sullivan County Comrs. v. Arnett*, 116 Ind. 433; *Knox County Comrs. v. Montgomery*, 109 Ind. 66; *Clark County Comrs. v. Brod*, 3 Ind. App. 585; *Spioer v. Elkhart County Comrs.* 126 Ind. 399; *Goshen v. Myers*, 119 Ind. 196; *Shelby County Comrs. v. Deprez*, 87 Ind. 509; *Wabash County Comrs. v. Pearson*, 120 Ind. 426; *Allen County Comrs. v. Bacon*, 96 Ind. 81; *Howard County Comrs. v. Legg*, 110 Ind. 479; *Porter County Comrs. v. Dombke*, 94 Ind. 72; *Allen County Comrs. v. Crewiston*, 133 Ind. 39; *Sullivan County Comrs. v. Sleson*, 2 Ind. App. 311; *La Porte County Comrs. v. Ellsworth*, 9 Ind. App. 596; *Apple v. Marion County*

fendant, and that it was performed within the scope of the board's official duty. It comes into court, and, by its pleadings and evidence, attempts to uphold the wrongs it has done by its officials, and persists in the continuance of this wrong, but, by contention of counsel, insists that it is not liable in damages, because its acts were unconstitutional, unauthorized, and void. Not only this, but it insists upon retaining the benefits of the illegal acts of its officers. It is not willing that the wrong shall cease, but aggressively insists that it will make no reparation for its past tort, and that it has a legal right to enjoy in the future all the benefits secured through an unconstitutional law. If valuable property rights can thus be taken, destroyed, diverted, and injured without compensation, there will be but little safety in the private ownership of property. We may concede the general rule to be that the defendant

would not be responsible for the unauthorized and unlawful acts of its officer, done *colore officii*; but when the defendant itself expressly authorizes such act, or, when done, adopts and ratifies it, and retains and enjoys its benefits, and persists in so doing, it is liable in damages. The law applicable to a case of this kind is well stated in the case of *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157, as follows: There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time; if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties

Comrs. 127 Ind. 553; *Shelby County Comrs. v. Blair*, 8 Ind. App. 574; *Parke County Comrs. v. Wagner*, 128 Ind. 609; *Boone County Comrs. v. Mutchler*, 137 Ind. 140; *Reinhart v. Martin County Comrs.*, 9 Ind. App. 572; *Madison County Comrs. v. Brown*, 89 Ind. 48; *Parke County Comrs. v. Sappenfeld*, 10 Ind. App. 609. (But these Indiana cases were all overruled in the following cases: *Johnson County Comrs. v. Hemphill*, 14 Ind. App. 219; *Cowan v. Adams County Comrs.*, 142 Ind. 699; *JASPER COUNTY COMRS. v. ALLMAN*; *Montgomery County Comrs. v. Coffenberry*, 14 Ind. App. 701.)

In other states the cases affirming liability are: *Cooper v. Mills County*, 69 Iowa, 360; *Morgan v. Fremont County*, 92 Iowa, 644; *Ferguson v. Davis County*, 57 Iowa, 601; *Huff v. Poweshiek County*, 60 Iowa, 529; *Roby v. Appanoose County*, 68 Iowa, 114; *Davis v. Allamakee County*, 40 Iowa, 217; *Weirs v. Jones County*, 80 Iowa, 351; *Casey v. Tama County*, 75 Iowa, 656; *Krause v. Davis County*, 44 Iowa, 141; *Hughes v. Muscatine County*, 44 Iowa, 672; *Huston v. Iowa County*, 43 Iowa, 456; *Wilson v. Jefferson County*, 18 Iowa, 181; *Brown v. Jefferson County*, 16 Iowa, 339; *Albee v. Floyd County*, 45 Iowa, 177; *Moreland v. Mitchell County*, 40 Iowa, 394; *Van Winter v. Henry County*, 61 Iowa, 684; *Newcomb v. Montgomery County*, 79 Iowa, 487; *Nims v. Boone County*, 68 Iowa, 642; *Kendall v. Lucas County*, 26 Iowa, 395; *Homan v. Franklin County*, 98 Iowa, 692; *Kennedy v. Cecil County Comrs.*, 69 Md. 65; *Baltimore County Comrs. v. Baker*, 44 Md. 1; *Eyler v. Alleghany County Comrs.*, 49 Md. 287, 33 Am. Rep. 249; *Chesapeake & O. Canal Co. v. Alleghany County Comrs.*, 57 Md. 201, 40 Am. Rep. 430; *Prince George's County Comrs. v. Burgess*, 61 Md. 29, 43 Am. Rep. 88; *Humphreys v. Armstrong County*, 3 Brewst. (Pa.) 49; *Armstrong County v. Clarion County*, 66 Pa. 218, 5 Am. Rep. 368; *Shadler v. Blair County*, 136 Pa. 439.

To travelers from defective roads: *Harford County Comrs. v. Hamilton*, 60 Md. 340, 45 Am. Rep. 799; *Anne Arundel County Comrs. v. Duckett*, 20 Md. 468, 38 Am. Dec. 557; *Alleghany County Comrs. v. Broadwaters*, 69 Md. 533; *Calvert County Comrs. v. Gibson*, 36 Md. 229; *Kennedy v. Cecil County Comrs.*, 69 Md. 65.

To persons from condition of buildings:

Escape of prisoner: *Brown County Comrs. v. Butt*, 2 Ohio, 343; *Richardson v. Spencer*, 6 Ohio, 13. But these cases were overruled in *Hamilton County Comrs. v. Mighels*, 7 Ohio St. 109.

To persons from negligence or torts of employees: *Hannon v. St. Louis County*, 62 Mo. 313.

Injuries to real property:

From construction or use of bridge: *Tyler v. Tehama County*, 109 Cal. 618 (Const.); *Chesler County*, 39 L. R. A.

v. Brower, 117 Pa. 647 (Const.); *Harford County Comrs. v. Wise*, 71 Md. 43; *Riddle v. Delaware County*, 156 Pa. 643.

Injury to property from operating a drawbridge: *Houston v. Police Jury*, 3 La. Ann. 568; *Ripley v. Essex & Hudson Counties Chosen Freeholders*, 40 N. J. L. 45.

By roads and road officers:

Injunction and damages: *Coburn v. San Mateo County*, 75 Fed. Rep. 530; *Cummings v. Kendall County*, 7 Tex. Civ. App. 184; *McCann v. Sierra County*, 7 Cal. 121.

Injury to property from dam: *SCHUSSLER v. HENNEPIN COUNTY COMRS.*

Injury for sewage nuisance: *Lefrois v. Monroe County*, 43 N. Y. Supp. 519.

Infringement of patent: *May v. Mercer County*, 30 Fed. Rep. 246; *May v. Rails County*, 31 Fed. Rep. 473; *May v. Johnson County*, Fed. Cas. No. 9, 334; *May v. Fond du Lac County*, 27 Fed. Rep. 695; *May v. Logan County Comrs.*, 30 Fed. Rep. 230; *May v. Saginaw County*, 32 Fed. Rep. 629; *May v. Jackson County*, 35 Fed. Rep. 710.

Tearing down building and taking vault: *Rhoda v. Alameda County*, 69 Cal. 523.

On dissolution of injunction: *Freeman v. Lee County Supers.*, 66 Miss. 1.

Suffering hog to become diseased: *Rowland v. Kalamazoo County Supers. of Poor*, 49 Mich. 553.

Diverting water (not decided): *Fenton v. Salt Lake County*, 3 Utah, 423.

Under the statute of Winton, 13 Edw. I., providing that if the country does not apprehend the felons within forty days an action lies against the inhabitants of the hundred where the robbery was committed for the money or goods whereof the party was robbed, and under some other similar statutes making the hundred liable for destroying turnpikes, cutting hop binds or destroying corn to prevent exportation, for wounding officers of the customs, demolition of works, many cases are given in Comyn's Dig. title, *Hundred*, c. 2-5.

For liability of county for property destroyed by mob, see *Glanfortone v. New Orleans* (C. C. E. D. La.) 24 L. R. A. 562, note.

Cases in regard to counties like San Francisco and St. Louis counties, when the city and county are the same in territory, are omitted from this note.

This note is not intended to include injunction suits against counties for nuisances unless damages were claimed, or cases under eminent domain where proceedings were had but were void or irregular, or cases against counties for collecting an illegal tax.

I. T.

and functions with which they are charged, by their offices, to act upon the general subject-matter; and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage,—reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against agents employed, and by what at the time appeared to be competent authority to do the acts complained of, but which are proved to be unauthorized by law. . . .

The court is therefore of opinion that the city of Boston may be liable in an action on the case, where acts are done by its authority which would warrant a like action against an individual, . . . or where, after the act has been done, it has been ratified by the corporation by any similar act of its officers."

We do not pass upon the constitutionality of chapter 381, Special Laws 1891, relative to the proceeding had by the board of county commissioners, but our opinion in this respect is based upon the concession of appellant's counsel. Points raised by counsel and not discussed in this opinion have been examined and considered, but are deemed immaterial.

Judgment affirmed.

WASHINGTON SUPREME COURT.

R. T. SMITH, and Wife, *Respts.*,

v.

John H. ALLEN and Wife, Impleaded, etc.,
Appts.

(..... Wash.)

1. The legislative adoption of so much of the common law as is applicable to the condition of the state of Washington does not include vendor's liens.

2. A vendor's lien for unpaid purchase money does not arise by implication on a conveyance of land without creating a lien by any reservation in the deed or any agreement between the parties.

(October 6, 1897.)

APPEAL by defendants Allen and wife from a judgment of the Superior Court for Clallam County in favor of plaintiffs in an action brought to foreclose an alleged vendor's lien. *Reversed.*

The facts are stated in the opinion.

Mr. J. C. Allen, for appellants:

The court should have granted the change of venue.

2 Hill's Code, §§ 158, 159, 161.

It was properly shown to the court that neither of the defendants resided in Clallam county, or had ever resided there, but that, on the contrary, all of the defendants were, and had for many years been, residents of Kings county.

Where property has been conveyed by deed, absolute upon its face, there is in this state no vendor's lien for unpaid purchase money, unless such lien is reserved in the deed, or by agreement of the parties.

Akrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449; *Simpson v. Mundee*, 3 Kan. 176;

NOTE.—As to the adoption of the common law, see *McKennon v. Winn* (Okla.) 22 L. R. A. 601, and note; also *Gatton v. Chicago*, R. I. & P. R. Co. (Iowa) 28 L. R. A. 556; and *Davis v. Chicago*, M. & St. P. R. Co. (Wis.) 33 L. R. A. 664.

39 L. R. A.

Brown v. Simpson, 4 Kan. 76; *Greene v. Barnard*, 18 Kan. 518; *Kauffelt v. Bower*, 7 Serg. & R. 64; *Heister v. Green*, 48 Pa. 96, 86 Am. Dec. 569; *Edminster v. Higgins*, 6 Neb. 265; *Philbrook v. Delano*, 29 Me. 410; *Peck v. Culberson*, 104 N. C. 425; *Richards v. Arms Shingle & Lumber Co.* 74 Mich. 57; *Dean v. Dean*, 6 Conn. 285; *Arlin v. Brown*, 44 N. H. 102; *Perry v. Grant*, 10 R. I. 334; *Wragg v. Comptroller General*, 2 Desauss. Eq. 509; 2 Jones, Liens, §§ 1061 *et seq.*

While it is true a great many of the states have adopted the lien, most all of them in later cases have lamented the doctrine, and in a great number it has been abolished by statute.

Conover v. Warren, 6 Ill. 498, 41 Am. Dec. 196; *Hammond v. Peyton*, 34 Minn. 529; *Porter v. Dubuque*, 20 Iowa, 440; *Bayley v. Greenleaf*, 20 U. S. 7 Wheat. 46, 5 L. ed. 398.

Even Lord Eldon looked upon the doctrine with disfavor.

Mackreth v. Symmons, 15 Ves. Jr. 329.

Before a party can be sued and a judgment obtained against him for the contract price of real estate it must be made to appear that a deed to the property has been made and tendered. It is true that in the case at bar a conveyance had been made, but appellants contend that the deed at its inception was a mortgage; that it was executed by the plaintiff and accepted by Allen as security. If this is so, then no subsequent agreement, unless made by deed or in such a manner as would satisfy our statute, could change the nature of the conveyance.

1 Jones, Mortg. 4th ed. § 340; *Henry v. Davis*, 7 Johns. Ch. 40; *Odell v. Montross*, 68 N. Y. 500; *Smith v. Brand*, 64 Ind. 427; *Hart v. Eppstein*, 71 Tex. 752; 1 Dembitz, Land Titles, § 96, p. 780, note No. 125.

Mr. George C. Hatch, for respondents:

The grantor's implied lien for unpaid purchase money exists in this state by force of having incorporated into its law the common law of England.

28 Am. & Eng. Enc. Law, topic, *Vendor's Lien*.

Reavis, J., delivered the opinion of the court:

Action instituted by plaintiffs (respondents) against defendants (appellants) to enforce a vendor's lien upon certain real property in Clallam county. In substance, the complaint is that respondents sold and conveyed by absolute deed to appellants 80 acres of land, situated in Clallam county, and that defendants promised and agreed to pay the sum of \$1,000 in instalments from time to time, as they were able, and as plaintiffs needed the same; that the agreement to purchase was in writing; and that defendants paid on the contract the sum of \$635.62, and refused to pay the balance. The complaint concludes with a prayer for judgment against the defendants for the balance of the sum alleged to be due on the purchase price of the land, and that it be declared a first lien on the premises, as a vendor's lien, and that the specified premises be sold to satisfy the same.

Defendants at the time of the commencement of the action were all residents of King county, and the defendants Allen each appeared and demurred to the complaint, and filed a motion to change the venue to King county. Sufficient affidavits showing the residence of all the defendants in King county, and also affidavits of merit, were at the same time filed. The superior court denied the motion for a change of venue on the ground that the suit was one to enforce a vendor's lien for balance due of the purchase price of the premises conveyed by respondents to defendant Allen. After the demurrer was overruled, the defendants answered, and a trial was had, and judgment for plaintiffs, with a decree establishing a vendor's lien, and ordering a sale of the premises before mentioned. The superior court evidently overruled the motion for a change of venue on the ground that the action was local, because of the enforcement of a vendor's lien. Sections 158, 159, 161, 2 Hill's Code, control the venue of the action. The defendants having at the proper time shown that they were residents of King county, the motion to change the venue was not addressed to the discretion of the court, but was a matter of right with the defendants.

The question of jurisdiction to try the action is determined, not by the remedy requested, but by what the facts alleged in the complaint entitle plaintiffs to receive; and thus the question presented for decision here is whether real property which has been conveyed by absolute deed is subject to a vendor's lien for unpaid purchase money, where no such lien has been reserved by the deed or by any agreement between the parties. No case in this state has been called to our attention where the question has necessarily arisen and been decided heretofore. It is true, the expression "vendor's lien" has been used perhaps a number of times by the court, but where the lien itself, as the foundation of a right, was not necessarily involved. The policy deduced from the uniform course of legislation in this state relative to conveyances of real estate and the title thereto has been to enlarge the scope of the recordation of all instruments affecting real estate. Only conveyances by deed are recognized, and encumbrances are required to be placed on rec-

ord. This is true of agreements subjecting real property to voluntary liens or encumbrances, as in the case of mortgages, and is also required in that large class of claims of lien which are authorized by statute. Evidently the policy of our registry acts is against secret liens. The vendor's lien, originally, as recognized in England, was devised by courts of equity, to enforce the rights of a grantor of real property against the grantee, who might remain in possession after the execution of an absolute deed, and yet refuse to pay the purchase price, or any balance remaining due thereon. The inability to subject land by process of law to execution for a simple-contract debt was recognized by the English chancellors as requiring a remedy. Hence the invention of a lien in favor of the vendor for the purchase price promised to be paid for land. The vendor's lien, at the time it originated and was enforced, was also less inconvenient and injurious against innocent purchasers or encumbrancers of land in England than in this country. The general policy of the law in England did not facilitate commerce in land, as here. The law there was rather favorable towards holding landed estates together, and did not assume to make transfers easy. Thus real estate was usually improved and regularly cultivated, the ownership long established and well known, and the transfers comparatively few, and usually better known than among our people. Here land is essentially a subject of trade and commerce, transfers are easy and simple, and purchasers and encumbrancers look to the record for their information. The vendor's lien in England seems to have been involved in some uncertainty, and its limitations not very well understood until the case of *Mackreth v. Symmons*, 15 Ves. Jr. 329, decided in 1808 by Lord Eldon. In this case the learned chancellor thought "the doctrine is probably derived from the civil law as to goods." The case, however, reviews the doctrine, and the source of its origin, and the reasons and authorities by which it is supported. The final grounds upon which it has been rested are natural equity, the supposed intention of the parties, and a trust arising out of the unconscientiousness of the vendee's holding the land without paying the price. Mr. Justice Gibson of Pennsylvania, in *Kauffelt v. Bower*, 7 Serg. & R. 64, meets this argument thus: "The implication that there is an intention to reserve a lien for the purchase money in all cases where the parties do not, by express acts, evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass." But the theory that a trust arises out of the unconscientiousness of the purchaser would construe the nonperformance of every promise made in consideration of a conveyance of property to the promisor into a breach of trust, and would attach the trust, not merely to the purchase money which he agreed to pay, but to the land, which he never agreed to hold for the benefit of the supposed *cestui que trust*. The earliest cases upon this subject in England were decided long after the first colonial settlements

in this country. Lord Eldon, in *Mackreth v. Symmons*, 15 Ves. Jr. 829, himself said, "It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution, or to have laid down the rule the other way so distinctly that a purchaser might be able to know without the judgment of a court, in what cases it would and in what it would not exist," but felt himself obliged to declare, as the result of all the authorities, that it was clear that different judges would have determined the same case differently. The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled, by some form of judicial process, to charge the land, in the hands of the vendee, as security for the unpaid purchase money. The doctrine of vendor's lien has never been affirmed by the Supreme Court of the United States, except where established by the local law. In *Bayley v. Greenleaf*, 20 U. S. 7 Wheat. 46, 5 L. ed. 893, Mr. Chief Justice Marshall observes: "It is a secret invisible trust, known only to the vendor and vendee and to those to whom it may be communicated in fact. To the world, the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien." Says Mr. Justice Gray in *Ahrend v. Odiorno*, 118 Mass. 261, 19 Am. Rep. 449: "The decisions in the courts . . . in favor of the doctrine, which are collected in the notes to 2 Sugden on Vendors, 8th Am. ed. chap. 19, suggest no reasons and afford no grounds why we should now for the first time adopt in this commonwealth a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has

shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by bona fide attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment on mesne process. If any third person has acquired rights in the property, there is no reason why equity, any more than the common law, should interpose to defeat them." Under our statutes the vendor may obtain his judgment for the purchase money, or any part thereof, which immediately becomes a lien of record upon the land sold, and under execution he may have the land sold in satisfaction of his judgment; and that, too, freed from any homestead or other claim of exemption. Thus, the reason for the maintenance of the lien of the vendor is gone, and the rule has never been applicable to our condition. The adoption of the common law of England by legislative enactment in this state adopts so much of that law as is applicable to our condition, and the lien devised in favor of the vendor by the English chancellors was inapplicable to the legislation and existing conditions in this state. *Ahrend v. Odiorno*, 118 Mass. 261, 19 Am. Rep. 449; *Simpson v. Mundee*, 3 Kan. 172; *Brown v. Simpson*, 4 Kan. 76; *Greeno v. Barnard*, 18 Kan. 518; *Kauffelt v. Bower*, 7 Serg. & R. 64; *Heister v. Green*, 48 Pa. 96, 86 Am. Dec. 569; *Edminster v. Higgins*, 6 Neb. 265; *Philbrook v. Delano*, 29 Me. 410; *Peck v. Culbertson*, 104 N. C. 425; *Richards v. Arms Shingle & Lumber Co.*, 74 Mich. 57; *Dean v. Dean*, 6 Conn. 285; *Arlin v. Brown*, 44 N. H. 102; *Perry v. Grant*, 10 R. I. 384; *Wragg v. Comptroller General*, 2 Desauss. Eq. 509; *Frame v. Sliter*, 29 Or. 131, 84 L. R. A. 690; 2 Jones, Liens, § 1061.

The change of venue from Clallam to King county should have been granted the defendants. *The cause is reversed*, with directions to the superior court to proceed in conformity to this decision.

Scott, Ch. J., and Dunbar, Anders, and Gordon, JJ., concur.

MARYLAND COURT OF APPEALS.

Marion DUCKETT *et al.*, Appls.,
v.

NATIONAL MECHANICS' BANK of Baltimore *et al.*

(.....Md.....)

1. A check stating that it is "for deposit to credit of" a person named, without adding the word "Trustee" to his name, although it contains a further clause stating that it is "the balance of purchase money due him as [trustee]," does not impress the funds with a trust so as to

prevent a bank in which he deposits it from crediting the check to his individual account.

2. A check stating that it is for "deposit to the credit of" a person named, with the word "Trustee" added to his name, is an explicit notification to the bank in which he deposits it that he is not the actual owner of the money, and if the bank credits it to his individual account, and loss ensues to the trust estate by reason of his drawing out the fund by checks on his personal account, the bank is liable for participation in the breach of trust.
3. A bank is not responsible for the use of trust funds made by a trustee unless it knowingly participates in the breach of trust, or profits by the fraud.
4. A ratification by a trustee of the act

NOTE.—As to the effect of depositing money in a bank in trust for third persons, see *Cunningham v. Davenport* (N. Y.) 82 L. R. A. 373, and *note*; and *Bath Sav. Inst. v. Hathorn* (Me.) 32 L. R. A. 377. 89 L. R. A.

of a bank in placing to his individual credit a check which showed on its face that it was due to him as trustee cannot relieve the bank from liability to the trust estate if the funds are lost by his checking them out on his personal account.

5. A defense of the statute of limitations cannot be invoked by a participant in a breach of trust any more than by the trustee himself.

6. The statute of limitations must be invoked by plea or answer in order to be available as a defense.

(December 1, 1897.)

APPEAL by plaintiffs from a decree of the Circuit Court of Baltimore City in favor of the defendant bank in a suit to hold it liable for participation in a misappropriation of trust funds. *Reversed.*

The facts are stated in the opinion.

Messrs. Marion Duckett, Charles H. Stanley, and David S. Briscoe, for appellants:

Equity has a natural and primary jurisdiction superadded to any legal rights that the suitors may have, and concurrent with them, and it is no bar that an action at law may have been sustained on the same state of facts.

2 Perry, Tr. § 848; *Swift v. Williams*, 68 Md. 287; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54-63, 26 L. ed. 693-698; *Stewart v. Baltimore Firemen's Ins. Co.* 53 Md. 564.

The trustees must sue and not join the *cestui que trust* if the trust is alive.

Abell v. Brown, 55 Md. 217; *Swift v. Williams*, 68 Md. 237.

A participant in a breach of trust, or an *ex maleficio* trustee, cannot plead limitations against the rights of the rightful owner to recover trust property or trust funds, because he who is thus placed becomes a trustee, and not until fraud is discovered or the breach made known, if then, does the act of limitations begin to run.

2 Perry, Tr. §§ 828, 832, 840, 859, 861; Code, art. 57, § 18.

The true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing, but because it is his property wrongfully withheld from him.

Englar v. Offutt, 70 Md. 78; *Swift v. Williams*, 68 Md. 287; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Union Nat. Bank v. Goetz*, 138 Ill. 127, 32 Am. St. Rep. 125, note; *Englar v. Offutt*, 70 Md. 78; *Perchen v. Arndt*, 46 Am. St. Rep. 603, see note, p. 608, 26 Or. 121, 29 L. R. A. 664.

Mingling the trust funds with his own is a breach of trust.

1 Perry, Tr. § 447 (1882).

A trustee has no power to sell and dispose of trust property for his own use and at his own mere will.

Third Nat. Bank v. Lange, 51 Md. 144, 84 Am. Rep. 804.

The insertion of the word 'trustee' after the name of a stockholder indicates and gives notice of a trust.

Central Nat. Bank v. Connecticut Mut. L. 89 L. R. A.

Ins. Co. 104 U. S. 54, 26 L. ed. 693; *Shaw v. Spencer*, 100 Mass. 882, 1 Am. Rep. 115, 97 Am. Dec. 107; 2 Perry, Tr. 1882, p. 463, § 814, note 2; *Stewart v. Firemen's Ins. Co.* 53 Md. 578; *Lowry v. Commercial & F. Bank*, Taney, 330; *Morse, Banks & Banking*, § 604; *Marbury v. Ehlen*, 72 Md. 216; *Jaudon v. National City Bank*, 8 Blatchf. 430, 82 U. S. 15 Wall. 165, 21 L. ed. 142.

A trustee cannot dispose of trust funds in his hands without an express and previous order of the court having jurisdiction over the trust estate.

Tilly v. Tilly, 2 Bland, Ch. 425; *Third Nat. Bank v. Lange*, 51 Md. 144, 84 Am. Rep. 804; *Abell v. Brown*, 55 Md. 223.

Messrs. Barton & Wilmer, James M. Ambler, and Randolph Barton, Jr., for appellees:

The rule that limitations cannot be pleaded by a trustee has a qualification that limits it to the case of an express or acknowledged trust, or a fraudulent collusion with a trustee.

Lewin, Tr. 9th ed. p. 983.

Limitations will bar as to trusts created by operation of law, though it may not as to express trusts.

McDowell v. Goldsmith, 6 Md. 319, 61 Am. Dec. 305; *Re Leiman*, 32 Md. 225, 3 Am. Rep. 182; *Weaver v. Leiman*, 52 Md. 708; *Walker v. Manhattan Bank*, 25 Fed. Rep. 255.

The mere fact that a trustee deposits and disburses a fund under his absolute control, as an individual, instead of as trustee, raises no presumption that his conduct is fraudulent or improper.

Kirby v. State, 51 Md. 383; *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 337; *Bolles, Banks and Their Depositors*, § 107, p. 111; *Morse, Banks & Banking*, 3d ed. § 317, p. 541; *Goodwin v. American Nat. Bank*, 48 Conn. 567.

Clagett had the power to place the fund to his individual account without any right or duty on the bank's part to protest; and his ratification of the bank's act is equivalent to a previous authority to the bank to so deposit the fund.

State Nat. Bank v. Dodge, 124 U. S. 346, 31 L. ed. 468.

Money is deposited in a bank by a trustee, or subject to his order, just as in the case of an individual, for safe-keeping and for convenience in handling, and not with the object of making the bank an overseer over the trustee and a guarantor of his fidelity.

Walker v. Manhattan Bank, 25 Fed. Rep. 255; *Bolles, Banks and their Depositors*, § 40c, p. 57; 1 *Morse, Banks & Banking*, 3d ed. § 317, p. 540; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 63, 26 L. ed. 698; *Patterson v. Marine Nat. Bank*, 130 Pa. 431; *Easey County Chosen Freeholders v. Newark City Nat. Bank*, 48 N. J. Eq. 53; *State Nat. Bank v. Reilly*, 124 Ill. 469; *Swartwout v. Mechanics' Bank*, 5 Denio, 555; *Goodwin v. American Nat. Bank*, 48 Conn. 567; *Swift v. Williams*, 68 Md. 252; 2 *Dan. Neg. Inst.* § 1612a; 2 *Morse, Banks & Banking*, § 432, p. 711; *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 336.

The simple case of a bank dealing with a trustee depositor and treating his rights over a trust deposit in his name just as those of an in-

dividual having an individual deposit, is, of course, to be distinguished from that of a bank attempting to assert a lien for a private debt due to itself from the trustee, against a fund known to be held by the trustee in a fiduciary capacity. For in such case the bank would be presumed to be a knowing participant in the profits of a fraud.

See *Walker v. Manhattan Bank*, 25 Fed. Rep. 255; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 64, 26 L. ed. 698; *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 421, 34 L. ed. 728; *Bank of Greenboro v. Clapp*, 76 N. C. 482.

If the trustee pays a private debt due the bank by a check upon a trust fund on deposit with it, the bank is not necessarily bound to presume that the payment is unlawful.

Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 63, 26 L. ed. 698; *Loring v. Brodie*, 134 Mass. 458.

The present case, moreover, is very different from that of a trustee offering for sale a note payable to him as trustee. Such a note is not negotiable and one buys it at his peril.

Third Nat. Bank v. Lange, 51 Md. 188, 34 Am. Rep. 304.

Or from the case of a trustee attempting to pledge trust property.

Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Loring v. Brodie*, 134 Mass. 470.

Or from an attempted sale of stock standing in the name of a trustee.

Marbury v. Ehlen, 72 Md. 206; *Stewart v. Fireman's Ins. Co.* 53 Md. 564; *Lowry v. Commercial & F. Bank*, Taney, 810.

In the case of stock there is no presumption of the trustee's right to sell.

Marbury v. Ehlen, 72 Md. 217.

A bank account is meant to be checked against.

Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 104 U. S. 64, 26 L. ed. 698.

Even in the case of stock, where the stock merely stands in the name of the holder as "trustee," with nothing else to indicate the name or nature of the trust, and no means of discovery, by any reasonable or ordinary inquiry, the purchaser will not be put upon inquiry.

Graffin v. Robb, 84 Md. 455; *Albert v. Baltimore*, 2 Md. 159.

The cases where the word "trustee" has been held to put purchasers of stock upon inquiry, have been those in which the name and object of the trust were easily ascertainable without inquiry from the trustee.

Marbury v. Ehlen, 72 Md. 206; *Stewart v. Firemen's Ins. Co.* 53 Md. 564.

Claggett knew of and approved the action of the bank in thus entering the deposits, and if he had complete power to direct the bank so to credit them, or so to transfer them when deposited, it can make no difference that he approved and adopted an act, which affected merely the form, and not the extent, of his control over the fund, instead of previously directing it.

2 Morse, Banks & Banking, §§ 440b, 471; Bolles, Banks and Their Depositors, § 86, § 41a, p. 54; *McEwen v. Davis*, 39 Ind. 112; *State Nat. Bank v. Dodge*, 124 U. S. 838, 334, 39 L. R. A.

81 L. ed. 458, 463; *Neff v. Greene County Nat. Bank*, 89 Mo. 581; *Risley v. Phenix Bank*, 83 N. Y. 328, 38 Am. Rep. 421.

Ratification is equivalent to a previous authority.

1 Dan. Neg. Inst. § 818, p. 237.

McSherry, Ch. J., delivered the opinion of the court:

These proceedings had their origin in a bill filed by the appellants against the appellees in the circuit court of Baltimore city. The appellants are trustees, who were appointed by an order of the circuit court for Prince George's county in the place and stead of Henry W. Claggett, the survivor of three trustees named in the will of John D. Bowling. To these latter—the testamentary trustees—certain funds were bequeathed by Mr. Bowling, to be held in trust for the purposes designated in the will; but as those purposes have no relation whatever to the questions presented on the record they need not be alluded to here. It is only necessary to state that the funds now in controversy formed part of the corpus of that trust estate. Upon the death of his associates Claggett became, under a decree of the circuit court for Prince George's county, sole trustee, and thereafter, having made default to the trust estate, was in due course removed, and the appellants were immediately appointed to discharge the trust created by the will of Mr. Bowling. Amongst the investments belonging to the trust estate in the hands of Claggett were two mortgages, each for \$2,000, one due by Thomas S. Duckett and the other by Washington J. Beall. The mortgage given by Beall was foreclosed by Claggett after he became sole trustee, and the money realized from the sale was paid to him through Mr. Charles H. Stanley. The payment was made by Mr. Stanley's check which reads as follows:

Laurel, Md., February 13, 1892.

Citizens' National Bank:

Pay to the order of James Scott, cashier, \$2,000, two thousand dollars, for deposit to credit of Henry W. Claggett, being the balance of purchase money due him as trustee from John R. Coale. C. H. Stanley.

When the Duckett mortgage matured the amount secured by it was paid to Claggett through Mr. Stanley by a check in these words:

State of Maryland.

Citizens' National Bank of Laurel, Laurel, Maryland, September 17, 1892:

Pay to the order of James Scott, cashier, \$2,024.30, two thousand and twenty-four and thirty one hundredths dollars, to deposit to the credit of Henry W. Claggett, trustee.

C. H. Stanley.

Both of these checks were deposited in the National Mechanics' Bank of Baltimore where Claggett kept an individual or personal account and the proceeds of each were carried to his credit in that account. Claggett in his capacity as trustee had no account with the bank. The individual account of Claggett, including the proceeds of the two checks just transcribed, was drawn on from time to time by him, and

after his removal as trustee it was discovered that these funds had been dissipated and spent. Clagett was and still is insolvent. The new trustees—the present appellants—made demand upon the National Mechanics' Bank for a restitution of the amount of the two checks, claiming that the bank was accountable therefor because it had wrongfully placed the proceeds thereof to Clagett's individual account instead of to his account as trustee, and had thereby aided and participated in his breach of trust; and to enforce that demand they filed the pending bill against the bank and Clagett. Upon final hearing the circuit court of Baltimore city decreed that the bank was not liable and dismissed the bill; whereupon this appeal was taken.

The ultimate inquiry is, whether under the circumstances stated the bank is liable to make good to the new trustees the amounts of these two checks. In addition, there are subordinate questions arising by way of defense, that will be disposed of after the main one has been dealt with.

There can be no dispute that as a general principle all persons who knowingly participate or aid in committing a breach of trust are responsible for the wrong, and may be compelled to replace the fund which they have been instrumental in diverting. Every violation by a trustee of a duty which equity lays upon him, whether wilful or fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust; 2 Pom. Eq. Jur. § 1079. There is in such instances no primary or secondary liability as respects the parties guilty of, or participating in, the breach of trust; because all are equally amenable. That a breach of trust was committed by Clagett does not admit of a doubt. The defaulting trustee was removed because he was a defaulter. He unquestionably received the proceeds of these two checks, and those proceeds formed part of the *corpus* of the trust estate which it was his imperative duty to preserve intact. Instead of performing that duty, he spent the funds—they have disappeared, and he has not explained what he did with them—and it can make no difference for what purpose he did spend them, if by spending them he impaired the *corpus* of the trust estate; and that he did impair the *corpus* of the trust estate no one pretends to deny. Whoever knowingly aided him, or knowingly participated with him in misapplying that fund, is, by reason of so aiding and so participating, equally liable with him to make the fund good by restoring it to the trust estate; 2 Pom. Eq. Jur. § 1079. If the bank knowingly aided and participated in Clagett's breach of trust, then the bank is, beyond dispute, as responsible to the new trustees as is the defaulting trustee himself. This liability of the bank depends, however, altogether upon the contingency that it knowingly aided the trustee, Clagett, to commit the default of which he was undeniably guilty. If without knowledge of Clagett's misconduct, or if without sufficient notice to put it on inquiry that would have enabled it to ascertain that Clagett was mingling with his individual deposits, and using as his own, money that the bank knew or had the means of knowing was trust money; or if it was

merely the innocent agency through which, without fault or negligence on its part, Clagett depleted the trust estate, then it was not guilty of aiding him in misappropriating the trust fund, and is not liable to restore it. In seeking, then, to solve the principal inquiry, we must look to the record for the evidence which will fasten on the bank this knowledge or notice, if in fact it possessed such knowledge or notice.

At the outset it ought to be noted that there is a marked difference between the phraseology and the legal effect of the two checks already set forth. The one is payable to Scott, cashier, for deposit to the credit of Clagett personally—that is, not in his capacity as trustee—though there is a memorandum added of which we will speak in a moment. The other check is payable to Scott, cashier, “to deposit to the credit of Henry W. Clagett, trustee.” Apart from these two checks and the information which they themselves by their terms imparted, there is no pretense that the bank had any notice or knowledge that the funds collected on them belonged to or formed part of any trust estate, or were other than Clagett's own individual property. As a consequence we are restricted to the checks alone in determining whether the bank is liable.

It is true, undoubtedly, that a bank is bound to honor the checks of its customer, so long as he has funds on deposit to his credit, unless such funds are intercepted by a garnishment or other like process, or are held under the bank's right of set-off. It is equally true that whenever money is placed in bank on deposit and the bank's officers are unaware that the fund does not belong to the person depositing it, the bank, upon paying the fund out on the depositor's check, will be free from liability even though it should afterwards turn out that the fund in reality belonged to someone else than the individual who deposited it. It is immaterial, so far as respects the duty of the bank to the depositor, in what capacity the depositor holds or possesses the fund which he places on deposit. The obligation of the bank is simply to keep the fund safely and to return it to the proper person, or to pay it to his order. If it be deposited by one as trustee, the depositor, as trustee, has the right to withdraw it, and the bank, in the absence of knowledge or notice to the contrary, would be bound to assume that the trustee would appropriate the money, when drawn, to a proper use. Any other rule would throw upon a bank the duty of inquiring as to the appropriation made of every fund deposited by a trustee or other like fiduciary; and the imposition of such a duty would practically put an end to the banking business, because no bank could possibly conduct business if, without fault on its part, it were held accountable for the misconduct or malversations of its depositors who occupy some fiduciary relation to the fund placed by them with the bank. In the absence of notice or knowledge a bank cannot question the right of its customer to withdraw funds, nor refuse (except in the instances already noted) to honor his demands by check; and, therefore, even though the deposit be to the customer's credit in trust, the bank is under no obligation to look after the appropriation of the trust funds when with-

drawn, or to protect the trust by setting up a *jus tertii* against a demand. But if the bank has notice or knowledge that a breach of trust is being committed by an improper withdrawal of funds, or if it participates in the profits or fruits of the fraud, then it will be undoubtedly liable. In support of these general principles, if support they need at all, we may refer to *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333; *State Nat. Bank v. Reilly*, 124 Ill. 464; *Essex County Chosen Freeholders v. Newark City Nat. Bank*, 48 N. J. Eq. 51, all cited in 8 Am. & Eng. Enc. Law, 2d ed. pp. 833, 834; *Walker v. Manhattan Bank*, 25 Fed. Rep. 255; 1 Morse, Banks & Banking, § 817; *Swift v. Williams*, 68 Md. 287.

As the bank, then, would not be responsible for the use made of the trust funds by the trustee unless it knowingly participated in a breach of trust or profited by the fraud, do the checks, as we have said, the only evidence in the record on this branch of the case, show that the bank is liable? As respects the first check representing the proceeds of the foreclosure of the Beall mortgage, we are of opinion that there is no liability on the part of the bank. It will be remembered that this particular check was not made payable to Clagett, as trustee, nor, being payable to Scott, cashier, were the proceeds directed to be placed to the credit of Clagett, trustee. In placing the proceeds to the individual credit of Clagett, the bank did just precisely the thing it was directed on the face of the check to do. In doing this, it violated no duty to anyone, unless the addition of the words "being the balance of purchase money due him as trustee from John R. Coale," controlled the explicit direction in the body of the check to deposit the fund to the credit of Clagett individually, and gave the bank notice that instead of doing what the check required should be done, it must do something it was not instructed to do at all, *viz.*: place the funds to the credit of Clagett, as trustee. Mr. Stanley's check was drawn, not on the National Mechanics' Bank, but upon the Citizens' National Bank of Laurel; and the memorandum descriptive of what the funds were or the source from whence they came was neither an instruction to the Mechanics' Bank, through which the check passed, as to the account in which these funds, when collected from the Citizens' Bank should be credited in the Mechanics' Bank, to Clagett; nor was it a notification to the Mechanics' Bank that the funds were impressed with a trust that would be invaded by their being carried to Clagett's individual credit. On the contrary, the specific instruction on the face of the check was to credit Clagett individually with the proceeds, whatever the origin or ultimate use of these proceeds might be. This memorandum imposed no duty on the Mechanics' Bank, and operated only to subvert the convenience of the drawer of the check. In the case of *State Nat. Bank v. Dodge*, 124 U. S. 833, 81 L. ed. 468, it appeared that the clerk of the United States district court for the southern district of Illinois deposited with the State National Bank the funds belonging to the registry of the court. Whenever a deposit was made it was accompanied by a deposit ticket, giving the number of the bankruptcy

case to which the fund belonged, and a corresponding entry was made upon the books of the bank indicating that a particular deposit belonged to a particular case designated by its number. All this was fully understood by the officers of the bank. When checks signed by the clerk and countersigned by the judge were drawn upon this account, the number of the case to which the fund to be paid on the check belonged was written on the upper right-hand corner of the check, following the words "Case No." Numerous deposits were made in many cases, but each and every deposit showed the number of the case, and consequently identified the case to which each deposit actually belonged. Many checks were drawn upon and paid by the bank in cases in which no deposits had been made by the clerk at all and the checks themselves showed by the case numbers written on the top right-hand corners that no deposit belonging to those cases had ever been received, because there were no deposits credited to the cases bearing those numbers. In consequence of the bank having paid various checks bearing case numbers to the credit of which cases no deposits had ever been made, the entire sum of the credit of the whole account was checked out before Dodge, to whom several checks were given in the distribution of the assets of a particular estate, received his checks and presented them to the bank for payment. In the case in which Dodge was interested as a creditor of a bankrupt, there had been deposited, as shown by the deposit tickets and by the entry of the case number on the bank's books, more than sufficient to pay the checks held by Dodge, as well as all other checks delivered to other creditors of the same bankrupt; but because the bank had paid out the funds belonging to this case, on checks bearing the numbers of other and different cases, as to which latter cases there had been no deposits made at all, there were no funds in bank to the credit of the registry with which to pay the checks held by Dodge, and the bank refused to pay them. Dodge brought suit against the bank, and bases his claim to recover on the distinct ground that the bank had actual notice from its own books as to what estates had funds on deposit, and had actual notice on the face of every check drawn in a case from which no funds had been received, that there were no funds on deposit applicable to the payment of such checks, and that, consequently, when it paid those checks it paid them knowingly out of the funds belonging to other and different cases or estates, and was bound to honor the checks held by Dodge, as they were drawn against funds which had been actually deposited as part of the assets of the bankrupt estate of which he was creditor. But the supreme court held that, "no bank is bound to take notice of memoranda and figures upon the margin of a check, which a depositor places there merely for his own convenience, to preserve information for his own benefit; and in such case, the memoranda and figures are not a notice to the bank that the particular check is to be paid only from a particular fund. So, too, a mark on a deposit ticket, if intended to require a particular deposit to be kept separate from all other depos-

its placed to the credit of the same depositor, must be in the shape of a plain direction, if such a duty is to be imposed on the bank." The court likewise held that "the bank had a right to assume that these memoranda of numbers in the deposits and in the checks were merely for the convenience of the court and its officers." Dodge was accordingly denied a recovery.

Unless we give to the memorandum made by Mr. Stanley for his own convenience on the first check, an effect which the supreme court declined to give to a much more significant memorandum contained in the checks delivered to Dodge, we must hold that the Mechanics Bank, by carrying to the personal credit of Clagett, the proceeds of the check representing the avails of the Beall foreclosure did no act that made it liable to the Bowling trust estate for the misappropriation of those particular proceeds by the deposed trustee. And this is so because the memorandum could not operate to qualify the right of Clagett to receive the funds individually and the bank did no wrong in placing them to his credit in the capacity in which he was obviously authorized to receive them. The bank having, therefore, rightfully entered the proceeds of the first check to Clagett's individual credit, he was entitled to draw them out so far as the bank was concerned, and the bank was under no obligation and had no authority to interfere with him in doing so.

Precisely for the reasons that the bank is not responsible for the misappropriation of the proceeds of the first check, it is liable to the new trustees for the misapplication by Clagett of the fund collected by it on the second check. The second, or Duckett check, in terms directed the cashier of the Mechanics Bank "to deposit" the \$2,024.30 "to the credit of Henry W. Clagett, trustee." This was an explicit notification to the bank that Clagett was not the actual owner of the money. *Bundy v. Monticello*, 84 Ind. 119; 8 Am. & Eng. Enc. Law, 2d ed. p. 882. It was an equally explicit instruction to the bank not to place the funds to the credit of Clagett's personal account. It was consequently more than a mere memorandum made for the convenience of the drawer of the check. Knowing that the money was not Clagett's, but that it was payable to him, and to be deposited to his credit as trustee, the bank had no authority to place it to his individual credit (*American Exch. Nat. Bank v. Loretta Gold & S. Min. Co.*, 165 Ill. 109); and if loss ensued by reason of Clagett drawing the fund out by checks on his personal account, the bank is liable to make restitution to the trust estate. The bank in the eye of the law participated in the breach of trust of which Clagett was guilty. In fact, the bank took the first step that ended in the spoliation of the trust. Its act in placing distinctly marked trust funds to the personal credit of Clagett was obviously wrongful, and it must bear the resulting consequences. It is no answer to say that had the bank obeyed the direction given to it, and had it opened an account in the name of Clagett as trustee, and credited that account with these funds, still Clagett could have withdrawn them on checks appropriately signed, and could then have misapplied the money without involving

the bank in any liability. This is no answer, simply because what might have been done was not done. Had the bank opened the account for this fund in the name of Clagett, trustee, instead of entering the credit to his personal account, it would have done what it was its plain duty to do, and it would not have been guilty of the error which it did commit. Had it done its duty, and had Clagett afterwards withdrawn the money, as he might have done, and had he then misapplied it without the co-operation of the bank, there would have been no liability incurred by the bank at all. But this was not done, and the failure of the bank to do what it ought to have done cannot be treated as tantamount to the thing that it did do unless contraries are equivalent of each other. What it ought to have done is not what it did do, and it cannot escape liability upon the mere conjecture that what did happen to the funds might have also happened had the bank not been derelict in its dealings with those funds.

It has, however, been insisted that Clagett, knowing that the bank had wrongfully placed trust funds to his individual credit, ratified that wrongful act by his subsequent conduct, and as his ratification was equivalent to a prior direction to do what was done, the bank is not answerable. Both Clagett and the bank participated in the wrong with respect to the proceeds of the Duckett mortgage. Because they both did wrong they are both accountable for it. But the contention is, if one of two wrongdoers who reaps the fruits of the joint wrongful acts ratifies what his accomplice has done, that accomplice is thereby released and exculpated. This, of course, is not the bald form in which the rather ingenious argument advanced to support the contention is presented; but, reduced to its last analysis, it comes to that startling proposition. The wrong was done, not to the trustee, but to the trust estate. As between the bank and the trustee, his ratification of its act might bind him; but upon what principle can such a ratification bind the beneficiaries of the trust, who have been injured by the joint breach of trust on the part of the bank and the trustee? No ratification by the trustee of the bank's participation in the breach of trust can possibly affect in any way the bank's accountability to the new trustees.

As to the statute of limitations it is only necessary to say that a participant in a breach of trust cannot, any more than can the trustee himself, invoke that defense. 2 Pom. Eq. Jur. § 1080. Even if the statute applied, to be availed of as a defense it must be invoked by either as a plea or an answer. *Allender v. Trinity Church*, 8 Gill, 166. The answer of the bank relies on limitations only as against the claim for \$2,000, which is not the claim for \$2,024.30 collected on the check given in payment of the Duckett mortgage debt—and that is the claim for which we hold the bank liable. So in fact the statute is pleaded against the claim that the bank is not liable for and is not pleaded against the claim for which it is responsible.

We have made no allusion to a line of cases of which *Third Nat. Bank v. Lange*, 51 Md. 188, 34 Am. Rep. 304; *Marbury v. Ehlen*, 72

Md. 206, and *Stewart v. Firemen's Ins. Co.* 58 Md. 564, are illustrations; because the principles applied in that group of decisions have no relation to the questions involved in the record now before us. The sale of a promissory note payable to a trustee—and therefore a non-negotiable note—or the transfer of a certificate of stock, standing in the name of an individual as trustee, is quite a different thing from the payment of a check drawn by a trustee, on an account standing to his credit as trustee in a bank. Where certificates of stocks are held in trust, and on their face indicate that they are so held, the bank or other corporation, is bound before suffering them to be transferred on the books of the corporation, to know, or at least to use proper diligence to ascertain, that the trustee has authority to make the transfer; whereas in the case of a deposit the relation of debtor and creditor is created in the capacity in which the

deposit is made, and the bank's duty is to pay out the fund to or upon the order of the person making the deposit when the check is properly signed, without looking to the application of the fund; and it incurs no responsibility by so doing unless it knowingly participates in a breach of trust or itself reaps the fruit thereof.

We hold, then, on the entire case, that the bank is accountable for the sum of \$2,024.80—the amount of the check dated September 17, 1892, with interest thereon from the date of the deposit of the proceeds to the credit of Clagett's individual account, and that it is not liable for the proceeds of the other check.

The decree dismissing the bill of complaint will accordingly be reversed, and the cause will be remanded that a new decree may be passed conforming to this opinion.

Decree reversed with costs above and below, and cause remanded.

KANSAS SUPREME COURT.

TOPEKA WATER COMPANY, *Plff. in Error,*
v.

Kate J. WHITING.

(.....Kan.....)

- *1. **The fact that a municipality confers upon a water company the right to place its hydrants in the streets,** and to open them for the purpose of flushing its mains, gives the company no license or right to flush at such times and in such a manner as to unnecessarily impede travel or imperil the safety of those passing and repassing over the street.
2. **The license to flush** carried with it the obligation to do so with reasonable care and a due regard for the rights of others.
3. **The testimony examined, and held,** that it tends to show that an open hydrant, from which water was thrown about 10 feet into the street, with considerable noise and spray, is calculated to frighten ordinarily gentle horses.
4. **In view of this fact it was the duty** of the water company to adopt such precautions and exercise such care in flushing its mains as an ordinarily discreet and prudent person would adopt and exercise under like circumstances for the protection and safety of those traveling upon the street.
5. **Ordinarily, it is a question of fact** in each case whether the precautions taken and the care exercised are sufficient to warn and protect travelers who are using ordinary care.
6. **Persons using a street which is in constant use,** and when their attention has not been called to any obstructions or perils thereon, have a right to presume that the street

is reasonably safe for ordinary travel. While they must act with reasonable care, they are not required to keep their eyes upon the pavement continuously, watching for obstructions or pitfalls.

7. **Upon examination of the testimony** it is held, that the question whether the plaintiff below was in the exercise of due care when her horse was frightened, and the injury inflicted, was fairly a question for the jury, and the finding in her favor upon the question is conclusive.

(November 6, 1897.)

ERROR to the District Court for Shawnee County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. D. W. Mulvane and N. H. Loomis, for plaintiff in error:

There was no negligence upon the part of defendant, and its demurrer to the evidence should have been sustained, and its request for an instruction in its favor should have been granted.

Morton v. Frankfort, 55 Me. 46; *Macomber v. Nichols*, 84 Mich. 212, 22 Am. Rep. 522; *Conan v. Muskegon R. Co.* 84 Mich. 588; *Sinclair v. Baltimore*, 59 Md. 592; *Welsh v. Wilson*, 101 N. Y. 254, 54 Am. Rep. 698; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804; *Agnew v. Corunna*, 55 Mich. 481, 54 Am. Rep. 838; *Loberg v. Amherst*, 87 Wis. 684; *O'Rourke v. Monroe*, 98 Mich. 520.

The plaintiff and her sister, who was driving, were both chargeable with contributory negligence.

Robb v. Connellsville, 187 Pa. 42; *Barnes v. Sowden*, 119 Pa. 58; *King v. Thompson*, 87 Pa. 365, 30 Am. Rep. 864; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804; *Butterfield v. Forrester*, 11 East, 60; *Barker v. Savage*, 45 N.

*Headnotes by JOHNSTON, J.

NOTE.—As to the liability for injuries caused by horses becoming frightened on a highway, see *Bowes v. Boston* (Mass.) 15 L. R. A. 365, and note; also *Kieffer v. Hummelstown* (Pa.) 17 L. R. A. 217. 39 L. R. A.

Y. 191, 6 Am. Rep. 66; *Plymouth v. Milner*, 117 Ind. 324; *Evans v. Adams Exp. Co.* 122 Ind. 362, 7 L. R. A. 678.

The court erred in instructing the jury that if plaintiff was chargeable with only slight negligence, and the defendant with gross negligence, a recovery could be had.

Kansas P. R. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 690; *Chicago, K. & W. R. Co. v. O'Connell*, 46 Kan. 581; *Atchison, T. & S. F. R. Co. v. Wells*, 56 Kan. 222; *Atchison, T. & S. F. R. Co. v. Winston*, 56 Kan. 456; *Atchison, T. & S. F. R. Co. v. Hague*, 54 Kan. 284.

Messrs. Waters & Waters, E. F. Hilton, and A. W. Dana, for defendant in error:

Even upon its own premises, the defendant would have been bound, in the flushing of its hydrant, to a due regard to the rights of others.

Central Branch Union P. R. Co. v. Henigh, 23 Kan. 358, 33 Am. Rep. 167; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 691, 31 Am. Rep. 203; *Culp v. Atchison & N. R. Co.* 17 Kan. 477.

And if of necessity, in flushing it, defendant had to use a portion of the highway, it was still bound to take such precautions as should prevent injury to the traveler using ordinary care.

2 Shearm. & Redf. Neg. §§ 342, 361; Ray, Negligence of Imposed Duties, 247.

No use of a public highway can be allowed except its use for travel and transportation.

Mikecell v. Durkee, 34 Kan. 509; *Smith v. Leavenworth*, 15 Kan. 81.

Negligence is not imputable to a person for failing to look for a danger when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended.

Brown v. Atchison, T. & S. F. R. Co. 31 Kan. 1; *Moulton v. Aldrich*, 28 Kan. 300; *Central Branch Union P. R. Co. v. Henigh*, 23 Kan. 358, 33 Am. Rep. 167; *Langan v. St. Louis, I. M. & S. R. Co.* 72 Mo. 892; *Gray v. Scott*, 66 Pa. 345, 5 Am. Rep. 371; *Fowler v. Baltimore & O. R. Co.* 18 W. Va. 579; *Dush v. Fitzhugh*, 2 Lea, 307; *Freer v. Cameron*, 4 Rich. L. 228, 55 Am. Dec. 672, and note; *Beach*, Contrib. Neg. 38, 39; *Deering*, Neg. 16; 2 Shearm. & Redf. Neg. 4th ed. § 90; 4 Am. & Eng. Enc. Law, pp. 34, 35, and note.

Even though these parties had not become educated into a belief as to the safety of the highway, through an experience that left no suspicion of danger, they still had a right, from the very fact of its being a public highway, to presume it to be safe, and to regulate their conduct upon such presumption.

McGuire v. Spence, 91 N. Y. 303, 43 Am. Rep. 663; *Wells v. Sibley*, 81 N. Y. S. R. 40; *Barry v. Terkildsen*, 72 Cal. 256; *Jennings v. Van Schaick*, 108 N. Y. 530; *Thompson v. Bridgewater*, 7 Pick. 189; *Gordon v. Richmond*, 83 Va. 438; *Davenport v. Ruckman*, 37 N. Y. 573; *Howard County Comrs. v. Legg*, 110 Ind. 483; *Koch v. Edgewater*, 14 Hun, 544; *Indianapolis v. Gaston*, 58 Ind. 225; *Pennsylvania Canal Co. v. Bentley*, 66 Pa. 33; *Smith v. Sherwood Twp.* 62 Mich. 159; *Brown v. Atchison, T. & S. F. R. Co.* 31 Kan. 1.

If gentle or ordinarily well-broken horses would naturally frighten at an unattended hydrant under full flow, the defendant, as matter 39 L. R. A.

of law, is charged with the duty of operating it with such reasonable care that horses will not frighten. If the defendant had no license to operate the hydrant in the street it was a nuisance and an illegal obstruction, and it was negligence to operate it at all.

Yates v. Warrenton, 84 Va. 387; *Cohen v. New York*, 118 N. Y. 532, 4 L. R. A. 406; *Clifford v. Dam*, 81 N. Y. 52.

If defendant had a license it was a license only to operate it in an ordinarily careful way, and the negligent operation of it cannot be justified by its license.

Bordentown & S. A. Turnp. Road v. Camden & A. R. & Transp. Co. 17 N. J. L. 814; *Moshier v. Utica & S. R. Co.* 8 Barb. 427.

There is not an element lacking to make plaintiffs conduct that of ordinary care as the jury found.

Salina v. Troesper, 27 Kan. 562.

In a legalized obstruction the thing must be done in a reasonably careful way and not in a negligent way.

Russell v. Columbia, 74 Mo. 490, 41 Am. Rep. 325; *Indianapolis v. Doherty*, 71 Ind. 5.

Plaintiff was not bound to look out for an obstruction that she did not know existed, and could not reasonably anticipate.

Moulton v. Aldrich, 28 Kan. 300; *Davenport v. Ruckman*, 37 N. Y. 568; *Barry v. Terkildsen*, 72 Cal. 244; *Kelly v. Blackstone*, 147 Mass. 448; *Indianapolis v. Gaston*, 58 Ind. 224; *Howard County Comrs. v. Legg*, 110 Ind. 479; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668.

Johnston, J., delivered the opinion of the court:

Near the noon hour on December 21, 1891, Kate J. Whiting, accompanied by her mother and sister, was driving upon one of the streets of Topeka, when their horse became frightened at the water spurting or flowing from an open hydrant in the street, and turned around suddenly, capsizing the buggy, and breaking Kate J. Whiting's arm, and otherwise seriously injuring her. The hydrant, which was upon a dead end of a main, was opened by an employee of the Topeka Water Company for the purpose of flushing the main, and relieving it of the stagnant and impure water therein. The plaintiff below alleged, and it is her contention, that the water company was culpably negligent in doing the flushing at the time when and in the manner in which it was done, and in failing to take due care for the protection and safety of those who were then passing along the street. The company, on the other hand, claims that, as the right to place hydrants upon the streets had been conferred on it, it was rightfully upon the street; that the flushing of the main at that point was necessary; and that it was done in the usual and ordinary way, and at a proper time. There was a further contention in favor of the company that the plaintiff below was negligent in failing to earlier observe the open hydrant, so that she could take greater care in controlling the horse, and avoiding accident or injury. It appears that the flow from the hydrant extended into the street for about 10 feet, and could have been seen by the Whitings, if their attention had been directed to it, for a distance of about 500 feet. Grace Whiting was driving

the horse, and neither she nor the plaintiff below noticed the flowing hydrant until they were within 100 feet of the same, and just at that time and place the horse discovered it, took fright, and overturned the buggy. The trial resulted in a verdict in favor of the plaintiff below in the sum of \$5,000, and the principal contention of the company is that the testimony was insufficient to support the verdict, or to show culpable negligence on the part of the company.

That the company had the right to place its hydrants in the streets, and to flush them, is conceded; but it had no license or right to flush them at such a time, or in such a manner, as to impede travel, or imperil the safety of those passing and repassing over the street. The license to flush carried with it the obligation to do so with reasonable care, and a due regard for the rights of others. The primary purpose of streets is use by the public for travel and transportation, and, if the water company unnecessarily interferes with that use, or negligently flushes its mains, thereby causing injury to others, it is liable for the consequences of such negligence. The testimony abundantly shows that an open, flowing hydrant is calculated to frighten horses of ordinary gentleness. Some of the witnesses said that the flowing water made a roaring noise; others, that it came with a great splash; while others said that there was a great deal of spray and froth. Experienced horsemen testified that gentle and well-broken horses were apt to be frightened at such objects; and it appears that, while the hydrant in question was only open for a few minutes, three driving horses were actually frightened by it. Whether an object is such as is calculated to frighten a gentle and roadworthy horse is usually a question of fact for the jury to determine. On these questions the findings of the jury are in favor of the defendant in error. The horse was gentle, the driver was experienced in handling horses, and the jury find that the manner in which the flushing was done had a peculiar tendency to frighten ordinarily gentle and well-broken horses. The water company was aware of this tendency, as the jury have found, and yet no precautions were taken to warn passers-by of the impending danger, or to protect them from injury. The employee who opened the hydrant was from 100 to 150 feet distant from the same when the horse took fright, and from his testimony it is evident that he was not endeavoring to warn or protect those passing along the street. It is said that the method of flushing in this instance was the usual and ordinary one which had been pursued, but this will not avail the company, as it cannot be sheltered from liability by frequent trespasses upon the rights of others, nor by the long continuance of negligent methods. What precautions should have been taken, and what degree of care should have been exercised? It is generally said that there should be that care and prudence which an ordinarily discreet and careful person would exercise under like circumstances. The protection and care which it is necessary to use in cases of this kind must be determined by the character of the risk and the nature of the threatened injury. It is claimed that the hydrants might have been

opened in the night-time, when few, if any, persons would be passing along the street; and it appears that sometimes the flushing was done at night. It also claimed that employees might have been stationed at the open hydrant to shut off the water on the approach of frightened horses, or one stationed on either side of it to warn travelers of the danger. A flag signal or other object of warning might have been placed on either side of the hydrant to call the attention of travelers to the open hydrant, and thus enable them to better control their horses, or to turn aside, and pass over another street. Still another method is suggested, which appears to be quite practicable, and that is, to conduct the water from the hydrant through a suitable hose. Just what method should have been employed, and what precautions should have been taken, we need not determine; but certainly they should be sufficient to accomplish the purpose. It is a question of fact in each case whether the precautions taken and the care exercised are sufficient to warn or protect travelers who are using ordinary care; and, under the testimony and findings of the jury, it must be held that the company failed to use that care which the law required of them.

We are not favorably impressed with the contention that the plaintiff below and her sister, Grace, were guilty of contributory negligence. It appears that they were riding in a single-seated buggy, and that Grace, who was seated between her mother and the plaintiff below, was driving. They were talking about Christmas presents, which they were intending to purchase. The plaintiff below and her mother were not giving special attention to the street, or keeping a lookout for obstructions. Grace, however, was giving ordinary attention, and, as the jury have found, was exercising reasonable care. Although they had driven into and through the street frequently, they had never seen an open, flowing hydrant, and were not anticipating any danger from that source. It is true that the open hydrant was within range of their vision if their attention had been called to it, and it was discernible before it was discovered by them. They were not, however, required to keep their eyes upon the pavement continuously looking for obstructions and pitfalls. It was a street which was in constant use, and over which they had passed almost daily without encountering such a danger. While they must still act with reasonable care, they had a right to presume, and to act on the presumption, that the street was reasonably safe for ordinary travel. They were not required to use the wisest precautions nor extraordinary care, but only such as persons of common prudence ordinarily exercise under similar circumstances. Grace did discover the danger when within about 100 feet of it, and it appears from the testimony that others whose horses were frightened did not observe the danger until they were quite close to it. Under these circumstances it certainly cannot be said, as a matter of law, that the plaintiff in error was guilty of contributory negligence. Whether she and her sister were in the exercise of ordinary care was fairly a question for the jury, and their finding in her favor is conclusive.

Complaint is made because the court, in its charge, remarked that slight negligence should not necessarily defeat a recovery by the plaintiff if the company was guilty of gross negligence. It is claimed that there was no averment or testimony which warranted the allusion to gross negligence. There is but little in the testimony tending to show gross negligence, but, as we have seen, the method used for flushing was calculated to frighten even gentle horses. The hydrant was opened in the daytime, when many persons were passing along the street. The jury found that the company was aware that the flowing hydrant had a tendency to frighten ordinarily gentle and well-broken horses, and yet, with this knowledge, it pursued the negligent method. Under the circumstances, we think the degree

of negligence was a matter for the determination of the jury, and we cannot say that prejudicial error was committed by reference to gross negligence. When the trial court came closer to the facts in the case, he instructed that the company was required to exercise ordinary care, and also that the plaintiff below was held to the exercise of the same degree of care, and the jury have practically found that she exercised ordinary care. There are some other criticisms of the charge of the court, and also of its rulings upon the testimony and findings, but we find nothing substantial in them.

The judgment of the District Court will therefore be affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

City of MAYSVILLE, *Appl.*,

v.

George T. WOOD *et al.*

(.....Ky.....)

A municipal corporation cannot hold the title as trustee on a dedication of land for a church lot or for religious purposes.

(November 12, 1897.)

APPEAL by complainant from a decree of the Circuit Court for Mason County refusing to declare void a judicial sale of certain property and to enjoin defendants from interfering therewith. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. N. Kehoe and W. H. Wadsworth for appellant.

Mr. E. L. Worthington, for appellees:

The state or any subdivision thereof may hold title to land in trust for such charitable purposes as are germane to the objects of its creation, such as for schools, poorhouses, hospitals.

The one thing under our system of government that the state and its subdivisions must keep their hands off is religion.

Const. § 5.

A grant, whether by deed, devise, or dedication to a municipal corporation in trust for religious purposes, is void, in so far as the title is attempted to be vested in the municipality.

2 Dill. Mun. Corp. § 578; *Jackson, Lynch, v. Hartwell*, 8 Johns. 422; *Franklin's Estate*, 150 Pa. 437.

Property may be effectually dedicated without the legal title to it being transferred to anybody, or any corporation. In such a case it remains in the dedicator and his heirs, in trust for the particular portion of the public for whose use the dedication was made; and they

are the proper parties to sue for any diversion of the dedicated property to other purposes.

Baptist Church v. Presbyterian Church, 18 B. Mon. 641.

White, J., delivered the opinion of the court.

This action was begun in the circuit court of Mason county by the appellant, the city of Maysville, against the appellees, George T. Wood and others, by which the appellant sought to have a sale by the court's commissioner, made under an *ex parte* proceeding on behalf of appellees, Woods and others, declared void, and a nullity, and to enjoin said appellees from in any way interfering with a certain lot of ground in the said city of Maysville, and also sought to perpetuate said ground for the purposes for which same had been dedicated years before. The petition states that in the year 1818 one Samuel January owned the land in that part of the city of Maysville, and laid same off into streets and alleys and lots, and sold lots according to said plat, and had same recorded. The place was then called "Limestone," but was not an incorporated town. On this plat there is a lot of ground—the land here in contest—marked "Meeting-House Square." This ground was never sold, and has never been built upon. Some time after the year 1818 the said town of Limestone was incorporated as East Maysville, and in 1858 the trustees of said town of East Maysville by a regular deed of conveyance executed and acknowledged, deeded or undertook to convey to Shackelford, Anderson, and Spencer, as trustees for the Christian or Reform Baptist Church, and to their successors in office, this said ground known as "Meeting-House Square," providing that said trustees should take possession of same and inclose and improve same in conformity to the true spirit and intention of the original donor; the said deed reciting that, as the said Samuel January and his wife and eight out of their nine children were or had been members of the Christian or Reform Baptist Church,

NOTE.—For municipal corporation as trustee of charity, see also *Dailey v. New Haven* (Conn.) 14 L. R. A. 66, and *note*.

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his charity—this lot—should be occupied by the church of which he and family were members. This deed was duly recorded in the clerk's office of Mason County. The petition also alleges that afterwards the said town of East Maysville became a part of the city of Maysville, and was such part at the filing of said petition. The petition states that at the September term, 1891, the appellees Woods, Williams, and Hall, acting as trustees of the religious denomination known as the "Maysville Christian Church," by an *ex parte* proceeding sought and obtained a decree of the circuit court of Mason county directing a sale of this lot known as "Meeting-House Square," and that under said decree the same was sold, and was bought by appellees Kackley and Trexel; that on the day of sale the said purchasers were notified of the fact that this appellant objected to the sale, and would contest the title of the purchaser; and that, on the report of sale being filed in said *ex parte* proceeding, this appellant appeared, and offered to file exceptions to the confirmation of the sale, but the court refused to permit same to be filed; and that appellant now brings this suit and asks that said sale be declared void, and that said lot of land be declared a dedication from said Samuel January to the use of the public to be used for the sole and only purpose of erecting thereon a house or houses of religious worship, which the petition alleges was the object and intention of said donor. The circuit court sustained a demurrer to this petition, and appellant, by leave, amended, and in the amendment the only change made is that it is alleged that said lot of land was by the said Samuel January dedicated to the public for use as a place of public resort or meetings of any and all legal character, and that the appellant had expended large sums of money on the streets adjacent to said property in grading and beautifying same. To this amendment, and the petition as amended, the court sustained a demurrer, and, appellant declining to plead further, the petition was dismissed, and from that action of the court this appeal is prosecuted.

The sole question to be determined on this appeal is, Did the petition of appellant, or the same as amended, present a cause of action in appellant? If that question be determined in the affirmative, the judgment of the circuit court should be reversed. In the amended petition filed the only change made from the original is the allegation that the city of Maysville had improved the streets around this "Meeting-House Square," and the allegation that in the dedication made by Samuel January the said donor intended "that said dedication was made for public meeting purposes generally, and intended as a place of public resort, where the

public generally had a right to and could meet and transact any and all matters affecting the public generally." This amendment only states the conclusion of the pleader as to the intention of the donor, as he therein pleads the dedication by the express words of the plat, and makes same a part thereof. It seems to us that this conclusion is not warranted by the plat, which is the only evidence of the dedication. On this plat there are three squares set apart called respectively "Public Square," "Seminary Square," and "Meeting-House Square." The two latter are situated adjacent, with an alley only between. The public square was some squares away, and in seems to us that the only meaning that could be attached to the words "Meeting-House Square" is that given to same in the original petition; *i. e.*, "for religious purposes and with a view of making it a place of religious instruction and worship." Now, this being the true meaning and intention of the donor in making the dedication, can the appellant, the city of Maysville, maintain this action? The question is not whether a lot may be dedicated for a church lot or for religious purposes—for it is now well settled that it can,—but whether a lot dedicated for religious or church purposes can be under the control of the municipal government, or whether the municipality can hold the title as trustee for the public so as to maintain an action for its preservation. In 2 Dill. Mun. Corp. § 573, the principle is stated, thus: "Municipal corporations cannot, for the same reasons applicable to ordinary corporations aggregate, hold lands in trust for any object or matter foreign to the purpose for which they are created, and in which they have no interest." To this principle we assent, and hold that municipal corporations cannot hold land in trust for religious purposes. It is clear that since the establishment of this government it has always been the intention of its citizens to entirely separate church and state. In all our constitutions such an intention is clearly expressed, and in the legal light of this history it is manifest that at no time was any municipal corporation ever organized in this state with any power or authority in matters affecting religious worship. We have said that land may be dedicated for church or religious purposes, but in no event can this dedication be to a municipal corporation as trustee. The duty of the corporation in regard to church property or religious worship is to guarantee the citizen his property or religious rights, and the free enjoyment of same. As the appellant, the city of Maysville, has no right of property in the lot in question,—all of which appears from the petition,—we are of opinion that the court did not err in sustaining the demurrers, and in dismissing the action, and the same is *affirmed*.

GEORGIA SUPREME COURT.

Sadie J. LUTHER, *Pff. in Err.*,
v.

J. N. CLAY, *Exr., etc.*, of Polly McWilliams.

(.....Ga.....)

- *1. Where, in the trial of a litigated case, a party procured from the presiding judge a ruling or decision that a given judgment was valid and legal, and, as a result, that case was adjudicated in favor of such party, he was, in subsequent litigation with the same adverse party, estopped from denying the validity or legality of the judgment in question.
2. Where a plaintiff had obtained a judgment, and, after the death of himself and his sole heir, an execution was issued in favor of the latter's legal representative, it was not, at the instance of a claimant of property levied on under such execution, a good ground of objection to its admissibility in evidence on the trial of the claim case that an order directing such execution to issue had been granted without service upon or notice to the defendant in the judgment.
3. An agreed statement of facts, upon which a case was tried by a judge without a jury, though not thereafter absolutely binding and conclusive upon the parties thereto in a jury trial of another case between them involving the same issues, was, in such trial, admissible in evidence at the instance of one against the other, subject to the latter's right to disprove, rebut, or explain any statement therein contained.
4. The rights of a mortgagee, who merely handed the mortgage to the mortgagor at his request, and for the purpose of inspection only, are in no way affected by the latter's secretly and fraudulently substituting in its place a copy thereof, abstracting the original, and forging upon it an entry of satisfaction, by means of which he procured the record of the mortgage to be canceled; it not appearing that the mortgagee, other than as above stated, reposed any trust or confidence in the mortgagor, or delegated to him the performance of any duty with respect to the mortgage, or had any reason to suspect the fraudulent design, or was negligent in not detecting the fraud at the time of its perpetration or thereafter. In such case, even a bona fide purchaser of the mortgaged premises, though he bought in the honest belief that the mortgage had been actually satisfied, took, nevertheless, subject to its lien.

(February 22, 1897.)

ERROR to the Superior Court of Fulton County to review a judgment overruling the claim of plaintiff in error to land upon which an execution had been levied to satisfy a judgment for the foreclosure of a mortgage which had been executed by R. H. Knapp to Robert McWilliams and the right to enforce which had finally vested in plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. Candler & Thomson for plaintiff in error.

*Headnotes by CORB, J.

NOTE.—For estoppel to deny forgery, see note to *Traders' Nat. Bank v. Rogers* (Mass.) 36 L. R. A. 599.

89 L. R. A.

Messrs. Hillyer, Alexander, & Lambdin and *J. N. Bateman*, for defendant in error:

The claimant is estopped from attacking the judgment in this case. There having been two foreclosures of the mortgage in question, and the execution which issued on the last foreclosure having been previously levied on the property claimed in this case, and upon trial of the claim case thus made on a previous occasion the claimant having had the court to dismiss the levy on the ground that there was outstanding a former valid judgment foreclosing the same mortgage, she is now estopped from denying the validity of said former judgment.

Ga. Civ. Code, § 5150; *Davis v. Wakelee*, 156 U. S. 680, 89 L. ed. 578; *Michels v. Olmstead*, 157 U. S. 198, 89 L. ed. 671; *Smith v. Sutton*, 74 Ga. 531; *Alexander v. Suthlive*, 3 Ga. 27; *Schnieitman v. Noble*, 75 Iowa, 120; *Knoop v. Kelsey*, 102 Mo. 291; *Crusselle v. Reinhardt*, 68 Ga. 619; *Miller v. Wilkins*, 79 Ga. 678.

The order of court directing execution to issue in the name of Clay, executor of Mrs. McWilliams, on the judgment rendered during the life of the original mortgagee, her husband, and in his favor (she being his sole heir and the defendant being nonresident), was valid, even though made without notice to the defendant.

Ga. Civ. Code, §§ 3855, 5030; *McElthaney v. Crawford*, 96 Ga. 174; *Towns v. Mathews*, 91 Ga. 546; *Rogers v. Truett*, 73 Ga. 386; *Johnson v. Champion*, 88 Ga. 527.

The agreed statement of facts used in evidence on the trial of a case between the same parties about the same subject-matter on a former occasion was competent evidence on the trial of this case.

Crusselle v. Reinhardt, 68 Ga. 619; *Anderson v. Clark*, 70 Ga. 362; *Cheney v. Selman*, 71 Ga. 384; *Miller v. Wilkins*, 79 Ga. 678; *Hyatt v. Burlington, C. R. & N. R. Co.* 68 Iowa, 662.

Neither forgery or theft can confer title even on an innocent purchaser.

Cole v. Levi, 44 Ga. 579; *Blaisdell v. Bohr*, 68 Ga. 56; *Kerr, Fraud & Mistake*, 315; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 2 L. R. A. 96; *Bangor Electric Light & Power Co. v. Robinson*, 52 Fed. Rep. 520.

The principle that where one of two innocent persons must suffer by the act of a third person he must bear the loss who put it in the power of such third person to do the wrong, is not applicable in this case,—because the act of Knapp in stealing the mortgage and forging the cancellation was not the proximate result of the mortgagee's allowing him to look at the mortgage for a few moments. These acts of Knapp were not an abuse of power, but were wholly unwarranted.

King v. Sparks, 77 Ga. 285; *Smith v. South Royallton Bank*, 32 Vt. 341, 76 Am. Dec. 182; *Angle v. Northwestern L. Ins. Co.* 92 U. S. 830, 23 L. ed. 556; *Western U. Teleg. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Wood v. Steele*, 78 U. S. 6 Wall. 80, 18 L. ed. 725.

No question of negligence or estoppel arose against the mortgagee on account of the way

in which the mortgagor obtained possession of the mortgage and procured its cancellation on the records.

McGinn v. Tobey, 62 Mich. 252; *Chandler v. White*, 84 Ill. 435; Bigelow, Estoppel, 5th ed. pp. 657, 658; *Meley v. Collins*, 41 Cal. 663, 10 Am. Rep. 279.

Registration of a forged instrument or release has no effect on the title; even an innocent purchaser takes the risk of forgeries.

Warvelle, Vendors, p. 536; *Haight v. Vallet*, 89 Cal. 245; *Reck v. Clapp*, 98 Pa. 581.

Where a release of a mortgage is a forgery, an innocent purchaser buys subject to the mortgage.

D'Wolf v. Haydn, 24 Ill. 525; *Lee v. Clark*, 89 Mo. 553; *Hagermann v. Sutton*, 91 Mo. 533; *Isaacs v. Skrainka*, 95 Mo. 521; *Smith v. Stark*, 3 Colo. App. 453.

Cobb, J., delivered the opinion of the court:

An execution in favor of J. N. Clay, executor of the will of Polly McWilliams, deceased, issued upon the foreclosure of a mortgage executed by R. H. Knapp to Robert McWilliams, was levied upon a certain described lot in the city of Atlanta, and a claim thereto was interposed by Mrs. Sadie J. Luther. On the trial a verdict in favor of the plaintiff in execution was directed by the court. The claimant made a motion for a new trial upon various grounds, and, the same having been overruled, she filed her bill of exceptions, alleging the refusal to grant a new trial as error.

The facts, as they appear upon the trial of the case, are as follows: On January 2, 1884, R. H. Knapp executed to Robert McWilliams a mortgage on certain land in the city of Atlanta to secure the payment of a note of even date. The mortgage was duly recorded on February 25, 1884, and McWilliams took the same to his home, inclosed in an envelop, and placed "it away among his papers or archives." In March, 1887, Knapp came to the house of McWilliams, who was a very old man (being nearly eighty years of age), and asked him whether the mortgage in question had ever been recorded, and requested that he be allowed to examine it, stating that he had made inquiry or examination at the record office, and had not found it. McWilliams took from his papers the envelop containing the mortgage, and handed it to Knapp, who received it, and was proceeding to examine, to see if the entry of recording was upon it, when McWilliams left Knapp for a few minutes. When he returned, Knapp handed him the envelop, stating that it was all right; and McWilliams, supposing that the mortgage was in it, placed it again among his papers, and did not examine it until some time afterwards, when Knapp had absconded. When McWilliams heard that Knapp had left the state, he went to his papers, to get the mortgage, and in the envelop which had contained the original he found only a copy. The only opportunity for the substitution of this copy was at the time above referred to. Upon investigation, the original mortgage was found on file in the clerk's office in Atlanta, and upon it was an entry of cancellation, purport-

ing to have been signed by McWilliams, which had been entered upon the record on the 30th day of March, 1887. The entry of cancellation upon the mortgage was a forgery. Mrs. Luther purchased a part of the land described in the mortgage to McWilliams for value after the filing of the forged cancellation with the clerk, and before Knapp ran away. The purchase was made without notice of the fraud perpetrated by Knapp in obtaining possession of the mortgage and causing a forged cancellation to be filed and entered on the record, and after an examination of the record, and upon the honest belief that the cancellation was authorized and genuine. On May 2, 1887, Robert McWilliams filed his petition in the ordinary form in the supreme court of Fulton county, praying for the foreclosure of the mortgage. A rule absolute was granted on March 31, 1888. In October, 1888, Robert McWilliams filed another petition for the foreclosure of the same mortgage. The petition, in addition to the usual recitals, contained the following: "Petitioner further shows that on or about the 24th day of March, 1887, the said R. H. Knapp fraudulently got possession of said mortgage, and entered upon its face a cancellation of the same, with authority to the clerk of the superior court of said county to make the record of said mortgage satisfied and settled; the same having been entered of record in Book 1, page 488, of the Records of Mortgages in said clerk's office aforesaid. Petitioner avers that he had no knowledge of said mortgage at the time it was canceled and delivered to the clerk aforesaid, being in the hands of said R. H. Knapp; that the entry of settlement made thereon was not made or signed by petitioner, nor was it made or signed by his authority, or anyone authorized by him, and that said entry of settlement and cancellation on said mortgage is a forgery." Pending the foreclosure an order was passed reciting the death of Robert McWilliams, leaving his wife, Polly McWilliams, as his sole heir; that she had paid all of his debts; and ordering her made party plaintiff in the case. Judgment of foreclosure was entered in the usual form, reciting the death of McWilliams and the making of parties. J. N. Clay, as executor of the will of Polly McWilliams, filed his petition to the superior court of Fulton county, reciting the first foreclosure of the mortgage above referred to, and that on November 7, 1894, after the death of Robert McWilliams, the clerk, by mistake, issued an execution upon such foreclosure. It was alleged that Polly McWilliams was the sole heir of Robert McWilliams, that she paid all of his debts, and that J. H. Clay was her executor. The prayer was that the execution issued in the name of Robert McWilliams be quashed, and that a new execution in favor of Clay, as executor of Polly McWilliams, be issued in lieu thereof. Service of this petition was not made upon the defendant or any other person. On December 21, 1894, in term, an order was passed quashing the execution and granting "leave to the petitioner to sue out a *fi. fa.* in his name as such executor." An execution was duly issued under this order.

1. The execution issued upon the second foreclosure above referred to was levied upon

the land embraced in the mortgage, and claims thereto were filed by Mrs. Luther and other parties to different parcels of the lot. The several claim cases were submitted to the judge without the intervention of a jury. Upon the trial, claimants objected to the introduction of the second foreclosure proceedings, and the execution issued thereon, on the ground that there had been a former foreclosure, and that the plaintiff had no right to proceed under the second foreclosure until the first foreclosure had been set aside. The court sustained the objection, ruled out the evidence, and dismissed the levies. The plaintiff in *fi. fa.* acquiesced in this decision, which had been made against him on the motion of the claimants, and proceeded to have the execution upon the first foreclosure issued under the circumstances above recited. When this execution was levied upon the mortgaged premises, claims were again interposed by the parties who were purchasers of the property. Upon the trial of the case now under consideration, in which Mrs. Luther was the claimant, objection was made to the introduction of the first foreclosure proceeding under which the levy in question was made, on the following grounds: First, because at the time of the foreclosure the original mortgage was not in the possession of the plaintiff, but was in the hands of the clerk of the court, marked "Canceled;" second, because the judgment of foreclosure was not made at the next term after that at which the rule *nisi* issued; third, because there was no legal service upon the mortgagor, in that he was not personally served, and there was no service by publication for four months next before the term at which said judgment was rendered. Under the view we take of the case, it is not necessary for these questions to be considered. Whether they would be well taken or not, if taken advantage of at the proper time, this claimant cannot now be heard to attack the regularity or validity of the first foreclosure. When this levy was made under the second foreclosure, it was upon motion of her counsel that such levy was held to be illegal, and dismissed. Having invoked a ruling from the court that the first foreclosure was valid, and this decision having been acquiesced in and acted upon by the party against whom it was made, she cannot be heard to attack the judgment which she obtained, and of which she took the benefit, although it may have been an erroneous one. In the case of *Davis v. Wakelee*, 156 U. S. 689, 39 L. ed. 584, where a question similar to the one under consideration was before the court, Mr. Justice Brown, in the opinion, says: "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." In the case of *Philadelphia, W. & B. R. Co. v. Howard*, 54 U. S. 18 How. 386, 387, 14 L. ed. 169, 170, in delivering the opinion of the court, Mr. Justice Curtis says: "The plaintiff was endeavoring to prove, that the paper declared on bore the corporate seal of the Wilmington & Susquehanna Railroad

Company. This being the fact to be proved, evidence that the corporation, through its counsel, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtedly admissible.

The defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil county court, by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, fraud in law if he does not know it to be true." We are clearly of the opinion that the defendant cannot be heard to say that what was asserted on a former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it.

2. When the first foreclosure was had, the clerk failed to issue an execution as required by law, and after the death of the plaintiff one was issued in his name. After the claimant had succeeded in obtaining a judgment of the court that the second foreclosure was invalid and the first foreclosure was valid, this execution, issued in the name of the deceased plaintiff, was, upon the *ex parte* application of the executor of the wife and sole heir of such plaintiff, quashed, and a new execution, in his name as executor, issued. No notice or service of this application was made upon the defendant in the judgment, or any other person. Certainly no one was entitled to notice except the defendant. Ought he to have been served? The issuing of an execution is a mere ministerial act, and, while it is not necessary to decide in this case whether an execution issued upon a judgment in favor of the plaintiff after his death is valid, still, if the legal representative of the owner of the judgment sees proper to have, by an order of court, an execution framed in accordance with the peculiar facts of the case at the time it is issued, we see no reason why notice should be given to the defendant of an intention to apply to the judge for an order to the clerk to do that which it would seem the clerk would have authority to do without such order. In any event, the claimant will not be heard to object to the execution on the ground that it was issued by the order of the judge without notice to the defendant, unless she alleged some valid reason why the judge should not have passed the order. No such reason appears in the present case. Civ. Code, §§ 3854, 3855.

8. When parties to a case agree to submit the same for decision upon an agreed statement of facts, and nothing is said in the agreement to the contrary, each party is absolutely bound and concluded by the statements of fact thus agreed to, so far as the trial in which the stipulation is made is concerned. Where the agreement is not expressly limited to use in the trial in which it is made, it is admissible in evidence as an admission in any other trial or litigation between the same parties, where the same issues are involved; but it is not abso-

lutely binding and conclusive upon the parties. When it is used against such parties in another trial of the same case, or in any other case, either party has the right to attack any statement of fact made therein either by disproving or rebutting the same or explaining it away. If parties enter into an agreed statement as to the facts in a case, and do not desire such statement to be used against them thereafter, they should distinctly stipulate to that effect. There being nothing in the agreed statement of facts which was introduced in this case to indicate that it was only intended to apply to the former litigation, the court did not err in allowing it to be introduced in evidence. Especially would this be no error in the present case, where there was no effort made to attack any statement of fact made therein, and the claimant's case absolutely depended upon facts set forth in the agreement.

4. The controlling question in this case arises out of the assignment of error which complains of the directing of a verdict for the plaintiff in execution. Was this erroneous under the facts as they appear in the record? The contest was between a mortgagee, who was the victim of a theft of the mortgage and a forced cancellation of the same, entered upon the record, and the purchaser, who bought in good faith, believing that the cancellation as it appeared of record was genuine and authorized. That title to property cannot be taken away by theft is a principle well settled. The seller can convey no greater title than he himself possesses. Civ. Code, § 3588; 2 Schouler, Pers. Prop. 3d ed. § 19. It is equally well settled that an owner of property will not be deprived of his right to the same by the commission of a forgery, and this is true even where the claimant under the forged instrument had no notice of the forgery, and honestly believed that it was valid and genuine. *Sampeyreac v. United States*, 32 U. S. 7 Pet. 222-240, 8 L. ed. 665-671; *Van Amringe v. Morton*, 4 Whart. 382, 34 Am. Dec. 517; *D'Wolf v. Hayden*, 24 Ill. 525; *Arrison v. Harmstead*, 2 Pa. 191; *Wallace v. Harmstad*, 44 Pa. 492; *Gray v. Jones*, 14 Fed. Rep. 83; *Reck v. Clapp*, 98 Pa. 581-586. In the case of *Western U. Teleg. Co. v. Dartmouth*, 97 U. S. 872, 24 L. ed. 1049, which was a suit in equity to compel the defendant, a corporation, to replace in the name of the appellants certain shares of capital stock alleged to have belonged to them, and to have been transferred, without their authority, on its books, to other parties, the transfer having been made under a forged power of attorney, Mr. Justice Field, speaking for the court, says: "In many instances they [officers of the corporation] may be misled without any fault of their own, just as the most careful person may sometimes be induced to purchase property from one who has no title, and who may perhaps have acquired its possession by force or larceny. Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner. The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires in the cases mentioned that the property wrongfully trans-

ferred or stolen should be restored to its rightful owner. The maintenance of that principle is essential to the peace and safety of society, and the insecurity which would follow any departure from it would cause greater injury than any which can fall, in case of unlawful appropriation of property, upon those who have been misled and defrauded."

As the conduct of Knapp included both a theft of a mortgage and a forgery of the cancellation, it appears clearly from the authorities cited that by these wrongful acts on his part McWilliams, the true owner of the mortgage, was not deprived of his right of property therein. But it is contended that McWilliams was negligent in allowing Knapp to have possession of the mortgage, and that by his negligence, together with a failure on his part to examine the envelop after Knapp had returned it to him, he put it in the power of Knapp to perpetrate this fraud upon Mrs. Luther. The doctrine that, where one of two innocent persons must suffer, the loss must fall upon him who has placed it in the power of the wrongdoer to bring about the injury, is invoked for the protection of the claimant in this case. This doctrine is not applicable to cases of this character. Under the facts as they appear in the record, there was no such trust or confidence placed by McWilliams in Knapp in allowing him, in his absence, to have possession of the papers, as would authorize the application of the doctrine above referred to. There is nothing in the evidence to indicate that McWilliams was put upon notice of any fraudulent intent on the part of Knapp. There was no relation, confidential or otherwise, between McWilliams and Knapp, which could mislead anyone into the belief that Knapp was authorized by McWilliams to cancel the mortgage, and have the cancellation entered upon the record. It is simply a case of one person surreptitiously getting into possession of the paper of another, and using it in an unauthorized and unwarranted way, and perpetrating fraud upon the owner of the paper. The fact that another innocent person is also the victim of the fraud is no reason why the owner should be deprived of his property. In no proper sense did the conduct of McWilliams place it in the power of Knapp to commit a fraud upon Mrs. Luther, so as to estop him from enforcing the lien of his mortgage upon the property. Even if the act of McWilliams in allowing Knapp to inspect the mortgage was negligence, it was only negligence in that broad unrestricted sense in which the term is often used, and was not that character of negligence which would be the foundation of an estoppel. *Wood v. Steele*, 73 U. S. 6 Wall. 80, 18 L. ed. 725; *King v. Sparks*, 77 Ga. 285.

In the case of *Bangor Electric Light & Power Co. v. Robinson*, 52 Fed. Rep. 520, where two persons, had a safety-deposit box in common, and one of them, without authority, abstracted therefrom a certificate of stock indorsed in blank, belonging to the other, and transferred it to an innocent purchaser for value, where the doctrine above referred to was invoked, Circuit Judge Putnam, in delivering the opinion of the court, says: "The contest at bar relates to the mere negligence of the original holder, and how far this may

prevent him from reclaiming his property. At first it occurred to the court that, inasmuch as Robinson had seen fit to leave this certificate in such condition as to indicate that somebody was authorized to acquire it and fill in the indorsement, he was barred; but the court is unable to find any authorities sustaining this suggestion, and is compelled to treat this certificate, indorsed in blank and stolen, as it would any other stolen property aside from strictly negotiable securities." In the case of *Bazendale v. Bennett*, L. R. 3 Q. B. Div. 525, the defendant gave H. his blank acceptance on a stamped paper, and authorized him to fill in his name as drawer and it was returned to the defendant with the blank unfilled, and was placed by him in an unlocked drawer of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. From this place it was lost or stolen, and came into possession of C, who, without authority, filled in the blank with his name; and in this condition the bill came into the hands of the plaintiff, who was a bona fide purchaser for value, without notice of the fraud. The defendant was held not liable on the bill. *Bramwell, L. J.*, in his opinion, says: "But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he stopped? What has he said or done contrary to the truth, or which should cause anyone to believe the truth to be other than it is? Is it not a rule that everyone has a right to suppose that a crime will not be committed and to act on that belief? Where is the limit if the defendant is estopped here?"

The defendant here has not voluntarily put into anyone's hands the means, or part of the means, for committing a crime. But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think that if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion." In the case of *Van Amring v. Morton*, 4 Whart. 382, 34 Am. Dec. 517, where it appeared that a deed executed and acknowledged by the grantor with a blank for the grantee's name was kept by the grantor locked in his drawer, and that he trusted his brother with the key, who, being induced by a third person, surreptitiously took out the deed, and filled up the

blank, and in this condition a bona fide purchaser for value accepted the deed from the grantee whose name was thus inserted, it was held that the purchaser stood in no better position than the fraudulent holder, and that no title passed. In the case of *Arri-son v. Harmstead*, 2 Pa. 191, where a conveyance reserving a rent in fee was altered by the insertion of material words after delivery by the agent of the grantor, it was held that the effect of the fraudulent alteration was to avoid the covenants reserving rents, and to preserve the fee simple to the innocent grantee discharged from the covenants in the deed, and that the innocent purchaser from the fraudulent grantor would not be entitled to collect the rents reserved. *Rogers, J.*, in the opinion, says: "It is said that Mrs. Lewis is a bona fide purchaser, without notice, and that the action may be sustained on that ground. But conceding that she is, her situation is no better than the fraudulent grantor's. Although the title of the grantor was, in its inception, good, it became absolutely void by matter *ex post facto*. At the time of the assignment, the title being avoided, the assignor had nothing to convey; of course nothing passed to the assignee. It may be, and perhaps is, a hard case. Fraud may be committed on an innocent purchaser, who may find it difficult to guard against imposition. This is conceded; but it is far better to encounter this risk, than to give the least countenance to any alteration whatever of a solemn instrument of writing, which would certainly be the result, if the guilty party could escape the consequences of his fraud by a transfer, real or pretended, to a person who might assume the garb of an innocent purchaser for a valuable consideration. We cannot lay too many restraints upon trick, artifice, and fraud." This is no doubt a hard case upon Mrs. Luther. To hold that she is protected would be equally hard upon the estate of McWilliams. Under the view we take of the matter, McWilliams was not guilty of such negligence as would deprive him of any of his legal rights. Indeed, he seems to have done no more than an ordinarily prudent person would have done under similar circumstances; and, following the authorities which seem to be conclusive upon the subject, we hold that the purchaser from Knapp, although she purchased in good faith, without notice of the fraud and forged cancellation by him, and in the honest belief that the forged cancellation was valid, took the property subject to the lien of the mortgage.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

John J. CARTER, *Appt.*,
v.
PRODUCERS' OIL COMPANY, Limited,
et al.

(182 Pa. 551.)

A rule of a partnership association excluding the right of a member to purchase additional shares and exercise the rights of a member in respect of them until he shall be re-elected to membership in respect of those shares, is valid under the act of June 26, 1885, providing that interests in such associations shall be personal estate and transferred under such rules and regulations as the associations prescribe.

(October 11, 1897.)

APPEAL by plaintiff from a decree of the Court of Common Pleas for Warren County in favor of defendants in a suit brought to compel defendants to transfer to plaintiff certain stock which he alleged belonged to him. *Affirmed.*

The facts are stated in the opinion of the lower court, which was as follows:

"I have found as a fact that the plaintiff is the bona fide owner of the stock which he seeks by his bill to have transferred to him. In so doing, I have negatived so much of paragraph c of the defendant's 5th proposition of law as avers that the plaintiff has not overcome the responsive denial of the answer as to the *bona fides* of his ownership. The proof of ownership offered by the plaintiff consisted of the production of the certificates issued by the Producers' Oil Company, Limited, evidence establishing their genuine character, and the due execution by the holders thereof of the transfers printed on the back of the certificates. To this was added his own testimony that he purchased the shares from the National Transit Company, and paid for the same in cash with his own money, and that no other person had any interest therein. He produced the check by which payment was made, the receipt of the National Transit Company, and other documents corroborating his testimony. This was certainly enough, in the absence of countervailing proof, to establish his unqualified ownership against the general and vague denial of the answer. It was declared in *Riegel v. American L. Ins. Co.* 153 Pa. 184 (the present chief justice delivering the opinion), that an averment of a fact in an answer which could not, in the nature of the case, be within the personal knowledge of him by whom it is sworn, and which is no more than 'an expression of his strong conviction of its existence, or what he deems an infallible deduction from the facts which were known to him,' is not responsive in the sense that it is evidence in his favor, so as to put the plaintiff upon proof by two witnesses. But it is unnecessary to in-

voke this principle, for the proof was abundant and practically uncontradicted.

"The proposition, however, raises the question of the good faith of the plaintiff in bringing this suit, and this is a broader question. It is said that he is 'shown to be acting in conspiracy with the Standard Oil Trust, in furtherance of its interests and purposes, and not for the welfare of the defendant.' The findings of fact establish that the plaintiff, in purchasing the stock in question, sought to obtain the control of the company; that his avowed purpose is to change its policy, so as to make it unobjectionable to the Standard Oil Trust, and so that it will be against the wishes and purposes of the other members of the company; also, that the Standard Trust is engaged in the same business as the defendant company, and that, at the time the National Transit Company sold the stock to the plaintiff, its agents received assurances, not amounting to an enforceable contract, that his action would be such as they desired. In my opinion, the motives and intentions of the persons composing the Producers' Oil Company, Limited, in organizing that company, are not material, except so far as they are expressed in the contract which they made with each other. We deal exclusively with the means which they adopted to carry out their purposes, whatever they were. A large amount of testimony was given relating to the preliminary steps looking towards the organization of the company, but, as it failed to show an agreement between the body of subscribers to the capital, we give it no consideration. Its only relevancy, if fully proved, would be to show that the purpose in the minds of the promoters was to deprive the Standard Trust of the Producers' oil, and to furnish a competitive market for the same. These purposes are not unlawful, and, if the means adopted were adequate, might be accomplished. But whether accomplished or not must depend upon the adequacy or inadequacy of the means.

"Nor can I see my way clear to refuse the relief prayed for on the ground that the plaintiff's motives and intentions are at variance with the purpose and wishes of his fellow members. If what he desires and intends to do as a member of the company, controlling a majority in value of interest of its capital, is legally and equitably his right, the court cannot refuse to aid him because it may think he ought not so to act; and, if it is not legally or equitably his right, the power of the court may be invoked to prevent his abuse of his power, but it does not justify refusing him such rights as he clearly has. The action of the court is not invoked by reason of any supposed equity in the plaintiff, but by reason of an alleged deprivation of his legal rights as a member of an association over which the court is given, by express statute, the supervision and control. Nor does the fact, which is apparent, that the policy which the plaintiff desires to adopt is

NOTE.—As to limited partnerships, see also the three cases immediately preceding this.

As to restrictions by by-laws on the right to transfer shares of a corporation, see *New England* 89 L. R. A.

Trust Co. v. Abbott (Mass.), 27 L. R. A. 271, and note; *Ireland v. Globe Milling & Reduction Co.* (R. I.), 29 L. R. A. 429; and *Victor G. Bloede Co. v. Bloede* (Md.), 33 L. R. A. 107.

also desirable to the Standard Oil Trust, in my mind furnish a reason for refusing relief, since we are compelled to believe that, although agreeing with that organization in opinion and policy, the plaintiff appears in his own right as a bona fide owner of shares.

"The cases cited for the defendant on this point are clearly distinguishable from the case in hand. *Baker's Appeal*, 108 Pa. 510, 56 Am. Rep. 231, and *Gould v. Head*, 41 Fed. Rep. 240, turned upon the fact that the plaintiff was not the real owner of the stock. *Kenton v. Union Pass. R. Co.* 54 Pa. 452, and *Camblos v. Philadelphia & R. R. Co.* 4 Brewst. (Pa.) 592, were cases in which it was attempted to control the action of a corporation by suits brought in the character of stockholders by persons who had bought stock for the mere purpose of bringing suit in the interest of outsiders. *Foll's Appeal*, 91 Pa. 484, 36 Am. Rep. 671, was a bill to compel specific performance of a contract to deliver stock in a national bank. The mere right of the plaintiff under his contract furnished no ground for the specific performance sought in equity, but the relief was demanded on the supposed equity arising from the fact that the plaintiff was already the owner of stock which with the stock contracted for would give him control of the bank, and enable him to elect himself and his friends directors and officers. Specific performance was refused, on the ground that the circumstances relied upon raised no equity in the plaintiff. It was said that the bank was a quasi-public corporation, and that it was against public policy that the control should be in the hands of a single individual. *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, was similar, but there was only a contract to permit the plaintiff to control the stock without actually buying it. None of the cases cited involved the right of a stockholder to be recognized as such; nor do any of them involve the denial of the ordinary equitable remedies to one standing wholly upon a legal right. On the other hand, the case of *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 287, seems to me fully in point upon the present question; and *Camden & A. R. Co. v. Atkins*, 37 N. J. Eq. 273, furnishes even a closer analogy. If the plaintiff is the bona fide owner of the interest in the capital of the defendant company which he claims, and is entitled, under the laws and rules of the company, to represent that interest in the meetings of its members, it cannot be that any legal or enforceable equitable right of the company can be infringed by requiring it to recognize his title. If, by his action or attempted action, the rights, legal or equitable, of any other member are infringed, that action may be restrained or controlled. But no other member of the company is before the court as a party in that character. The real contention of the defendants seems to be, not so much that the company will suffer if the relief prayed for be granted to the plaintiff, as that other members in their individual character as producers of oil will be injured; and this is a controversy which we are manifestly unable to determine in this proceeding.

"I turn, therefore, to the question raised upon the undisputed facts by the plaintiff's 1st, 2d, 3d, 4th, 5th, 7th, 8th, and 10th, and the 39 L. R. A.

defendant's 1st, 2d, 3d, and 4th, propositions of law. Under the law governing 'partnership associations' formed under the act of June 2, 1874, and its amendments, and the agreement, rules, and regulations governing the Producers' Oil Company, Limited, is a member of that company who purchases additional shares entitled to represent such additional interest in the capital in the meetings of the company, without being elected to membership in respect to such additional interest? The 4th section of the act of June 2, 1874, as amended by the act of 25th of June, 1885, provides as follows: 'Section 1. Interest in such partnership associations shall be personal estate, and may be transferred, given, bequeathed, distributed, sold, or assigned, under such rules and regulations as such partnership associations shall, from time to time, prescribe, by a vote of a majority of the members in number and value of their interests, and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy, or otherwise, which occurs in the absence of any rules and regulations of such associations regulating such transfer, and which is not followed by election to membership in such association, shall entitle the owner or transferee only to the value of the interest of the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisement shall be subject to the approval of said court.' The provisions of this section affecting the status of transferees of interests are only operative in the absence of rules and regulations prescribed by the association by a vote of a majority of the members in number and value of their interests. On June 5, 1894, over a year before the plaintiff purchased any of the shares involved in this controversy, the Producers' Oil Company, Limited, in the manner prescribed by the act, and also in conformity with the provision in the rules governing amendments thereto, adopted the amended rule set forth in the findings of fact. It is conceded that this rule, if valid, is conclusive against the rights claimed by the plaintiff in his bill. But it is contended that the rule is invalid, because no authority to make such a rule is given by the statute, because it is against the terms of the statute, and because it is in restraint of trade, in derogation of the rights of the members, and unreasonable in its provisions.

"The provision forbidding sales of shares except to a particular class of persons, and that requiring a member purchasing additional shares to be elected to membership in respect to such shares, are independent; either may stand though the other fall. The plaintiff, although he had never been lawfully expelled from membership in the P. O. A., was not at the time he purchased this stock qualified for membership therein by reason of his business

associations with the Standard Oil Trust. But the first clause of this rule deals with the right of a member to sell, and not to buy. No member of the company sold his stock to the plaintiff; nor are we able to determine whether or not the persons to whom they did sell were or were not qualified under this clause. We pass it by, therefore, to consider the last paragraph of the rule, which specifically covers the case in hand. Many cases are cited for the plaintiff to show that the right of a corporation to make by-laws for the regulation or transfers of stock does not include the right to place restrictions upon transfers. For the protection of the corporation, its stockholders and creditors, it may prescribe, by by-laws, the mode of transfer; but it cannot, without express authority in the charter, impose restrictions upon the free alienability of its shares, which is an incident of such property. The argument, however, fails when it is attempted to apply it to a 'partnership association;' for it is quite clear that the rules and regulations authorized by the act of 1885 are intended to govern more than the mere mode of transferring shares, and to embrace the status of a transferee in respect to the association. The language is: 'Interests may be transferred, given, bequeathed, distributed, sold, or assigned under such rules and regulations as such partnership association shall from time to time prescribe.' And as the act prescribes, not the manner of registering transfers, but the status of a transferee who has become the owner of an interest in the capital by gift, bequest, distribution, sale, assignment, or other mode of transfer, only in the absence of rules and regulations, it is necessarily implied that these rules and regulations, which are to take the place of the statutory provisions, may cover the same subject; and this is precisely what the first sentence of this section declares. If the association may not make rules and regulations covering the status of transferees as well as the manner of transfer, it follows that, in every association having rules and regulations governing the formal transfer of interests, any transferee becomes immediately a member without election, for the statute operates only in the absence of rules and regulations. Every association, if this be a correct construction of the law, will be required to choose between doing business without any rules at all governing the transfer of shares and the loss of all control over the membership through the adoption of such rules.

"It is quite too clear for argument that the power of partnership associations under the statute to make rules and regulations extends to the general subject of the status of transferees, and the manner in which they may become members, as well as to the mode of transfer; and the question is therefore narrowed to this: Is the provision requiring members of the company purchasing additional shares to be re-elected in respect thereto within this general power, or is it void as against the spirit and intention of the law? Whether the partnership association ought to be classified by the professor of legal science as a species of the genus corporation, or the genus partnership, or whether it should be set apart as a new genus, seems to me unimportant. If a

corporation, it is so peculiar in its features that the general law of corporations cannot be applied to it without important modifications; if a partnership, it so differs from the common type that the general law of partnerships is but slightly applicable. Both the law of corporations and the law of partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration. In the present case we derive little assistance from either. The general rule of corporations invoked by the plaintiff has been laid down to meet the conditions existing in corporations in which the ownership of stock carries with it *ipso facto* membership in the corporate body. If there are corporations in which the conditions are different, it is manifest that the rule is inapplicable to the extent of the difference.

"The *delectus personarum*, as it exists in partnerships, grows out of the contract of the partners to be associated with each other, and with no others. The reason for it is found in the right of each partner to act as agent for all the others, the liability of each for the partnership obligations, and the right of each to contribution from the others. None of these conditions exist in partnership associations. The case of a transfer of interest from one partner to another is not analogous to the case in hand, for the dissolution is caused in such a case, not by the addition to the interest of one of the partners, which adds nothing to his power, but by the dropping out of the assigning partner, whose continuance is necessary to the partnership existence. A partnership association differs from the common type of partnerships in that the members vote and do not act with the powers of partners, and in that they are subjected to no joint liability. It differs from the common type of corporations in that the members have a right to admit or refuse membership in the company to the transferee of the interest, as well as in some other particulars. In determining whether the act of 1885 should be strictly construed against the power of the association to limit the right of one of its members to acquire control by increasing his interest, we ought to look to the spirit and intention of the act. The peculiar form of *delectus personarum*, so carefully guarded in partnership associations, cannot be based upon the same consideration which gives rise to the common form in partnerships, for there is no mutual agency, no joint liability. Looking at the general scheme of the act, it seems apparent that it was intended to enable persons desiring to combine their capital in any business enterprise to do so without incurring, on the one hand, the general liability of partners, or, on the other, the risk of having the business taken out of the control of those in whom it was originally placed without their consent, which exists in ordinary corporations. If this be true, it is manifest that transfers of interests from one member to another are within the mischief sought to be prevented, for the member's vote by value of interest as well as number upon most important questions.

"If the case of a member transferee is not included within the provisions of the statute, it is not because the letter of the law does not

include it, but because the court is moved by the context to limit its literal meaning. 'Interests,' the act declares, without indicating any exception, 'may be transferred . . . under such rules and regulations as such partnership association shall from time to time prescribe,' etc. 'Any change of ownership which occurs in the absence of any rules and regulations of such associations regulating such transfer . . . shall entitle the owner or transferee,' etc. But the term 'election to membership' is not happily chosen to express the consent of the members to the acquisition of a greater interest by one of their number. One who is already a member cannot be, in any proper sense of the term, elected to membership. The broad and general terms used in the act, together with the use of this phrase, inappropriate to the case of transfer between members, indicate that the particular case of such transfer was not present in the legislative mind. Had it been, the general terms would have been modified if it were intended to exclude it, and some modification of the term 'elected to membership' would have been made had the intention been specifically to include a transfer to one already a member. We can only ascertain the legislative will in a particular case by determining whether or not it falls within the general intention expressed in the law. And, while my mind inclines to the belief that such a case was not within the intention of the legislature, it is not without much doubt and some hesitation that I so decide. But it seems clear to me that the power of the association to regulate the status of transferees of interests in capital is not limited by the regulations prescribed by the act. In conferring upon the association authority to legislate for itself, it is implied that it may make rules which differ from those prescribed in the act. If the case of a transfer to one already in the membership be not included in the terms of the act, it is, at most, an omitted case, which the association itself may provide for. The rule adopted by the defendant is not against the terms of the act, for, at best, the act does not cover it at all. Nor is it unreasonable, for it is in line and harmony with the general spirit and intention of the act. Nor does it infringe any right of the members, for the owners of the shares may still freely sell them to whom they please, the only difference being that a sale to a member is put in the same category as a sale to other persons. No member can claim a vested right to a greater voting power than was given him by the articles of association. The full value of the interest is guaranteed to the purchaser in any event.

"Thus far we have considered the rules and regulations of the defendant as mere by-laws, imposed by a majority under the authority of the statute. The original rules were, however, agreed to and signed by all the members at the time the company was organized, and as part of its organization. They have therefore the effect of articles of association additional to the certificate filed as required by law. The plaintiff had notice of them, both actual and constructive. He is therefore bound by this agreement, and one of its provisions is that it may be altered by a vote of the majority of the

members in number and value of their interests. It was so altered long prior to his purchase of the shares in question, no vote being against it except his own. Conceding that the authority thus given to alter cannot be carried so far as to permit a change in the general scope of the instrument; that no change can be made against the mandate of positive law, or contrary to the certificate of association, or which is unreasonable or oppressive,—still, I think, this alteration is not an undue exercise of the power, for the same reasons which have been already adverted to, and which, considered in this aspect, are still more forcible and cogent.

"Being of opinion that the last clause of rule 25, which excludes the plaintiff from participation in the business and profits of the defendant in respect to the shares purchased by him until he shall be elected to membership in respect to such shares by the majority of the members in number and value of their interests, is valid, it follows that he is not entitled to the relief prayed for in his bill. His counsel in the argument distinctly disclaimed any desire to have the stock transferred upon the books of the company unless such transfer carried with it the right to vote and participate in the profits; and hence we do not consider the question whether so much of the relief prayed for might not properly be granted on the facts disclosed.

"It remains to consider the case for affirmative relief presented by the defendants upon their cross bill. At the time the plaintiff presented the certificates for 18,013 shares to the secretary of the company, and had new certificates issued to himself for the same, he was not in fact the owner of the interest represented by the certificates. He, in effect, represented himself to be owner by presenting them indorsed as they were in the usual form, and demanding the transfer to himself. But he is not the owner of the same shares by a subsequent purchase. And the National Transit Company, which was at the time owner, is clearly estopped by its own acts from asserting the ownership as against the defendant. We are required to note a difference here between partnership associations and ordinary corporations. In the latter the transfer of stock on the books invests the transferee with the full rights of a stockholder, including the right to vote the stock and to receive the dividends. In the former this right does not follow the transfer on the books, which is a merely ministerial act of an officer or clerk, but is obtained only by election to membership by the members of the company. We have held in the principal case that the plaintiff cannot participate in the business or profits of the defendant company as to purchased stock without re-election, and it follows that no clerk or officer can confer that right upon him by permitting a transfer upon the books. Apart from membership, and pending the appraisal of the value of the interest, or the sale of it to another who may be acceptable to the remaining members, it may be important, and it seems to me it is quite proper, that the interest should stand on the books of the company in the name of the true owner, both for its protection and his own. If we now grant the relief prayed for in the

cross bill, we shall restore the interest owned by the plaintiff on the books of the company to the names of the original members, and invest them with an apparent right to dividends and participation in the business to which they are not entitled, and which might be an injury to all concerned. The books of the company defendant do not show that the plaintiff is entitled to vote or participate in profits in respect to these shares, and it can therefore suffer no injury from an unauthorized transfer. Let a decree be drawn dismissing both the plaintiff's bill and the cross bill filed by the defendant, at the costs of the plaintiff; and, at the time of settling the decree, the court will hear either party upon any exceptions to the findings of fact or of law which they may file, respectively, within ten days after notice of the filing of this opinion."

Messrs. Knox & Reed, Hinckley & Rice, Weil & Thorp, and Roberts & Carter, for appellant:

The Producers' Oil Company, Limited, has no power or authority to adopt by-laws.

If such corporations are not quasi corporations, but unincorporated associations, with all the powers and liabilities of general partnerships, except as modified by statute or the articles of association, they then have no power to adopt by-laws unless given by statute or by the articles of association. The latter are silent on the subject, and no statute gave such authority until the act of June 9, 1895.

8 Am. & Eng. Enc. Law, N. S. p. 1060; *Livingston v. Lynch*, 4 Johns. Ch. 578; *Thomas v. Ellmaker*, 1 Pars. Sel. Eq. Cas. 98; Niblack, Mut. Ben. Soc. § 16; 1 Morawetz, Priv. Corp. § 491.

If such associations are quasi corporations, with all the powers incidental thereto, except as modified by statute or the articles of association, then they have the power to adopt by-laws, and of course are governed by the laws relating to corporations with reference to such by-laws, which laws declare this by-law to be void.

These associations are quasi corporations.

Oak Ridge Coal Co. v. Rogers, 108 Pa. 147; *Stevens v. Philadelphia Ball-Club*, 142 Pa. 52, 11 L. R. A. 860; *Patterson v. Tidewater Pipe Co.* 12 W. N. C. 452; *Hill v. Steller*, 127 Pa. 161; *Whitney v. Backus*, 146 Pa. 29; *Brier Hill Coal & I. Co. v. Atlas Works*, 146 Pa. 290; *Laftin & R. Powder Co. v. Steyler*, 146 Pa. 484, 14 L. R. A. 690; *Billington v. Gautier Steel Co.* 19 W. N. C. 839; *Com. v. Sandy Lick Gas, Coal, & Coke Co.* 16 Phila. 599.

Associations with the powers of the Producers' Oil Company, Limited, are held to be corporations by the Federal Supreme Court.

Liverpool & L. Life & F. Ins. Co. v. Oliver, 77 U. S. 10 Wall. 566, 19 L. ed. 1029.

As corporations, whether quasi or in fact, no good reason can be shown why they should not be governed by the analogies of corporation law, by whatever name the association may be called.

Waterbury v. Merchants' Union Exp. Co. 50 Barb. 157; *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237.

No such by-law can be adopted by any corporation without express authority of the clear-
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est and most unequivocal kind, and such authority must be contained in the charter or the statute.

Re Klaus, 67 Wis. 401; 1 Cook, Stock & Stockholders, § 408; *Bank of Attica v. Manufacturers' & T. Bank*, 20 N. Y. 501; *Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co.* 118 Mo. 447.

There is a distinction between "by-laws" and "rules and regulations" recognized by all law-writers. By-laws are intended to control the action of the corporation. "Rules and regulations" are intended to control the conduct of third persons dealing with the corporation.

Waterman, Corp. § 77; 1 Morawetz, Corp. § 501; Boisot, By-Laws of Priv. Corp. § 5; 1 Thomp. Corp. § 937; 1 Am. & Eng. Enc. Law, p. 705.

The words of both the act of 1874 and 1885 apply, not to restrictions upon transfer, but to the formal requisites to make a transfer effectual, to the formalities of transfer.

28 Am. & Eng. Enc. Law, p. 64, citing *Chouteau Spring Co. v. Harris*, 20 Mo. 882; *Peckheimer v. National Exch. Bank*, 79 Va. 80; *Johnston v. Laftin*, 108 U. S. 800, 26 L. ed. 582; *Moore v. Bank of Commerce*, 52 Mo. 377; *Com. v. Gill*, 8 Whart. 228; *Victor G. Bloede Co. v. Bloede*, 84 Md. 129, 83 L. R. A. 107; *Driscoll v. West, B. & O. Mfg. Co.* 4 Jones & S. 488, 59 N. Y. 96; *Bank of Atchison County v. Durfee*, 118 Mo. 481.

Only one restriction is anywhere provided for by the act, that is, election to membership of transferees not already members, in the absence of rules and regulations doing away with such election, and therefore no other restriction can be added. By implication all other restrictions are excluded.

Coast-Line R. Co. v. Savannah, 80 Fed. Rep. 649; *Diligent Fire Co. v. Com.* 75 Pa. 291; *Raynor v. Beatty*, 9 W. N. C. 201.

Having authorized the adoption of rules and regulations for some purposes, power to adopt them for other purposes is excluded.

Ang. & A. Corp. § 875; *Child v. Hudson Bay Co.* 2 P. Wms. 207; *Ireland v. Globe Milling & Reduction Co.* 19 R. I. —, 29 L. R. A. 429.

The alleged by-law or rule and regulation is void, because not within the scope of subjects to be controlled by by-laws or rules or regulations.

Taylor, Priv. Corp. § 7; 1 Bl. Com. 475; Waterman, Corp. §§ 72, 88; Ang. & A. Corp. §§ 325, 345; 1 Morawetz, Priv. Corp. § 491; Cook, Stock & Stockholders, § 700A; 1 Thomp. Corp. § 985; 2 Kyd, Corp. 122; *Taylor v. Griswold*, 14 N. J. L. 227, 27 Am. Dec. 83.

The right to vote upon stock cannot be denied or abridged because of alleged wrongful motives influencing the holder in buying and holding the stock.

1 Cook, Stock & Stockholders, § 618, citing *Pender v. Lushington*, L. R. 6 Ch. Div. 70; *Re Stranton, Iron & S. Co.* L. R. 16 Eq. 859; *People, Barker, v. Kip*, 4 Cow. 388, note; *State v. Smith*, 48 Vt. 290; *Moffatt v. Farquhar*, L. R. 7 Ch. Div. 591; *Camden & A. R. Co. v. Elkins*, 37 N. J. Eq. 273; *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 237; *Farmers' Loan & T. Co. v. New York & N. R. Co.* 150 N. Y. 410, 34 L. R. A. 76.

Messrs. Watson & McCleave and Samuel S. Mehard, for appellees:

The plaintiff cannot extend his membership in the defendant company from the one three-hundredth part to over a majority of its capital, without a novation of the contract under which the company was formed, and this can be effected only by the mutual consent of the parties.

The defendant company was formed by the contract of its members.

The relation of members in such an association results entirely from the contract entered into by them in forming the company, whether it be viewed from the standpoint of a partnership or from that of a corporation.

Lindley, Partn. *1; 1 Morawetz, Priv. Corp. 1st ed. §§ 2, 3, 12, 27-31, 126-135.

The contract whereby the defendant company was formed cannot be changed save by the mutual consent of the parties.

Stone v. Miller, 16 Pa. 450; *Potter v. McCoy*, 26 Pa. 458; *Hartley v. Kirlin*, 45 Pa. 49; *Kemmerer's Appeal*, 102 Pa. 558; *Walstrom v. Hopkins*, 103 Pa. 118; 1 Parsons, Contr. *220; 1 Morawetz, Priv. Corp. 1st ed. § 321.

The contention of the plaintiff involves a material change in the contract under which the defendant company was formed.

The statutes under which the defendant company was organized do not involve consent to an extension of membership without further action of the parties.

Eliot v. Himrod, 108 Pa. 569.

Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.

Bl. Com. *59; Endlich, Interpretation of Statutes, § 4; Black, Interpretation of Laws, 35; *Bradbury v. Wagenhorst*, 54 Pa. 180; *Allegheny County v. Gibson*, 90 Pa. 897, 35 Am. Rep. 670; *Pittsburgh v. Kalchthaler*, 114 Pa. 547.

A construction which would leave without effect any part of the language of the act is a most improbable one.

Endlich, Interpretation of Statutes, 23; *Com. v. Shopp*, 1 Woodw. Dec. 128; *Packer v. Sunbury & E. R. Co.* 19 Pa. 211; *Howard Assn.'s Appeal*, 70 Pa. 344.

The spirit and reason of the statutes likewise forbid an extension of plaintiff's membership without the consent of his fellows.

1 Bl. Com. *61.

If the meaning of the statute is doubtful as to rule governing transfers to members, the construction must follow the common law, which requires the express consent of all the partners to an enlargement of a partner's membership.

Black, Interpretation of Laws, 110; *Arthur v. Bokenham*, 11 Mod. 148; *Doner v. Stauffer*, 1 Penr. & W. 198, 21 Am. Rep. 370; *Baker's Appeal*, 21 Pa. 76; *Cooper's Appeal*, 26 Pa. 262; *Vandike's Appeal*, 57 Pa. 9; Parsons, Partn. §§ 106, 108; *Cochran v. Perry*, 8 Watts & S. 262.

The rules of the common law have been applied to partnership associations formed under the act in question, except where expressly changed by the provisions of the act by this court in numerous cases.

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Maloney v. Bruce, 94 Pa. 249; *Hill v. Stetler*, 127 Pa. 145; *Vanhorn v. Corcoran*, 127 Pa. 255, 4 L. R. A. 886; *Lennig v. Penn Morocco Co.* 16 W. N. C. 114; *Crowther v. Upland Industrial Co-Op. Assn.* 1 Del. Co. Rep. 264; *Small's Estate*, 151 Pa. 5; *Eliot v. Himrod*, 108 Pa. 569; *Ames v. Downing*, 1 Bradf. 321; *Jaffe v. Krum*, 88 Mo. 669; *Allen v. Long*, 80 Tex. 261; *Imperial Refining Co. v. Wyman*, 38 Fed. Rep. 574, 3 L. R. A. 508; *Carnegie v. Hulbert*, 10 U. S. App. 454, 58 Fed. Rep. 10, 8 C. C. A. 391; *Chapman v. Barney*, 129 U. S. 682, 32 L. ed. 801; *Robbins v. Butler*, 24 Ill. 387; *Dennis v. Kennedy*, 19 Barb. 517; *Taft v. Ward*, 106 Mass. 518.

The rule was authorized by the statute.

Lafin & R. Powder Co. v. Steytler, 146 Pa. 484, 14 L. R. A. 690; Ang. & A. Corp. 11th ed. § 342.

The purpose of the plaintiff to gain control of the defendant company, and to so manage its affairs as to supply the Producers' oil to the Standard Oil Company is wrongful, and aid will not be given by a court of equity to enable him to carry it out.

Forrest v. Manchester, S. & L. R. Co. 4 De G. F. & J. 126; *Rice v. Rockefeller*, 134 N. Y. 174, 17 L. R. A. 287; *Foll's Appeal*, 91 Pa. 484, 36 Am. Rep. 671.

McCullum, J., delivered the opinion of the court:

We think the court below entered the proper decree in this case. The plaintiff filed his bill to compel the defendant company to concede to him the rights of a member as to shares of which he was merely a transferee. The shares so held by him, together with the shares he subscribed for, represented a clear majority of the capital of the company. On payment of his subscription in accordance with its terms, he was duly elected to membership in the company, and he then received from it a certificate for 800 shares of its capital, of the par value of \$10 each, that being the number of shares for which he had subscribed. Afterwards, and prior to the institution of this suit, he purchased from the National Transit Company 29,764 shares, and from other persons 181 shares, making in all 29,875 shares in addition to his original 800 shares. The shares thus purchased by him were shares which members of the defendant company had sold, and which the parties from whom he had purchased had bought. The National Transit Company was then one of the companies affiliated with the Standard Oil Company and controlled by what is known as the "Standard Oil Trust," in which the plaintiff was a shareholder at the time of his purchase. His avowed purpose in making the purchases mentioned was to obtain control of the defendant company, and change its policy from what he characterized as "gad fly" competition with the Standard to such competition as he believed would be unobjectionable to it. There is reason to believe that he could not have obtained the stock but for the assurance that he would use the power he supposed it would give him to accomplish his declared purpose. While it is probable the accomplishment of his purpose would be advantageous to him, it is very clear that the other members of the defendant company regarded his scheme as

fatal, if carried out, to the principal object intended to be achieved by the organization of the company, and as destructive of their interests in it. The principal and controlling question raised by the bill and answer is whether the plaintiff is entitled, by reason of his election to membership in the defendant company, on payment of his subscription, to have transferred to him on the books of the company and to vote the shares purchased as above stated. The plaintiff contends that he is, and the defendant company contends that he is not. The arguments in support of and against their respective contentions are exhaustive and able, but an extended review of them is not deemed essential to a proper determination of the question we have to consider.

It is conceded that the plaintiff has no right to vote the shares he purchased as above stated if the rule of June 5, 1894, is valid. It appears from the tenth finding of fact that the rule was adopted by the vote of a majority in number and value of interests of the members of the defendant company. To determine whether it was in the power of the company to establish the rule, we must look to the statutes under which it was organized. As bearing on this question it is sufficient to refer to the act of June 25, 1885 (Pub. Laws, 182), which is amendatory of the 4th section of the act of June 2, 1874 (Pub. Laws, 271). It is as follows: "Interests in such partnership associations shall be personal estate, and may be transferred, given, bequeathed, distributed, sold, or assigned under such rules and regulations as such partnership associations shall from time to time prescribe by a vote of the majority of the members in number and value of their interests; and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy, or otherwise, which occurs in the absence of any rules and regulations of such associations regulating such transfer, and which is not followed by election to membership in such association, shall entitle the owner or transferee only to the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement, at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisal shall be subject to the approval

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of said court." It will be observed that the statute makes no distinction between a transferee who is a member of the partnership association and a transferee who is not a member of it. The language of the statute fairly excludes such distinction, and there is nothing in the articles of association which warrants it. It is a distinction which, if made, would enable a member of the association to obtain a controlling interest in it by a purchase of a sufficient number of the shares to defeat the controlling purpose of its organization, and to impair, if not absolutely destroy, the interests of the other members. If the legislature had intended to make this distinction, it could and presumably would have done so in a few words. The absence of anything in the statute indicative of a purpose to make it tends to confirm the view that members who purchase shares sustain the same relation to them as purchasers who are not members. Of what avail is it to deny to a stranger who buys shares of the capital of the association the right to vote them without its consent, manifested by his election to membership therein, while a member of the association who desires to obtain control of it, to defeat the purpose for which it was organized, and to change its policy, in the interest of a rival company, is allowed to vote without its consent the shares he has purchased? It seems to us that a construction of the statute which admits of such results is opposed to the spirit as well as the letter of it, and that so much of the rule of June 5, 1894, as puts the member who purchases shares on the same footing with respect to them as the strangers who purchase shares is in clear accord with and authorized by it. We cannot assent to the plaintiff's claim that the defendant company is a corporation, and restricted in the adoption of by-laws, rules, and regulations for its government to such as it is within the power of the latter to prescribe. It may be conceded that the defendant company has some of the qualities of a corporation, but it is nevertheless a partnership association, governed by the statutes and articles under which it was organized, and the rules and regulations it may prescribe in execution of the powers with which the statutes have invested it. We concur in, and need not add anything to, what the learned judge of the court below has so well said on this point, and in respect to the agreement or understanding between the parties when the company was organized. In accordance with the views expressed in this opinion, we overrule the specifications of error.

Decree affirmed and appeal dismissed, at the cost of the appellant.

WASHINGTON SUPREME COURT.

H. M. BENTON *et al.*, *Respts.*,
v.
Philip A. JOHNCOX *et al.*, *Appts.*
(17 Wash. 277.)

1. **The common-law rights of riparian proprietors** are incident to the estate of settlers upon public lands who acquire title from the government as against subsequent appropriators of the waters.
2. **The riparian rights of a patentee of the government** attach by relation at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land.
3. **Existing riparian rights** are not affected by Laws 1873, p. 520, regulating irrigation and water rights.
4. **The doctrine of appropriation of water** applies only to public lands, and not to lands which have become private property.
5. **The common-law doctrine of riparian rights** is not inapplicable to an arid region in which irrigation is necessary to make the land productive.

(July 2, 1897.)

APPEAL by defendants from a judgment of the Superior Court for Yakima County in favor of plaintiffs in an action brought to enjoin defendants from interfering with plaintiffs' alleged rights in a stream flowing through their property. *Affirmed.*

The facts are stated in the opinion.

Messrs. James B. Reavis and Ira P. Englehart, for appellants:

This case is one of first impression in the appellate court.

In *Thorpe v. Tenem Ditch Co.* 1 Wash. 566, the court says: "It is the opinion of the court that the prior appropriator of the flow of any water over the public lands of the United States has a vested right therein."

In *Ellis v. Pomeroy Improv. Co.* 1 Wash. 572, it was there decided: "Watercourses on the public lands of the United States are subject to appropriation by use in accordance with local customs and laws; and vested rights so acquired cannot be divested by relation back of a patent granted."

In *Geddis v. Parrish*, 1 Wash. 587, it was held: "Where one has appropriated the waters of a stream flowing across public lands, by erecting on his own land a ditch, one acquiring title from the United States takes subject to such appropriation."

Cook v. Hewitt, 4 Wash. 749, and *Rigney v. Tacoma Light & W. Co.* 9 Wash. 576, 26 L. R. A. 425, are not from the arid district.

In *Isaacs v. Barber*, 10 Wash. 124, 30 L. R. A. 665, it was held that "the right to prior appropriation of water upon the public domain for mining and other beneficial purposes has been established by a custom so universal that courts must take judicial notice thereof."

NOTE.—For rights of prior appropriators of water as affecting the subject of riparian rights, see *Isaacs v. Barber* (Wash.) 30 L. R. A. 665, and *note*.

89 L. R. A.

The common-law right to running water is that every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration.

3 Kent, Com. *489; *M'Calmont v. Whitaker*, 8 Rawle, 84, 23 Am. Dec. 102; *Brown v. Bush*, 45 Pa. 66; *Van Hoesen v. Coventry*, 10 Barb. 518; *Moffett v. Brewer*, 1 G. Greene, 848; *Tillotson v. Smith*, 32 N. H. 94, 64 Am. Dec. 355; *Bealey v. Shaw*, 6 East, 208; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636.

But in England and in all the older states irrigation was unknown as a reasonable use of running water.

Angell, *Watercourses*, 7th ed. § 120.

In *Evans v. Merriweather*, 4 Ill. 496, 38 Am. Dec. 106, the court says irrigation is by no means essential, and cannot therefore be considered a natural want of man.

The use of water from the lands and running streams by miners and irrigators grew into customary law without legislation, either congressional or local, and valuable properties were created before the act of 1866, the substantial provisions of which act have been placed in the Revised Statutes of the United States as § 2339.

Atchison v. Peterson, 87 U. S. 20 Wall. 507, 22 L. ed. 414; *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. ed. 452; *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 813; *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240; *Broder v. Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790.

This act of Congress merely confirmed and established the customary local law.

The common-law doctrine of riparian rights, that every riparian owner is entitled to the natural flow of the stream through his land as it is wont to run, is not applicable to the streams in Yakima and Kittitas counties, but rights should be determined by the doctrine of prior appropriations.

The common law was made for man, not man for the common law.

The colonists brought with them the common law of England so far as it was applicable to their new conditions.

The common law of England, so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States and the organic act and laws of Washington territory, shall be the rule of decision in all the courts of this territory.

The question whether the use of water in any particular locality is necessary to man's existence is a question of fact, and not of law.

Crandall v. Woods, 8 Cal. 142.

Much of the confusion and uncertainty existing on the water question arises from a failure to distinguish what is law and what is fact in the application of the common law.

Vansickle v. Haines, 7 Nev. 249; *Luz v. Haggin*, 69 Cal. 255; *Com. v. Knowlton*, 2 Mass. 534; *People, Loomis, v. Canal Appraisers*, 33 N. Y. 482.

The common-law doctrine of riparian rights is unsuited to the condition of our state, and

this case should have been determined by the application of the principle of prior appropriation.

Reno Smelting, M. & Reduction Works v. Stevenson, 20 Nev. 269, 4 L. R. A. 60; *Drake v. Earhart*, 2 Idaho, 716; *Stowell v. Johnson*, 7 Utah, 215; *Moyer v. Preston* (Wyo.) 44 Pac. 845; *Clough v. Wing* (Ariz.) 17 Pac. 458; *Trambley v. Luteran*, 6 N. M. 15; *Black's Pomeroy*, Water Rights, § 106.

Legislation confirms the custom of appropriation, and abrogates riparian rights in Yakima county.

Laws 1873, p. 520; Laws 1895-96, 508; *Black's Pomeroy*, Water Rights, §§ 106-108, 113.

Messrs. D. J. Crowley and Whitson & Parker, for respondents:

Under the common-law rule the riparian owner might make reasonable use of flowing water for the purpose of irrigation.

Black's Pomeroy, Water Rights, §§ 150, 151, 153, 155, 157; *Luz v. Haggin*, 69 Cal. 255; *Jones v. Adams*, 19 Nev. 78; *Vansickle v. Haines*, 7 Nev. 286; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 199; *Washb. Easements & Servitudes*, 2d ed. p. 240; *Elliot v. Fitchburg R. Co.* 10 Cush. 194, 57 Am. Dec. 85; *Swift v. Goodrich*, 70 Cal. 108. See also *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Gillett v. Johnson*, 80 Conn. 180; *Farrell v. Richards*, 80 N. J. Eq. 511; *Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540; *Stanford v. Felt*, 71 Cal. 249; *Gould v. Stafford*, 77 Cal. 66; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 681; *Anaheim Water Co. v. Semitropic Water Co.* (Cal.) 30 Pac. 623.

Water for irrigation in arid countries is a natural want.

Evans v. Merriweather, 4 Ill. 492, 38 Am. Dec. 106; *Kinney, Irrigation*, §§ 157, 158.

The right of appropriation exists so long as the lands are the public lands of the United States; whenever the government parts with its title it grants to its patentee, as an incident, any water flowing over it which had not been appropriated prior to the inception of his title.

Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. ed. 452; *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176; *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 451.

The history of legislation and constitutional enactment in this state has conclusively recognized the riparian doctrine.

Wash. Const. art. 21; Acts 1889-90, p. 719, §§ 44, 46, 48, 57; 1 Hill's Code, §§ 1761-1763, 1765, 1774, 1787; *Thorpe v. Tenem Ditch Co.* 1 Wash. 566; *Isaacs v. Barber*, 10 Wash. 133, 80 L. R. A. 665; *Crook v. Hewitt*, 4 Wash. 749; *Rigney v. Tacoma Light & W. Co.* 9 Wash. 576, 26 L. R. A. 425.

No court where the other view has been taken has ever answered satisfactorily the comprehensive and able arguments contained in *Vansickle v. Haines*, 7 Nev. 249.

See also *Luz v. Haggin*, 69 Cal. 255; *Kinney, Irrigation*, §§ 191, 208; *Black's Pomeroy*, Water Rights, 145, 150, 158; *Crandall v. Woods*, 8 Cal. 136; *Lehigh Co. v. Independent Ditch Co.* 8 Cal. 323; *Cole v. Logan*, 24 Or. 304.

The doctrine of appropriation applies only to public lands.

Gould, Waters, § 240; *Black's Pomeroy*, 39 L. R. A.

Water Rights, § 30; *Curtis v. LaGrande Hydraulic Water Co.* 20 Or. 84, 10 L. R. A. 484.

When a patent issues the title relates back to the initiatory act, viz., the date of settlement.

Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761; *Kinney, Irrigation*, § 210; *Shepley v. Cowan*, 91 U. S. 837, 23 L. ed. 426; *Stark v. Starr*, 73 U. S. 6 Wall. 418, 18 L. ed. 929; *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450; *Larsen v. Oregon R. & Nav. Co.* 19 Or. 240; *Cole v. Logan*, 24 Or. 304; *Faull v. Cooke*, 19 Or. 455.

Oregon has the same statute substantially as Washington on condemnation of riparian ownership, quoted at § 499, *Kinney on Irrigation*. That court has steadily maintained the doctrine of riparian ownership.

Oregon Iron Co. v. Trullinger, 8 Or. 1; *Taylor v. Welch*, 6 Or. 199; *Shively v. Hume*, 10 Or. 76.

In Kansas the doctrine of riparian rights is upheld, although the statutes of that state seem to recognize as fully as those of this state the taking of water by appropriation.

Kinney, Irrigation, §§ 427, 442.

In North Dakota the riparian doctrine is recognized.

Kinney, Irrigation, § 467.

So also in South Dakota,

Kinney, Irrigation, § 477.

Anders, J., delivered the opinion of the court:

An action was instituted in the superior court of Yakima county by the plaintiff Benton, a riparian proprietor on the Ahtanum river, in said county, to restrain certain of the appellants from diverting the waters of said stream, and conducting the same to and upon their land, situated at a distance therefrom, for the purposes of irrigation. Three separate actions were also commenced by other parties, seeking similar relief, and by stipulation of all the parties, and an order of the court, all of those causes were consolidated and tried in this action. Many riparian owners became parties by intervention, and joined the plaintiffs in claiming the relief sought by them, and the defendants in the several causes were all made defendants in the consolidated case. The complaint in each case, briefly stated, alleges riparian ownership on the part of the plaintiff, and appropriation of the water, and the date thereof, and the use of the water for irrigation, and its diversion by the defendants. Each of the nonriparian landowners alleges ownership of lands, and appropriation and use of the water for irrigation, and date of such appropriation, and the making of valuable improvements on the land. And each party to the action avers that his land, without artificial irrigation, is arid and unproductive, and prays that he may be decreed entitled to a certain specified quantity of water for the purpose of irrigating his premises. The action involves the rights of a multitude of farmers located on the banks of the river, as well as those of a great number of nonriparian landowners. The evidence preserved in the record is exceedingly voluminous, but the facts deduced therefrom and stated by the court are so satisfactory to counsel that we have been relieved of the labor of examining it in detail. Of the ninety-one

findings of fact made by the court, none of any special importance is disputed by counsel for appellants. The trial court awarded a perpetual injunction restraining each and every of the nonriparian owners of land from diverting or interfering with the water of the river. Appellants excepted to the conclusions of law as announced by the court, and to the whole decree, as founded on erroneous conclusions of law, and here insist that the rights of all parties should be determined by this court by the application of the doctrine of appropriation, in accordance with the facts found by the superior court. It may be stated generally that the court found from the evidence the date when each party settled upon his land and took the initiatory step in the acquisition to title thereto, as well as the date at which he appropriated the water for agricultural purposes. While the court recognized the existence in this state of the doctrine of prior appropriation, it nevertheless held that the plaintiff and plaintiff interveners, who settled upon their respective lands, and acquired their title thereto by complying with the laws of the United States, and appropriated and used the water of the stream for irrigation and domestic purposes, prior to the diversion by appellants, were entitled to have the stream continue to flow as it naturally flowed through or by their lands at the time their possessory rights attached. In other words, the court held that the respondents were entitled to the common-law rights of riparian proprietors, as against subsequent appropriators of the water, from the date of their occupancy, with intent to acquire the title of the government in pursuance of law. And this ruling of the trial court was not at variance with the rule repeatedly announced by this court, and the territorial supreme court except upon the question as to the date at which riparian rights become vested in lawful occupants of public land. That such rights, as well as the right of prior appropriation, have hitherto been recognized in the decisions in this state, will be disclosed by an examination of the following cases: *Thorpe v. Tenem Ditch Co.* 1 Wash. 566; *Ellis v. Pomeroy Improv. Co.* 1 Wash. 572; *Geddis v. Parrish*, 1 Wash. 587; *Crook v. Hewitt*, 4 Wash. 749; *Rigney v. Tacoma Light & W. Co.* 9 Wash. 576, 26 L. R. A. 425; *Isaacs v. Barber*, 10 Wash. 124, 30 L. R. A. 665. Nor did the legislature disregard the rights of riparian owners in the general act of 1890 relating to appropriation of water for irrigation. 1 Hill's Code, § 1718 *et seq.* On the contrary, §§ 1761 and 1774 of that act especially recognized the existence of riparian rights, and we do not see anything in that statute or the subsequent act of 1891 evincing an intention on the part of the legislature to disregard such rights.

But it is most earnestly insisted by the learned counsel for appellants that the common-law doctrine touching riparian rights is not applicable to the arid portions of the state, and especially to Yakima county; and this court is now urged to so decide, notwithstanding anything it may heretofore have said to the contrary. The legislature of the territory of Washington in the year 1868 (Laws 1868, p. 68) enacted that "the common law of England, so far as it is not repugnant to, or inconsistent

with, the Constitution and laws of the United States and the organic act and laws of Washington territory, shall be the rule of decision in all the courts of this territory." The language of this provision was changed by the state legislature in 1891 by omitting the words "of England," substituting the word "state" for "territory," and inserting the clause, "nor incompatible with the institutions and condition of society in this state." Code Proc. § 108. But the meaning remains substantially the same. It thus appears that the common law must be our "rule of decision," unless this case falls within the exceptions specified in the statute. Now, the common-law doctrine declaratory of riparian rights, as now generally understood by the courts, is not, in our judgment, inconsistent with the Constitution or laws of the United States or of this state. Nor is it incompatible with the condition of society in this state, unless it can be said that the right of an individual to use and enjoy his own property is incompatible with our condition,—a proposition to which, we apprehend, no one would assent for a moment. It is held by practically all the better authorities that the right of the riparian owner to the natural flow of the stream by or across his land in its accustomed channel is an incident to his estate, and passes by a grant of the land, unless specially reserved. It is not an easement in or an appurtenance to the land, but, as Angell says, is as much a part of the soil as the stones scattered over it. Angell, *Watercourses*, § 5.

"By the common law," says the court in *Lux v. Haggin*, 69 Cal. 255, "the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned." And one of the purposes thereafter mentioned was irrigation. In Washburn on Easements & Servitudes, 4th ed. pp. 316, 317, the learned author says: "The right of enjoying this flow, without disturbance or interruption by any other proprietor is one *jure natura*, and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself, in its natural state, unaffected by the tortious acts of a neighboring landowner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years' adverse possession." (In this state, by statute, an adverse possession for ten years would destroy the right.) And the law on this subject is laid down by Prof. Pomeroy in language equally clear and explicit. He says: "The use of the stream, and of the water flowing through it, forms a part of the rights incident to and involved in the ownership of the lands upon its borders. This is the principle recognized by the common law, and which should be recognized by any auxiliary legislation. It is, more-

over, a natural law, an inevitable fact, which no legislation can change. Any statute denying this fact simply attempts an impossibility." Pom. Riparian Rights, § 152.

While the doctrine announced by the foregoing authorities has never, so far as we are advised, been directly denied, it has been apparently ignored by the courts in some of the Pacific states and territories, on the theory that the principles and rules of the common law respecting the rights of private riparian owners were inapplicable to the condition and necessities of the people of the particular localities where the causes of action arose. *Coffin v. Left Hand Ditch Co.* 6 Colo. 446; *Drake v. Earhart*, 2 Idaho, 716; *Stowell v. Johnson*, 7 Utah, 215; *Moyer v. Preston* (Wyo.) 44 Pac. 845; *Clough v. Wing* (Ariz.) 17 Pac. 453; *Trambley v. Luterma*, 6 N. M. 15. But the legislatures of those states and territories have attempted to abolish the common-law doctrine relative to private property in watercourses and to riparian rights generally. Pom. Riparian Rights, § 106. And the decisions above cited are presumably in accordance with the local statutes, though some of them, it appears, were grounded solely on the assumption that the rules of the common law were inapplicable by reason of the aridity of the soil and the consequent necessity for extensive irrigation. But how it can be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly cannot be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by a well-settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they irrigate them with water taken from the Ahtanum river is no sufficient reason for depriving the respondents, who settled upon that stream in pursuance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent, and without compensation. If it be true, as claimed by appellants, that, if the judgment of the court below is affirmed, their land will again become a barren waste, and cease to "blossom as the rose," it is equally true that, if the waters of the river are diverted from its channel, the premises of the respondents will become unproductive and utterly worthless. "The aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasture, while much of the water diverted must necessarily be dissipated." McKinstry, J., in *Lux v. Haggin*, 69 Cal. 255. The question of the applicability of the common law in controversies respecting

water rights in the mineral districts of California was lucidly discussed by Chief Justice Sanderson in *Hill v. Smith*, 27 Cal., at page 482. With reference to the charge of the trial court, which seemed to be based on an erroneous view of the law with respect to the rights of miners and ditch owners using the water of a stream for mining purposes, the learned chief justice said: "This is due in a great measure, doubtless, to the notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this state, upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is without any substantial foundation. The reasons which constitute the groundwork of the common law upon this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves. The maxim, *Sic utere tuo, ut alienum non laedas*, upon which they are grounded, has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this state, as operative a test of the lawful use of water as at any time in the past, or in any other country. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural 'channel,—*ubi currere solebat*,—without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded did not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel; but more frequently necessitates such diversion, and moreover does not require the water in a pure state in order to insure its reasonable and beneficial use." In *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414, the Supreme Court of the United States stated, as claimed by appellants, that, as respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. That action was brought by parties who were ditch owners, for an injunction to restrain the defendants from carrying on certain mining operations on Ten-Mile creek, in Montana, and the question of riparian rights does not seem to have been involved therein. In fact, in the course of the opinion it is observed that "the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship in respect to the waters of those streams,"—meaning the streams on the public lands, the waters of which were subject to appropriation and use under the customs obtaining among miners. In *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. ed. 452, the question on the merits in the case, as stated by the court, was whether a right

to running waters on public land of the United States for the purposes of irrigation could be acquired by prior appropriation, as against parties not having the title of the government, and the court held that it could. But the question of riparian rights was not in the case, and the court said that "neither party has any title from the United States; no question as to the rights of riparian proprietors can therefore arise. It will be time enough to consider those rights when either of the parties has obtained a patent of the government. At present both parties stand upon the same footing; neither can allege that the other is a trespasser against the government without at the same time invalidating his own claim." But in the later case of *Sturr v. Beck*, 138 U.S. 541, 33 L. ed. 761, the question as to the rights of the riparian proprietor as against an appropriator of the water did arise, and was determined by the court. The facts were that one John Smith settled on a tract of government land in the territory of Dakota in March, 1877, and continued to reside thereon until he sold and conveyed it by warranty deed to one Beck. He made his homestead application or entry on March 25, 1879, and his final proof May 10, 1883, and received a patent from the United States. The waters of a certain creek flowed in its natural channel across Smith's homestead, and in May, 1880, Sturr went upon that homestead, located a water right thereon, and constructed a ditch by which the waters of the creek were diverted to his own land. Beck went into possession under his deed from Smith, and in 1886 notified Sturr to cease diverting the water and maintaining the ditch, whereupon Sturr commenced an action to enjoin Beck from interfering with his alleged water right and ditch, and the use of the water of the creek. Sturr claimed the right to divert and use the waters of the stream for the purposes of irrigation by virtue of a prior appropriation, and Beck defended and asked affirmative relief on the ground of riparian ownership. It will thus be seen that the question there raised was identically the same as that which is presented for determination here. In that case it appeared that neither Smith nor his grantee, Beck, had ever diverted the waters of the creek from the natural channel prior to the location of the alleged water right by Sturr; but the court unanimously held that Smith's patent related back to the date of his homestead filing, and cut off completely the alleged claim of Sturr. The learned chief justice, in delivering the opinion of the court, after referring to the act of Congress of July 26, 1866 (Rev. Stat. § 2339), and the amendatory act of 1870, and quoting from the opinion in *Atchison v. Peterson*, 87 U.S. 20 Wall. 507, 22 L. ed. 414, said: "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow *ut currere solebat*, undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect."

39 L. R. A.

And after quoting certain sections of the Civil Code of Dakota, and setting out the local custom of diverting and appropriating the waters of flowing streams for the purpose of irrigation, he concluded the opinion in the following language: "The question is not as to the extent of Smith's interest in the homestead as against the government, but whether, as against Sturr, his lawful occupancy under settlement and entry was not a prior appropriation which Sturr could not displace. We have no doubt it was, and agree with the brief and comprehensive opinion of the Supreme Court to that effect." It seems to us that the soundness of that decision can scarcely be doubted. While the court fully recognized the doctrine of prior appropriation of water on the public lands, in accordance with the local customs, laws, and decisions of courts, it announced and established the just and equitable rule that the riparian rights of a patentee of the government attach, by relation, at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land. That case, it would seem, settles the law adversely to the contention of the appellants in this case. The doctrine that the rights of a patentee or grantee of the government relate back to the first act of the settler necessary in the proceedings to acquire title is also announced in the following cases: *Shepley v. Cowan*, 91 U.S. 330, 23 L. ed. 424; *Larsen v. Oregon R. & Nav. Co.* 19 Or. 240; *Faull v. Cooke*, 19 Or. 455. See, also *Kinney, Irrigation*, § 210; *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450.

The trial court in this case followed the rule laid down in the case of *Sturr v. Beck*, and other cases above referred to, and, in so doing, we think, committed no error. But it is claimed by appellants that the act of the territorial legislature entitled "An Act Regulating Irrigation and Water Rights in the County of Yakima, Washington Territory" (Laws 1873, p. 520), fully authorized them to divert and use the waters of the Abtatum river as they had done. It is perhaps sufficient to say with reference to that act that the rights of many of the respondents who own riparian lands had attached, under the law as announced in the *Sturr Case*, prior to its passage, and were therefore in no wise affected by it. And besides by the first section of that act the respondents were entitled to the use of the water for the purpose of irrigating their lands "to the full extent of the soil thereof." Moreover, the doctrine of appropriation applies only to public lands, and when such lands cease to be public, and become private, property it is no longer applicable. *Gould, Waters*, § 240; *Pom. Riparian Rights*, § 30; *Curtis v. La Grande Hydraulic Water Co.* 20 Or. 34, 10 L. R. A. 484. It was for the purpose of protecting the rights of appropriators of water for beneficial uses on the public lands which had vested and accrued, by virtue of local customs, laws, and decisions of the courts, that the 9th section of the act of Congress of July 26, 1866, the substance of which is included in § 2339 of the Revised Statutes, was enacted. It was apparent to Congress, and, indeed, to everyone, that neither local customs nor state laws or decisions of state courts could vest the title to public

land or water in private individuals without the sanction of the owner, *viz.*, the United States. The government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; but, when it disposed of land without reserving the water, the latter passed to its grantee free from interference thereafter by the grantor. "The object of the section [Rev. Stat. § 2339] was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands." *Jennison v. Kirk*, 98 U. S. 456, 457, 25 L. ed. 241, 242.

It is suggested on behalf of the appellants that the use of water for irrigation was practically unknown to the common law. But, while it may be true that it is seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running streams for that purpose by riparian proprietors is recognized by the courts of that country. It is expressly so stated in

Gould on Waters (§ 217), where a number of English cases are cited; and in Pomeroy on Riparian Rights (§ 125) it is declared that the common-law rule that every riparian proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration, is subject to the well-recognized limitation that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes; and the author there cites several English and many American decisions in support of that declaration. See also 2 Washb. Real Prop. 5th ed. pp. 387, 388; Gould, Waters, § 205; *Luz v. Haggin*, 69 Cal. 255, and cases cited; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 177.

A careful consideration of all the questions raised on this appeal discloses no error and the judgment is therefore affirmed.

Scott, Ch. J., and Gordon, J., concur. Dunbar and Reavis, JJ., being disqualified, did not sit in this case.

Rehearing denied.

ILLINOIS SUPREME COURT.

Theodore P. SIDDALL, Jr., by Next Friend, *Appt.*,

v.

Egbert L. JANSEN *et al.*

(168 Ill. 43.)

1. The facts may be reviewed by the supreme court of Illinois to the extent of ascertaining whether or not there was such evidence tending to establish plaintiff's declaration as should have been submitted to the jury, where error is assigned to the giving or refusal of an instruction to find for the defendant.
2. An ascending and descending cage of an elevator is such an attraction to children that an unguarded or open door, or one which may readily be opened from the outside, may constitute negligence on the part of the owner when children are allowed to play where they may be injured by it.
3. Failure to comply with the provisions of an ordinance respecting the doors of elevators will render the owner liable for an injury received in consequence by a child which was rightfully at the place of the injury.
4. Whether a child five years of age is a trespasser or not when playing near an elevator in a store, used by employees and reached through open doors from the main floor of the store in which the father of the child was employed, is a question for the jury, if the child was rightfully in the store by invitation of the father.

(November 1, 1897.)

A PPEAL by plaintiff from a judgment of the Appellate Court, First District, affirm-

ing a judgment of the Superior Court for Cook County in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

Statement by Phillips, Ch. J.:

This was an action brought by Theodore P. Siddall, Jr., by his next friend, against Egbert L. Jansen and others, composing the firm of Jansen, McClurg, & Co., wholesale and retail booksellers and stationers, in Chicago, to recover damages for an injury received by being struck by a descending elevator of the defendants. The father of plaintiff was an employee of defendants, and the plaintiff, then about five years of age, was playing around the store. In the temporary absence of the parent the child was attracted to an elevator shaft, the door of which was unfastened, and was severely bruised and mangled by the descending cage. The negligence alleged in the declaration charges the defendants with negligently permitting to continue open and unguarded the doorway of the elevator shaft, and the partitioned inclosure surrounding it, and in failing to place fastenings upon the elevator door, so they could be opened only from the inside, and thus be under the entire control of the elevator operator, as is provided by a city ordinance of Chicago. A judgment for \$10,000, rendered November 15, 1889, was reversed by the appellate court (41 Ill. App. 279), and on appeal here the judgment of the appellate court was reversed, with directions to find facts, or remand the case (143 Ill. 537). The appellate court remanded the

NOTE.—As to liability for maintaining dangerous attractions for children, see *Missouri, K. & T. R. Co. v. Edwards* (Tex.) 32 L. R. A. 825, and other cases cited in footnote thereto; also some cases in note to 89 L. R. A.

Chicago City R. Co. v. Robinson (Ill.) 4 L. R. A. 127. See also *Moran v. Pullman Palace Car Co.* (Mo.) 33 L. R. A. 755, and cases there cited.

case (51 Ill. App. 74), and on another trial, May 6, 1896, the superior court, pursuant to the first opinion of the appellate court, directed a verdict and entered judgment for the defendants, which the appellate court affirmed in the following opinion: "*Ryan v. Armour, Siddall v. Jansen*. Per Curiam. Each of these cases, with the names of the parties reversed, has been here before. 61 Ill. App. 314; 51 Ill. App. 74; 41 Ill. App. 279. The cases have now been again tried in accordance with the views of this court heretofore expressed, and still entertained, and therefore the judgments are now affirmed." 67 Ill. App. 102. A certificate of importance was granted by the appellate court, and by appeal the case comes to this court.

Messrs. F. W. Becker and Dale & Francis, for appellant:

The store was a "public place." No effort was made by appellees on the trial to limit or restrict the publicity of the place. What is a "public place?" *Ex vi termini*, a place for all, for the old and young—like the public streets, which are open to the use of the entire public without regard to what may be the lawful motives and objects of those traversing them.

Chicago v. Keefe, 114 Ill. 222, 55 Am. Rep. 860.

This court found no trouble in implying an invitation when one of the defendants entered the *Beaurivage Flats*, as a visitor merely upon an occupant and not upon the owner, and without any business with the owner, and who while there was injured in an unguarded elevator.

Fisher v. Jansen, 30 Ill. App. 91.

The most that can be said is that the father's negligence contributed to the injury, or, rather, that the concurring negligence of the father and the defendants produced the injury, which is no defense (*Carterville v. Cook*, 129 Ill. 152, 4 L. R. A. 721), and especially is this the rule where the injury, as here, is the result of an unlawful act—the violation of an ordinance, in which case the original wrongdoer will be held responsible, although other causes may have subsequently arisen and contributed in producing the injury.

Weick v. Lander, 75 Ill. 93; *Laflin & R. Powder Co. v. Tearney*, 131 Ill. 322, 7 L. R. A. 262.

The ordinance, its violation, and resulting injury, presented, at least, a *prima facie* case, which could not be withdrawn from the jury, for the statute of Westminster gives a remedy by an action on the case to all who are aggrieved by the neglect of any duty created by statute.

Couch v. Steel, 3 El. & Bl. 802; *St. Louis, J. & C. R. Co. v. Terhune*, 50 Ill. 151, 99 Am. Dec. 504; *Mechanicsburg v. Meredith*, 54 Ill. 84; *Illinois C. R. Co. v. Gillis*, 68 Ill. 317; *Chicago & E. I. R. Co. v. Goyette*, 133 Ill. 21.

The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons, and each person specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery.

Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 89 L. R. A.

L. ed. 410; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450.

The defendants owed it to the public, whom they invited to their premises, to keep those premises reasonably safe.

Hart v. Washington Park Club, 157 Ill. 9, 29 L. R. A. 492.

Can it be said that the conduct of the defendants was so clearly and palpably correct that all reasonable minds would so pronounce it without hesitation or dissent?

Lake Shore & M. S. R. Co. v. Johnsen, 135 Ill. 641.

Messrs. Mason Brothers, for appellee:

The decision of the appellate court is a finality.

Great Western R. Co. v. Haworth, 39 Ill. 846; *Chicago & A. R. Co. v. Bonifield*, 104 Ill. 228; *Rogers v. Chicago, B. & Q. R. Co.* 117 Ill. 115; *Practice Act*, chap. 110, Ill. Rev. Stat. § 88; *Brown v. Aurora*, 109 Ill. 165; *Neer v. Illinois C. R. Co.* 138 Ill. 29; *Jones v. Fortune*, 128 Ill. 518.

Appellees were not guilty of negligence.

Murray v. McLean, 57 Ill. 378; *Gibson v. Seiepienski*, 37 Ill. App. 601; *Chicago & A. R. Co. v. Lammert*, 12 Ill. App. 408.

Appellant was himself guilty of negligence.

Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478; *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 580; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616; *Chicago & A. R. Co. v. Murray*, 62 Ill. 326; *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, 21 L. R. A. 76.

Appellant was in the immediate custody and control of his father, and the father's negligence will defeat appellant's action. The father is the cause of the accident.

Chicago v. Starr, 42 Ill. 176, 89 Am. Dec. 422; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 443; *Tyler, Infancy & Coverture*, 200; *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, 21 L. R. A. 76; *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88.

The damages awarded in the circuit court are excessive.

Peoria Bridge Asso. v. Loomis, 20 Ill. 285, 71 Am. Dec. 263; *Joch v. Dankwardt*, 85 Ill. 331; *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373; *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Chicago City R. Co. v. Henry*, 62 Ill. 145; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Decatur v. Fisher*, 53 Ill. 407; *Bloomington v. Goodrich*, 88 Ill. 558; *Andrus v. Boedecker*, 17 Ill. App. 213; *Illinois C. R. Co. v. Ebert*, 74 Ill. 401; *Chicago West Div. R. Co. v. Hughes*, 87 Ill. 94.

Phillips, Ch. J., delivered the opinion of the court:

We are authorized to review the facts in this case, to the extent of ascertaining whether there was, at the close of the plaintiff's testimony, evidence tending to show the acts of negligence charged in his declaration, for the reason that at the close of such testimony the trial court, at the request of defendants, gave to the jury a peremptory instruction to find for the defendants. The rule is that where an instruction is offered, at the close of plaintiff's testimony, to instruct the jury to find for the defendant, and error is assigned on the giving or refusal to give such instruction, this court may review the facts, to the

extent of ascertaining whether or not there was such evidence tending to establish plaintiff's declaration as should have been submitted to the jury. *Cicero & P. Street R. Co. v. Meisner*, 160 Ill. 320, 31 L. R. A. 331; *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 38; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 18 L. R. A. 215; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Purdy v. Hall*, 184 Ill. 298; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 182; *Bartelott v. International Bank*, 119 Ill. 259; *Simmons v. Chicago & T. R. Co.* 110 Ill. 340. The rule is, also, that an instruction taking the case from the jury, and directing a verdict for the defendant, should only be given where the evidence, with all the legitimate and natural inferences to be drawn therefrom, is wholly insufficient, if credited, to sustain a verdict for plaintiff. *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 38.

The first count of the declaration charges negligence of the defendants in permitting to continue open and unguarded the doorway of an elevator shaft, and the door to the partitioned inclosure surrounding it, on their premises, whereby plaintiff (being of the age of five years) was seriously injured by a descending cage of the elevator. To the entire declaration the plea of the general issue was interposed. It is urged by appellees this elevator shaft was not in a public place in their store, but was secluded, and was not intended as a passenger elevator, and that plaintiff was a trespasser. This court has held, in *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, that the general rule relieving a private owner of property of liability against injuries sustained by strangers or trespassers from the unsafe condition of his property is not applicable to children of tender years, who may be attracted thereon by such conditions or surroundings as may appeal to childish curiosity. An ascending and descending cage of an elevator might be said to be of such a character, and to hold out an implied invitation to a five-year-old child to approach it and satisfy his childish curiosity. An unguarded or open door, or one which might readily be opened from the outside, might in such cases, as to a child, be fraught with great danger, and constitute negligence on the part of the person permitting such conditions to exist. It was a question which should have been submitted to a jury to say whether or not there was negligence under this count.

Another of the counts of plaintiff's declaration was based on the alleged negligence of defendants in not complying with a certain ordinance of the city of Chicago relating to elevators of the character which injured plaintiff, and which ordinance is as follows: Section 1056, art. 9, chap. 15: "Hoistways, in which an elevator shall be used, shall have a fire-proof shaft, starting at the lowest part reached by such elevator, and from such point extended up through and 6 feet above the roof." Section 1057: "Doors in such shaft shall be made of metal, and the catches or fastenings upon such doors shall be so placed that they can be opened only from the inside of the shaft, and entirely under control of the elevator operator."

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The evidence produced by the plaintiff below tends to show that there was not, on the part of the defendants, a compliance with this ordinance. A peremptory instruction having been given to the jury to find for defendants, there was consequently no evidence produced by them. As there was evidence tending to show there was no compliance with the provisions of this ordinance, and that plaintiff was rightfully at the place of the injury, it was a question which should have been submitted to the jury. Whether or not plaintiff was a trespasser was also a question of fact for the jury, where there was evidence tending to show he was not. The evidence does show that near the location of this elevator in appellees' store it was not infrequent that children of other employees and of customers were seen. While the elevator was not, as it appears, a regular passenger elevator, it was used by employees who desired to ascend to the upper floors. The elevator, together with the inclosures around it, was but a short distance from the main floor, and was connected by open doors. To this main floor the general public had constant access, and were there by the invitation of the firm engaged in business. Plaintiff was there by invitation of his father, who was an employee of this firm, and in charge of one of its departments. It was not uncommon for other employees to have their children at the store. If the father had any right to invite plaintiff, then the invitation to a child of five years, the age of this plaintiff, would, in its ordinary sense, have given him the right to be in those places where his father was. In *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, this court, after referring to the general rule that a private owner of property is under no obligation to strangers or trespassers to keep his premises in safe condition, against those who come upon such premises without invitation, said (p. 147): "An exception, however, to this general rule exists in favor of children. Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises which are thus supplied with dangerous attractions are regarded as holding out implied invitations to such children." Without passing on the weight of the evidence on this particular branch of the case, or the liability of appellees, as it must again be submitted to a jury, we hold that there was sufficient evidence that appellant was not a trespasser to submit the question to a jury.

We hold that it was error for the trial court, under the circumstances, to give the peremptory instruction on behalf of the defendants; and the judgment of the Appellate Court of the First District, and of the Superior Court of Cook County, are each reversed, and the cause remanded to the Superior Court of Cook county for a new trial in conformity with the views in this opinion.

Bernard IAGO, *Appt.*,
v.
Selina IAGO.

(168 Ill. 330.)

1. The insanity of a defendant in a divorce suit does not prevent maintaining a writ of error from a decree against him.
2. The next friend of an insane person in a writ of error is not necessarily the same person who represented him as guardian *ad litem* in the lower court, since the incapacity of the insane person to change his representative does not prevent the court from making the change.

(November 1, 1897.)

APPEAL by defendant from a judgment of the Appellate Court, First District, dismissing a writ of error to review a decree of the Circuit Court for Cook County granting a divorce. *Reversed.*

—Statement by Boggs, J.:

This was a bill in chancery filed in the circuit court of Cook county by Selina Iago, defendant in error, against Bernard Iago, her husband, for divorce. It appeared to the circuit court that the said Bernard Iago was insane, whereupon the court appointed one H. T. Aspern as guardian *ad litem* for the defendant. Such proceedings were had in the circuit court as that a decree of divorce was entered in favor of the wife, the defendant in error. On the application of the husband, by Annie Brock, his next friend, a writ of error to reverse the decree was sued out in the appellate court of the first district. On motion of the defendant in error, the writ was dismissed (66 Ill. App. 462); hence this appeal.

Messrs. Haley & O'Donnell for appellant.

Messrs. F. A. Denison and J. E. White for appellee.

Boggs, J., delivered the opinion of the court:

The ground of the motion to dismiss was that the plaintiff in error was an insane person at the time the writ of error was sued out, and, by reason of such insanity, was incapable to elect whether he would remain married or become single, and no one can elect for him. It seems well settled that the right to sue for an absolute divorce is a personal right, and requires the intelligent action of the injured party, for which reason it has been frequently held that a guardian or next friend of an insane person cannot maintain a suit for absolute divorce for his ward. It is also well settled in this state that a writ of error is a new suit. The reasoning of the appellate court is that an insane person, being incapable in law of instituting and maintaining a bill for divorce, is likewise incapable of maintaining a writ of error for the purpose of questioning the regu-

larity and legality of a decree of divorce entered against him in a proceeding instituted after he became insane. We are unable to assent to this view. Actions for divorce may be instituted against insane defendants for a cause of divorce committed before the period of insanity. When such an action is begun, a court of equity, in view of the peculiar duty of such courts to protect the personal and property rights of lunatics, will appoint some discreet and proper person to conduct the defense. The power possessed by the courts of equity to provide that such defense shall be made is not exhausted by the appointment of a conservator *ad litem* or next friend to defend in the trial court, but may be exercised in courts of review, and further defense of the action for divorce prosecuted by any remedy provided by law whereby reversal of a decree of the trial court may be obtained. A writ of error is a new suit, but at the same time, when brought to review a decree for divorce, is but a step in defense of the relief sought to be obtained by the complainant in the original bill. In *Bradford v. Abend*, 89 Ill. 78, 31 Am. Rep. 87, a bill in chancery filed by the conservator of an insane wife to set aside a decree of divorce was entertained by the circuit court; and its decree vacating a decree of divorce was affirmed by this court. It is true that in that case the bill for the divorce was filed in the name of the wife, while she was insane, and that the principle that an insane person cannot maintain a bill for divorce was applied by this court, in support of the decree of the circuit court, in vacating the decree for divorce. But it is further true that the insane wife was equally incapable of electing whether she would remain married or single as was the plaintiff in error in the case at bar, yet the aid of the court against the decree of divorce was fully recognized and enforced. In the case cited the ground of attack upon the decree could not be availed of in a writ of error, and for that reason resort was had to an original proceeding in the trial court. Had such ground been apparent from an inspection of the record, no reason is perceived why the relief might not have been had through the medium of such writ. Though an insane person may be incapacitated from maintaining an action for divorce, still it by no means logically follows that no legal remedy can be availed of to remove a decree of divorce entered against the person so unfortunately afflicted.

It is not essential that the same person who represented the insane party as guardian *ad litem* in the circuit court should appear as next friend in a writ of error. *Ames v. Ames*, 148 Ill. 321. True, as suggested, the insane person has not capacity to consent to a change of the representative, but it is within the power of the court to appoint or accept another person to act in that capacity. Rev. Stat. 1898, *Lunatics*, chap. 86, § 13.

We think no sufficient reason appeared for dismissing the writ. *The judgment of the Appellate Court is therefore reversed*, and the cause remanded to that court, with directions to overrule the motion.

NOTE.—As to the effect of insanity of husband or wife on the right to a divorce, see *Mohler v. Shank* (Iowa) 34 L. R. A. 161, and *note*.

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J. N. DIXON, *Appl.*,
v.
PEOPLE of the State of Illinois.

(108 Ill. 179.)

1. No compensation for expert testimony other than ordinary witness fees can be required as a condition of giving an opinion as an expert when the witness has been properly subpoenaed.
2. A physician duly subpoenaed and interrogated as an expert witness can be punished as for contempt if he refuses to testify without receiving compensation other than ordinary witness fees.
3. The property of an expert witness is not taken without just compensation by requiring him to give his opinion as an expert without other compensation than ordinary witness fees.
4. The duty of an expert witness to testify is the same in a suit between private parties as it is in a suit between the state and an alleged criminal, if he is properly subpoenaed and paid ordinary witness fees.
5. The ordinance of 1787, passed by the Congress of the Confederation for the government of the Northwest Territory, has no force in Illinois except so far as its principles are embodied in the state Constitution.

(November 1, 1897.)

APPEAL by defendant from an order of the Appellate Court, Third District, affirming an order of the Circuit Court for Sangamon County adjudging him guilty of contempt in refusing to answer a question propounded to him as an expert witness, in the case of *Purdy v. Springfield*. *Affirmed*.

The facts are stated in the opinion.

Messrs. Conkling & Grout, for appellant:

In a civil suit for damages, a physician, who knows nothing of the facts, and who is called as an expert only, to answer a hypothetical question, the answer to which calls for a professional opinion based on his experience and study, and who refuses to answer because no compensation for testifying, other than ordinary witness fees, has been promised or pro-

vided for, but which has been expressly refused, cannot be compelled to so testify, nor should he be held to be in contempt of court for so refusing.

An expert is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge or experience concerning the same.

Rogers, *Expert Testimony*, § 1; *Century Dict.*; 7 *Am. & Eng. Enc. Law*, p. 491; 1 *Rice, Ev. chap. 9*, § 194; *Anderson, Law Dict.*; *Reynolds, Ev.* § 52, citing *Stephens, Ev. art. 49*; *Best, Ev.* § 518; 1 *Greenl. Ev.* § 440, 440a; *Taylor, Ev.* § 1274-1281; *Carter v. Boehm*, 1 *Smith, Lead. Cas.* 7th *Am. ed.* **618, 628, 644.

Study of standard authorities, as well as experience or observation, may give the special knowledge required.

Citizens Gaslight & Heating Co. v. O'Brien, 15 Ill. App. 400, 19 Ill. App. 281, 118 Ill. 174.

It is enough that the matter is a subject of which the witness possesses a special knowledge not possessed by the jury or by persons in general.

James v. Johnson, 12 Ill. App. 286.

Opinions of witnesses are not competent where inquiry is into a subject-matter, an understanding of the nature of which does not require any peculiar habit, study, or scientific knowledge.

Linn v. Sigsbee, 67 Ill. 75; *Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157; *Pennsylvania Co. v. Conlan*, 101 Ill. 98; *Wight F. Proofing Co. v. Poczekai*, 180 Ill. 139; *Illinois O. R. Co. v. People*, 143 Ill. 449, 19 L. R. A. 119; 7 *Am. & Eng. Enc. Law*, p. 491; *Rogers, Expert Testimony*, p. 18; *Hopkins v. Indianapolis & St. L. R. Co.* 78 Ill. 32; *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 577; *Hamilton v. Des Moines Valley R. Co.* 36 Iowa, 31; *Muldoney v. Illinois C. R. Co.* 36 Iowa, 462; *Citizens Gaslight & Heating Co. v. O'Brien*, 15 Ill. App. 400; *Pennsylvania Co. v. Conlan*, 101 Ill. 98; 1 *Rice, Ev. chap. 9*, § 195.

But when there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.

Stephens, Ev. § 49; 1 *Rice, Ev. chap. 9*, § 192.

NOTE.—*Right of state to require service of witnesses without compensation.*

- I. *Inherent right to command service.*
- II. *Application of constitutional provisions.*
- III. *The rule as applied to expert testimony.*
- IV. *General rules with relation to civil cases.*
 - a. *Necessity of payment or tender.*
 - b. *Sufficiency of payment or tender.*

I. *Inherent right to command service.*

The state in the exercise of its sovereignty may require the service of its citizens as witnesses without compensation. *Bennett v. Kroth*, 37 Kan. 236, *dictum*.

Or without compensation first paid or tendered. *Dills v. State*, 59 Ind. 15, dissenting opinion.

The administration of justice being a source of mutual benefit to all the members of a community, each is under obligation to aid in furthering it as a matter of public duty, and every competent citizen may be summoned by due process of law to appear and render personal services in court without right on his part to a special compensation for 39 L. R. A.

so doing. His time is claimed by the public as a tax paid by him to that system of law which protects his rights as well as those of others. *Ex parte Dement*, 53 Ala. 389, 25 *Am. Rep.* 611, quoting from *Ordronaux*, *Medical Jurisprudence*, 1890, p. 128. And see **DIXON v. PEOPLE**.

And a witness is bound to obey the process of subpoena in a criminal prosecution without payment or tender of fees on behalf of the defendant as well as on behalf of the state. *West v. State*, 1 Wis. 209.

By the common law no fees were fixed for witnesses, but they were commanded by the King's writ subpoena *ad testificandum* to lay aside all pretenses and excuses and appear at the trial to testify under the penalty of a certain sum. *Dills v. State*, 59 Ind. 15, dissenting opinion; **DIXON v. PEOPLE**.

And in England after the recognition of the right of the prisoner to have witnesses sworn and examined on his behalf, it was held that a witness subpoenaed by the defendant in a criminal case was bound to appear and testify, although no

In Alabama the practice of the trial courts is to require an expert to testify as an ordinary witness, or be held to be in contempt.

Ex parte Dement, 53 Ala. 389, 25 Am. Rep. 611.

In Arizona there is no distinction made by statute between the two classes of witnesses, but an expert by custom can claim for services or refuse to testify.

In Arkansas the statute makes no distinction between different classes of witnesses.

The supreme court holds that an expert who testifies for the state in a criminal case cannot demand compensation in addition to the usual fees allowed witnesses.

Flinn v. Prairie County, 60 Ark. 204, 27 L. R. A. 669.

But the United States court refused to compel a physician, called as an expert, to testify, and declined to regard the refusal of the witness to testify as a contempt of court.

United States v. Howe (Ark.) 12 Cent. L. J. 193.

In California there are no statutes nor decisions on the subject.

In Colorado the statute makes no distinction between the different classes of witnesses.

An expert physician, called for the state in a criminal case, who testifies voluntarily, cannot recover for so testifying.

Larimer County Comrs. v. Lee, 8 Colo. App. 177.

In Connecticut there are no special statutes nor decisions.

In Delaware there is no statute. In criminal prosecutions, expert witnesses are commonly paid by a special allowance granted by the levy court of the county, but this is voluntary on the part of the levy court.

In District of Columbia there are no statutes nor decisions.

In Florida there is neither statute nor decision.

In Georgia there is no statute and no decision.

In Idaho there are no statutes nor decisions.

In Illinois there are no statutes except §§ 6 and 29 of chap. 85, which allow a physician when acting as commissioner to make inquest in lunacy the sum of \$5 per day and traveling expenses.

Wright v. People, 112 Ill. 540, under peculiar

circumstances holds that an expert witness must testify, and *Hutchinson v. Hutchinson*, 152 Ill. 847, holds that the fees of an expert in a certain case could not be charged against the losing party.

In Indiana, Rev. Stat. 1888, § 504, provides: "A witness who is an expert in any art, science, trade, profession, or mystery may be compelled to appear and testify to an opinion, as such expert, in relation to any matter without payment or tender of compensation other than the *per diem* and mileage allowed by law to witnesses.

Prior to the passage of the statute, physicians and surgeons could not be compelled to perform service by giving opinions without being paid.

Buchman v. State, 59 Ind. 1, 26 Am. Rep. 75.

In Indian territory there is no statute nor decision on the subject.

In Iowa, McClain's Code 1888, p. 1493, title 28, chap. 3, § 5090, says: "Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations, and state the result thereof, shall receive additional compensation to be fixed by the court."

In Kansas there are no statutes nor decisions.

In Kentucky there are no statutes nor decisions.

In Louisiana Acts No. 19 of 1884, p. 25, provides that witnesses called to testify in court only to an opinion shall receive additional compensation.

In Maine there is no statute nor decision.

In Maryland, in the absence of statute or decisions, expert witnesses are treated in this respect as ordinary witnesses.

In Massachusetts the court cannot allow expenses and fees of experts not appointed by the court.

Atty. Gen., Petitioner, 104 Mass. 537.

In Michigan there are no statutes nor decisions.

In Minnesota, Gen. Stat. 1878, chap. 70, § 8, pp. 774, 775, provides "that the judge of any court of record in this state, before whom any witness is summoned, or sworn and examined, as an expert in any profession or calling, may, in his discretion, allow such fees or compensa-

fees had been paid or tendered him. *West v. State*, 1 Wis. 209, citing 1 Starkie, Ev. 85; 2 Hawk P. C. chap. 46, § 172; *Rex v. Ring*, 8 T. R. 586; 2 Russell, Crimes, 948; *Rex v. Cooke*, 1 Car. & P. 321.

And in this county the state frequently brings witnesses into court in certain causes where it is a party without becoming liable to them in any event for witness fees. *Bennett v. Kroth*, 87 Kan. 225; *Ex parte Chamberlain*, 4 Cow. 49.

The court will not declare that a witness shall give his time and liberty, however, to any person without compensation, in the absence of express legislative authority. *Morris v. Rippy*, 4 Jones, L. 533, *dictum*.

And the right of a witness residing out of the county where he is to give testimony, to a tender or payment of his traveling expenses in going to and returning from the place where he is summoned to testify, is not taken away by Ky. Civil Code, Prac. § 594, which only intimates that when a witness lives in an adjacent county he can be compelled to attend, and he is not guilty of contempt in disobeying a summons until such payment is made. *Thurman v. Virgin*, 18 B. Mon. 785.

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But the common-law rule that a witness's expenses should be tendered before he can be compelled to attend court is abrogated by Tenn. Act 1798, chap. 1, § 29, providing that every witness being summoned to appear in any court shall appear accordingly, and continue to attend from term to term until discharged, and such witness is bound to attend and give evidence when subpoenaed, though the party summoning him did not tender or offer him his necessary expenses. *Smith v. Barger*, 9 Yerg. 322.

And witnesses subpoenaed in an action brought by a person *in forma pauperis* in North Carolina are bound to attend and give their testimony without having expenses previously paid or tendered, but if they can recover for their attendance from the pauper in the mode provided by law they are at liberty to do so, or they may file their tickets and have them collected from the defendant in the event of the plaintiff's success. *Morris v. Rippy*, 4 Jones, L. 533.

So, under the South Carolina statutes the defendant in a case of felony is entitled to like process as

tion as, in his judgment, may be just and reasonable."

In Mississippi there is no statutory regulation as to the compensation of expert witnesses.

In Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, and New Mexico there are no statutes nor decisions.

In New York there is no statute.

It is the practice for district attorneys in criminal cases to employ and pay extra compensation to expert witnesses in professional life.

People v. Montgomery, 13 Abb. Pr. N. S. 288.

In North Carolina § 8756 of the Code, vol. 2, p. 562, provides for *per diem* and mileage allowed witnesses generally, and a proviso is added to the section as follows: "Provided further, that experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order." (Laws 1871.)

In North Dakota Sess. Laws 1887, chap. 61, § 8, provides that physicians shall receive \$10 as witness fees *per diem* when called to testify.

In Ohio, Oklahoma, and Oregon there are no statutes nor decisions.

In Pennsylvania the General Statutes make no distinction between witnesses. Special statutes allow extra compensation in certain cases.

In Rhode Island, judiciary act May 19, 1893, chap. 24, allows the reasonable fees of experts according to the character of the service to be performed, to be fixed by such justice.

In South Carolina, Rev. Stat. 1893, p. 882, § 2566, chap. 102, vol. 1, contains some regulation of the subject.

In South Dakota and Tennessee there are no statutes nor decisions.

In Texas there is no statute. A physician when called by the state in a criminal case to testify concerning a *post mortem* examination made by him must testify.

Summers v. State, 5 Tex. App. 865, 32 Am. Rep. 573.

In Utah and Vermont there are no statutes nor decisions.

In Virginia there is no statute, except the act of March 5, 1888, which allows physicians attending before a commission of lunacy extra fees.

the state to compel the attendance of witnesses in his behalf, and the witnesses so secured are entitled to be paid in the same manner as the state's witnesses, and such provisions are not limited to cases of capital felony. *Eustace v. Greenville County*, 42 S. C. 190.

And in New York in prosecutions for felony witnesses are compellable to attend without fees, the distinction lying between a felony and a misdemeanor; in case of a misdemeanor the defendant must tender the witnesses their fees as in civil cases. *Ex parte Chamberlain*, 4 Cow. 49.

II. Application of constitutional provisions.

The services of witnesses in criminal cases are not particular services within the meaning of a constitutional provision that no man's particular services shall be demanded without just compensation, but are of the class of general services which every man in the community is bound to render for the general as well as his own individual good. *Israel v. State*, 8 Ind. 466; *Daly v. 89 L. R. A.*

In Washington there are no statutes nor decisions.

In West Virginia, chap. 161, § 4, has some provisions on the subject.

In Wisconsin there is no statute.

In Wyoming, Rev. Stat. § 1200, p. 344, provides: "Any physician or surgeon who may be called upon to testify as an expert before a coroner, or other officer, shall be entitled to a fee of \$5 for half a day or less, and for more than half a day \$10.

It seems to be almost universal practice for parties calling expert witnesses to pay them extra compensation as for professional services.

The Roman law permitted the use of experts to inform the judge on physical laws or phenomena.

Enderman, 248.

In England the statute of 5 Eliz. chap. 9, doubtless formulated a pre-existing custom, and provided that witnesses should be paid, according to their countenance and calling, a reasonable sum.

Buckley v. Thomas, 1 Plowd. 125.

The skill and professional experience of a man are so far his individual capacity and property that he cannot be compelled to bestow them gratuitously upon any party. On the witness stand, precisely as in his office, his opinions may be given or withheld at pleasure, for a skilled witness cannot be compelled to give an opinion, nor committed for contempt if he refuses to do so.

Ordronaux, Medical Jurisprudence, pp. 138-142; 1 Whart. Ev. § 880; Stat. 5 Eliz. chap. 9; 2 Phillips, Ev. 4th Am. ed. p. 828.

An expert witness, called to testify his opinion, is entitled to compensation over and above the fees allowed other witnesses by law.

Underhill, Ev. p. 277; 1 Redf. Wills, note 44, § 81, p. 154; 1 Rice, Ev. chap. 14, § 197.

The English practice is now settled that extra compensation to scientific witnesses may be taxed.

Lawson, Expert Ev. citing *Bailey v. Kynock*, L. R. 20 Eq. 632; *Re Laffitte*, L. R. 20 Eq. 650; *Taylor*, Ev. § 1126; *Moore v. Adam*, 5 Maule & S. 156; *Willis v. Peckam*, 1 Brod. & B. 515; *Serern v. Olive*, 3 Brod. & B. 72; *Webb v. Page*,

Multnomah County, 14 Or. 20. And see principal case of *STATE v. HENLEY*.

And Oregon Sess. Laws 1885, p. 10, providing that in all criminal actions and proceedings witnesses residing within 2 miles of the place of trial, or place where they are required to appear and testify, shall not be entitled to receive their fees or mileage, is not in conflict with Oregon Const. art. 1, § 8, providing that the particular services of any man shall not be demanded without just compensation. *Daly v. Multnomah County*, 14 Or. 20.

And calling upon a physician to testify as an expert in answer to hypothetical questions is not calling for particular services within the meaning of a constitutional provision that if public exigencies make it necessary for the common preservation to demand any man's particular services full compensation shall be made therefor. *DIXON v. PEOPLE*.

So, a constitutional provision guaranteeing compulsory process to everyone charged with crime does not extend to requiring the payment by the state of the fees of the witnesses for the defendant;

1 Car. & K. 23; *Betts v. Clifford*, 1858, Warwick Lent Assizes; *Parkinson v. Atkinson*, 31 L. J. C. P. N. S. 199; *Turner v. Turner*, 5 Jur. N. S. 889.

To compel a person to attend, merely because he is accomplished in a particular science, art, or profession would subject the same individual to be called upon in every case in which any question in his department of knowledge is to be solved. Thus the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the district, and give his opinion in every trial in which a medical question should arise.

Re Roelker, 1 Sprague, 276; *Atty. Gen., Petitioner*, 104 Mass. 537; 12 Cent. L. J. p. 194 (1881) *Current Topics*; *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75.

Mr. James M. Graham, for the People: Contempt of court is a disobedience to the rules or orders of the court which interferes with the due administration of the law.

3 Am. & Eng. Enc. Law, p. 777.

A court of record has power to punish, for contempt, a witness who refuses to answer a question determined by the court to be proper.

Whart. Crim. Ev. § 450; Bishop, *Statutory Crimes*, 2d ed. 187.

And the exercise of this power is entirely in the discretion of the court, and will not be re-examined, except when the proceedings are so grossly defective as to be void.

3 Am. & Eng. Enc. Law, p. 800.

If an expert claims that he is exempt from the general rule concerning witnesses, the burden is on him to establish the exception.

Rogers, *Expert Testimony*, 2d ed. 427.

At common law no witness fees were paid, and in the absence of a statute authorizing it, no fees can now be taxed as costs, or recovered.

Fish v. Farwell, 33 Ill. App. 244; *Constant v. Matteson*, 22 Ill. 560; *Eimer v. Eimer*, 47 Ill. 375; *Smith v. McLaughlin*, 77 Ill. 597; *Atty. Gen., Petitioner*, 104 Mass. 542; *Larimer County Comrs. v. Lee*, 3 Colo. App. 177.

Statutes allowing costs, being in derogation of the common law, must be strictly construed.

23 Am. & Eng. Enc. Law, p. 387; *Cadwalader v. Harris*, 76 Ill. 870.

the state guarantees to him the use of all its power in bringing them into court, but goes no further. *Bennett v. Kroth*, 37 Kan. 235; *State v. Waters*, 39 Me. 54; *Avery v. State*, 7 Baxt. 331. And see principal case of *STATE v. HENLEY*.

And a statute thereunder providing that the state or county shall pay the proper costs accrued in behalf of the state applies to costs of the state only, and not to the cost of subpoena for the defendant's witnesses, which are defendant's costs. *Avery v. State*, 7 Baxt. 331.

The constitutional provision that the accused shall have the right of having compulsory process for obtaining witnesses in his favor simply means that he shall not be debarred the right of issuing subpoenas for his witnesses as in civil cases.

The rule has been laid down, however, that a fair construction of a constitutional provision that the accused in a criminal prosecution shall have a compulsory process for obtaining witnesses in his favor would be that he has not only the right to process to compel the attendance of all classes of

Until the matter is settled by statute the practice which has hitherto prevailed in Illinois must continue, as no principle is better established than that all merely private interests are subordinate to the public welfare.

Metropolitan City R. Co. v. Chicago West Div. R. Co. 87 Ill. 318.

It is of vital interest that the tribunals which pronounce judgments shall have power to coerce the production of any relevant evidence existing within the sphere of their jurisdiction requisite to prevent them from falling into error.

Ex parte Dement, 58 Ala. 389, 25 Am. Rep. 611; *Summers v. State*, 5 Tex. App. 377, 32 Am. Rep. 573; *Dilla v. State*, 59 Ind. 15.

The ordinance of 1787 was superseded by the adoption of the Constitution.

3 Am. & Eng. Enc. Law, p. 677, note 4; *Strader v. Graham*, 51 U. S. 10 How. 94, 13 L. ed. 342; *Permoli v. Municipality No. 1*, 44 U. S. 3 How. 610, 11 L. ed. 748; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 9, 31 L. ed. 632; 3 Am. & Eng. Enc. Law, 671, note 4; *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 31 L. ed. 149.

The power to suppress a contempt by an immediate offender results from the first principles of judicial establishments, and must be an inseparable attendant on every superior tribunal.

Anderson, *Law Dict.*; 3 Am. & Eng. Enc. Law, p. 790, note 2; *Stuart v. People*, 4 Ill. 395; *People v. Wilson*, 64 Ill. 197, 16 Am. Rep. 528; 2 Bishop, *Crim. L.* 8th ed. 243.

Summary punishment for contempt is not an infringement of the constitutional right of trial by jury.

3 Am. & Eng. Enc. Law, p. 791, note 2, also p. 795; 6 Am. & Eng. Enc. Law, p. 49(1), p. 50, note 1.

Property in its legal sense is not the thing itself, but certain rights in and over the thing, these rights being: (1) user; (2) expulsion; (3) disposition.

Lewis, *Em. Dom.* § 54; *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.* 115 Ill. 875, 56 Am. Rep. 173; *East St. Louis v. O'Flynn*, 19 Ill. App. 64; *Rigney v. Chicago*, 102 Ill. 68; *Munn v. People*, 69 Ill. 89.

Appellant's skill and knowledge do not fit these conditions. He could not divest himself

witnesses on his behalf, but also the right that they shall be compelled to testify. *Dilla v. State*, 59 Ind. 15, dissenting opinion; *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305; *State v. Waters*, 39 Me. 54.

And that a constitutional guaranty that an accused person shall have the right to compulsory process to compel the attendance of witnesses in his own behalf without the advancement of money or fees can only be satisfied by the production of the witnesses in court without the payment of fees or mileage in advance. *State, Thurston County, v. Grimes*, 7 Wash. 445.

In Kansas, pursuant to the constitutional provision guaranteeing compulsory process to everyone charged with crime, it is provided by statute that inability of the defendant to pay his witness fees in advance shall not impair his means of defense. *Bennett v. Kroth*, 37 Kan. 235.

And in Wisconsin the defendant in a criminal prosecution is entitled to compulsory process to compel the attendance of witnesses in his behalf

of his skill and knowledge. He could not dispose of them in the sense here intended. He could not give a purchaser either title or possession. He could not possibly dispose of his skill and knowledge so that he would not still have them.

Even where the expert has a special contract to get more than the statutory witness fees, he cannot recover on the contract.

Walker v. Cook, 83 Ill. App. 563; *Smith v. McLaughlin*, 77 Ill. 596; *Collins v. Godefroy*, 1 Barn. & Ad. 950.

A professional witness in the discharge of his duty as a good citizen is, like any other person, whether he be laborer, merchant, broker, manufacturer, or banker, compellable to attend in obedience to process, and to testify as to what he may know whether it be observed facts or accumulated knowledge acquired by study and experience.

Larimer County Comrs. v. Lee, 3 Colo. App. 177; *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611; *Summers v. State*, 5 Tex. App. 865, 32 Am. Rep. 573; *State v. Teipner*, 36 Minn. 535; *Flinn v. Prairie County*, 60 Ark. 204, 27 L. R. A. 669; *Vise v. Hamilton County*, 19 Ill. 78; *Edgar County v. Mayo*, 8 Ill. 83; *Wright v. People*, 112 Ill. 540; *Hutchinson v. Hutchinson*, 152 Ill. 347.

Magruder, J., delivered the opinion of the court:

At the January term, 1895, of the circuit court of Sangamon county, the case of Oliver Purdy against the city of Springfield was on trial. It was a suit for damages for injury caused by a defective sidewalk. The appellant, Dr. J. N. Dixon, was called as an expert witness on the part of the city, and testified that he was a physician and surgeon; that he had practised as such twenty-one years, and nineteen of them in Springfield; that he was surgeon for five railroads running into said city, and had been such surgeon from two to seventeen years; and that he was a graduate of regular schools of medicine, and had been practicing general surgery for eighteen years. The witness was then asked this question: "Dr. Dixon, suppose a patient, a woman forty-five years of age, who had been married seventeen years, had one child twelve years ago, and a

miscarriage ten years ago, never pregnant since, living with her husband all the time, doing her own work as a housewife, enjoying perfect health, should, when walking at a moderate gait, trip on the sidewalk, by reason of the end of the board tipping up, and should thereupon fall forward on her hands and knees, with such force as to make a slight abrasion on her knee, and felt no other immediate injury, but in two or three days thereafter should claim that she had falling of the womb, and that her breast, stomach, and spine had been injured by reason of said fall; what would you say as to such injuries being the probable results of such fall?" This question the witness declined to answer, stating the following as his reason for so declining: "On the ground that an expert witness is entitled to a different and greater compensation than an ordinary witness is allowed, and that an expert is not required to give expert testimony without compensation as an expert, unless a reasonable compensation shall have been paid or provided for. My reasonable fee for an expert or professional opinion in this case is \$10. I have not been paid nor offered anything for compensation for my expert or professional opinion in this case, nor has said compensation been in any way promised to me or provided for. On the contrary, it has been expressly refused. Therefore I decline to testify until such fee is provided for." It was conceded that the witness knew nothing about the facts of the case, and was called as an expert only. It was also conceded that the charge of \$10 as a fee, if a legal one, was reasonable, but that the city had no means provided for paying such fee, and had not promised to pay the same. The witness was brought into court by a regular subpoena, the same as any ordinary witness. The witness again stated, in answer to a question by the court, that he declined to answer because he had received no fee, nor any promise of a fee, as an expert. Thereupon the court stated to the witness that he was not entitled to receive any such fee, but that it was his duty to testify as an expert witness. In answer to a further question by the court the witness stated that he was not willing to testify, although informed by the court that it was his duty to do so, and the witness refused to answer the question. The clerk was then directed to docket a case

without prepayment or tender of fees. *West v. State*, 1 Wis. 209.

So, requiring a citizen to attend and testify in a criminal prosecution without the prepayment or tender of fees does not constitute taking private property for public use without compensation. *West v. State*, 1 Wis. 209.

And in *Neely v. State*, 4 Baxt. 174, a constitutional provision that no man's particular services shall be demanded, or property taken or applied to public use, without consent or just compensation, was held not to apply to services as juror, the court saying that it is one of the implied and necessary conditions upon which men form governments, that sacrifices must sometimes be made by individuals for the common good, for which no compensation can be claimed.

See also *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573; and *Buchman v. State*, 69 Ind. 1, 26 Am. Rep. 75, 25 Am. Rep. 619, note, *supra*, III.

III. The rule as applied to expert testimony.

The duty of a person to give evidence material
39 L. R. A.

to the issues in a pending case devolves upon him as a citizen in view of the protection which he receives from the laws of the country in the matter of his personal liberty and of the protection of his property, and such duty devolves as much upon a physician who is required to testify as an expert in answer to hypothetical questions as it does upon the ordinary witness testifying to facts within his knowledge. *DIXON v. STATE; Flinn v. Prairie County*, 60 Ark. 204, 27 L. R. A. 669; *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611. And see dissenting opinion in *Dills v. State*, 69 Ind. 15.

An expert witness who is called upon to answer an hypothetical question involving a special knowledge peculiar to his calling is merely required to do what every other good citizen is required to do in behalf of public peace and good order and in promotion of public good. *DIXON v. PEOPLE*.

And a medical practitioner called upon to attend a person injured, and who makes a *post-mortem* examination, cannot decline to state the cause of the man's death upon a prosecution for his mur-

against the witness for contempt, and the court stated to the witness that it was the order of the court he should answer the question, and he still declined to do so. Thereupon the court found him guilty of contempt, and for such contempt fined him in the sum of \$25. This order fining the witness was excepted to, and his counsel made a motion for remission of the fine, which motion was overruled by the court. To the order overruling the motion, exception was taken, and an appeal was brought to the appellate court. The appellate court has affirmed the judgment of the circuit court, and given a certificate of importance. The present appeal is prosecuted from such judgment of affirmance so entered by the appellate court.

The question in this case is whether a physician, who has been subpoenaed and is interrogated as an expert witness only, can be punished as for a contempt for refusing to testify, when no compensation greater than that allowed to an ordinary witness has been paid to him, or promised to him. The question here involved has never been directly decided by this court. In *Wright v. People*, 112 Ill. 540, a physician, before appearing as a witness, had visited a patient professionally, and had stated while testifying as a witness, without any objection on his part, the condition of the patient whom he had thus visited. He was then asked his opinion as to the cause of the symptoms he had thus discovered to exist, but refused to answer without a professional fee being paid or secured to him therefor. In that case it was held that the witness could not refuse to state the cause of the symptoms he had discovered to exist, upon the ground that such statement was pertinent to the subject about which he had already testified voluntarily. But no opinion was there expressed concerning the precise question here involved. In *Hutchinson v. Hutchinson*, 152 Ill. 347, the question arose whether a court of equity had a right to compel payment for the services of the solicitor of a guardian *ad litem* of an infant defendant, and for the time and services of two physicians who were expert witnesses for said guardian *ad litem*. In that case we said (p. 354): "The general rule that prevails in this state is that solicitors' fees and experts' fees cannot be taxed as costs against unsuccessful litigants in chan-

cery suits, and that the discretion of the chancery courts in awarding costs in such cases is confined to statutory allowances."

The ruling in the *Hutchinson Case*, however, is not decisive of the question which is presented in the case at bar. At common law no witness fees were paid. Costs are a creature of the statute, and, in the absence of a statute authorizing it, no fees can now be taxed as costs, or recovered. 8 Bl. Com. 369; *Constant v. Mat-teson*, 22 Ill. 560; *Eimer v. Eimer*, 47 Ill. 373; *Smith v. McLaughlin*, 77 Ill. 596; *Larimer County Comrs. v. Lee*, 32 Colo. App. 177.

Section 47 of chapter 53 of the Revised Statutes of this state provides that "every witness attending in his own county upon trials in the court of record, shall be entitled to receive the sum of \$1 for each day's attendance, and 5 cents per mile each way for necessary travel." There is also a provision for paying witnesses from a foreign county in criminal cases. As, therefore, such fees only can be taxed as costs as are provided for in the statute, and as only such witness fees as are specified in said § 47 are provided for in the statute, it is manifest that no extra compensation for the services of an expert witness, testifying to a matter of opinion, can be taxed as costs against the defeated party. Many of the cases in England which are referred to as sustaining the doctrine that such expert witness may be allowed an extra fee for his services are based upon the statute of 5 Eliz. chap. 9, which enacted that the witness must "have tendered to him, according to his countenance or calling, his reasonable charges." Mr. Greenleaf, in his work on Evidence (15th ed. § 310), says that "in this country these reasonable expenses are settled by statutes, at a fixed sum for each day's actual attendance, and for each mile's travel, from the residence of the witness to the place of trial and back, without regard to the employment of the witness, or his rank in life." Our statutes treat all witnesses alike, regardless of their "countenance or calling," whether they be physicians or lawyers or ordinary citizens, so far as the question of the taxation of their fees as costs is concerned. Witnesses are not entitled to special privileges on account of their rank or employment. Mr. Best, in his work on Evidence (8th ed. p. 112

der, upon the ground that his knowledge was obtained by professional skill and from the deductions of experience which were his own property, and for which the county refused to pay. *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573.

And the right to compel an expert witness to testify as such, and to give his professional opinion without compensation other than the ordinary witness fee, is not affected by the fact that he is called upon in a civil action. *DIXON v. PEOPLE*.

The rule has been laid down, however, that the skill and professional experience of a man are so far his individual capital and property that he cannot be compelled to confer them gratuitously upon anyone, and that neither the public nor any private person has a right to extort services from him in the line of his profession without adequate compensation. *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75, 25 Am. Rep. 619, note, quoting *Ordronaux, Medical Jurisprudence*, §§ 114, 115.

And that while a witness called upon to depose to facts which he saw is bound as a matter of public duty to speak to such facts, as without such

testimony the course of justice must be stopped, one who is called in an action to depose to a matter of opinion depending upon his skill in a particular trade is under no such obligation, and has a right before being examined to demand from the party calling him a compensation for his loss of time. *Webb v. Page*, 1 Car. & K. 23.

As to right to compel experts to testify without compensation other than that allowed to witnesses in general, see also *Flinn v. Prairie County (Ark.)* 27 L. R. A. 669, and note.

IV. General rules with relation to civil cases. . .

a. Necessity of payment or tender.

While the rules laid down in the preceding subdivisions are applicable alike to civil and criminal proceedings, it is to be observed from an examination of the cases that they have been adopted and acted upon almost exclusively with relation to criminal matters. With reference to civil cases and proceedings the general and common-law rule which in a number of instances has been adopted.

note 8), refers to a passage in the work of Jeremiah Bentham, and puts the following illustration: "Were the Prince of Wales, the Archbishop of Canterbury, and the lord high chancellor to be passing in the same coach while a chimney sweeper and a barrow woman were in a dispute about a half-penny worth of apples, and the chimney sweeper and the barrow woman were to see proper to call upon them for their evidence, could they refuse it? No! most certainly not!" *Ex parte Dement*, 53 Ala. 390, 25 Am. Rep. 611. It follows that in this case the court could not fix a compensation to be paid to appellant, nor order his fee of \$10 to be taxed as costs, nor order the party calling the witness to pay or secure to him compensation. It is claimed, however, that in a civil suit a witness, who is called to testify as an expert only, should not be punished for contempt in refusing to testify because no compensation is provided for his professional opinion, other than ordinary witness fees. The power to compel the production of testimony necessary to the decision of issues involved in pending lawsuits is one of the rights and powers which is inherent in the very organization of courts of justice. Contempt of court is a disobedience to the rules or orders of the court, which interferes with the due administration of the law. 3 Am. & Eng. Enc. Law, p. 777. The refusal of a witness to answer any question which he may be lawfully required to answer is a contempt of court, and, if he persists in his refusal, he may be punished accordingly. *Samuel v. People*, 164 Ill. 885.

The grounds upon which the right to such extra compensation on the part of expert witnesses has been sustained have generally been three in number:

The first ground is that the time of the expert witness is more valuable than the time of ordinary men, and that, by attendance at court to give his testimony, such a witness meets with a loss of time. The better and more recent authorities, however, both in England and this country, now unite in the view that the right to such extra compensation cannot be properly rested upon loss of time, as a basis. In *Loneragan v. Royal Exchange Assurance Co.* 7 Bing. 729, Chief Justice Tindal said: "There is no reason for assuming that the time of medical

men and attorneys is more valuable than that of others whose livelihood depends on their own exertions." In *Collins v. Godefrey*, 1 Barn. & Ad. 950, Lord Tenterden, Ch. J., said that "a party cannot maintain an action for compensation for loss of time in attending a trial as a witness." *Moor v. Adam*, 5 Maule & S. 156; *Larimer County Comrs. v. Lee*, 8 Colo. App. 177; *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611. Loss of time, as a ground for claiming extra compensation for services as a witness, applies as well to all ordinary witnesses as to expert witnesses. It is conceded that when any witness, whether he is an expert witness or not, is acquainted with any facts which bear upon the matter in controversy in a litigation, he is obliged to testify; and a distinction is drawn between the testimony of an expert witness who is acquainted with the facts about which he testifies, and an expert witness who is called upon to give his opinion, in reply to a hypothetical question, without any knowledge of facts. Manifestly the witness who goes to court and testifies as to the facts of which he knows is subjected to a loss of his time as much as a witness who goes there to testify as an expert upon a mere matter of opinion.

The second ground upon which the claim for such extra compensation is based is that the skill and accumulated knowledge of the expert are his property, and that a man's property should not be taken without just compensation. Various definitions have been given of property. Webster defines property to be "the exclusive right of possessing, enjoying, and disposing of a thing." This court has adopted this definition in *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.* 115 Ill. 375, 56 Am. Rep. 173. Blackstone says, "Property consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 Bl. Com. 138. It has also been said that property, in its legal sense, is not the thing itself, but certain rights in and over the thing, those rights being: (1) user; (2) exclusion; (3) disposition. Lewis, Em. Dom. § 54. This court has also said, in discussing the right to make and enforce contracts as being included in the right to acquire property, that labor is property, and that the laborer has the same

and confirmed by statutory enactment is that a witness is entitled to demand his fees and mileage before he obeys a subpoena. *Young v. Merchants' Ins. Co.* 29 Fed. Rep. 273. And see cases cited below.

And that a witness is not bound to attend court or remain in attendance unless his fees and expenses have been paid or tendered. *Atwood v. Scott*, 99 Mass. 177, 96 Am. Dec. 728; *Brocas v. Lloyd*, 28 Beav. 129, 26 L. J. Ch. N. S. 758.

And that a witness will not be punished for contempt for failure to attend as a witness in a civil case unless his fees have been paid or tendered. *Bonner v. People*, 40 Ill. App. 628; *Bliss v. Brainard*, 42 N. H. 255.

Within this rule a witness cannot be deemed to have been lawfully subpoenaed for the purpose of punishment for nonattendance unless the fee be paid or tendered, where the statute expressly requires that the fee shall be paid, fixing the amount. *Ogden v. Gibbons*, 5 N. J. L. 513.

And a witness who was called by one party to an action and testified on his behalf, and then de-

parted, cannot be attached by the opposite party as an absent witness where he had not subpoenaed him or paid or tendered him fees as required by statute; the witness should have been duly subpoenaed by him if he wished to avail himself of his testimony. *Beaulieu v. Parsons*, 2 Minn. 26.

And the party on whose behalf a witness gives evidence, if required by the other side to produce him for cross-examination, is bound in the first instance to pay him his reasonable expenses though he may be out of the jurisdiction. *Richards v. Goddard*, L. R. 17 Eq. 238, 43 L. J. Ch. N. S. 144, 22 Week. Rep. 204, 29 L. T. N. S. 884.

So, a party made a witness by his adversary is as much entitled to fees as a condition precedent to create a duty to attend as a third person. *Bonner v. People*, 40 Ill. App. 628; *Anderson v. Johnson*, 1 Sandf. 713; *Hewlett v. Brown*, 1 Bosw. 555.

And when such fees are not paid he could not be punished for a contempt for not attending unless first brought up on attachment or served with an order to show cause. *Hewlett v. Brown*, 1 Bosw. 555.

right to sell his labor, and to contract with reference thereto, as has any other property owner. *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79. Labor is defined by Webster to be "physical toil or bodily exertion," and also to be "hard muscular effort directed to some useful end, as agriculture, manufactures, and the like." He also defines labor to be "intellectual exertion; mental effort, as the labor of compiling a history." It is not exactly accurate to say that the mere abstract knowledge acquired in the study of a special employment is of itself property. It is the right to apply that knowledge to the accomplishment of a particular result which constitutes property. For instance, if the appellant had been required to answer a question put to him with a view of prescribing a remedy for the relief of Mrs. Purdy, the plaintiff in the suit in which he was called to testify as a witness, then it might be said if he was not offered any compensation, that he was deprived of a property right. But where a physician is asked a hypothetical question and is called upon to give his opinion upon the facts stated in the hypothetical question while he is testifying as a witness in court, he is not thereby required to practise his healing art. He is merely making a statement, not for the purpose of effecting a cure, or relieving a patient, but for the purpose of enabling the court and the jury to understand correctly a case which is before the court. There is no infringement here of a property right. It may be conceded that in a certain sense the knowledge of the physician, acquired by special study, is property; but the question here is, not, so much whether certain knowledge is property, as whether the requirement that he shall answer a hypothetical question is a taking of his property. Where he is required to make an application of his knowledge to a particular case, so as to secure a particular result,—such as, for instance, the curing of a disease or the healing of a wound,—then he would undoubtedly be entitled to compensation. A physician or surgeon cannot be punished for a contempt for refusing to make a *post-mortem* examination unless paid therefor; nor can he be required to prepare himself in advance for testifying in court, by making an examination, or performing an operation, or resorting to a cer-

tain amount of study, without being paid therefor. But when he is required to answer a hypothetical question, which involves a special knowledge peculiar to his calling, he is merely required to do what every good citizen is required to do in behalf of public peace and public order, and in promotion of public good. Counsel for appellant states that many of the cases which have held that expert witnesses can be required to testify without being paid are criminal cases, where the interest of the state and the interest of the public demand of the physician that he should yield up something of his knowledge for the benefit of society at large. This position, however, is inconsistent with the contention that when an expert witness is required to testify without compensation his property right is interfered with. A man's property cannot be taken from him by the state without compensation. It makes no difference whether it is to be taken for the good of the public or for the benefit of a private individual, so far as the right to compensation is concerned. It is true that private property cannot be condemned by the state for a private purpose. Private property can only be taken for a public purpose. But in either case it must be paid for. To concede, therefore, that in a criminal prosecution conducted by the state a physician may be required to testify without compensation, because it is for the public good, is to concede that his knowledge may be made use of by a court of justice without his being paid therefor. We conceive, however, that it can make no difference whether the suit in which the witness is called upon to testify is a suit between private parties, or is a suit between the state and an alleged criminal. In either case the object is to promote public justice, and to aid the due administration of justice. It is just as important to the peace and good order of society that private controversies should be settled upon correct proofs, and in accordance with truthful testimony, as that criminals who violate the laws of the state should be punished. It is the duty of the ordinary witness and of the expert witness to testify as to facts within his knowledge which bear upon the decision of controversies in the courts. Such duty de-

And when a party is compelled to attend court and be examined in behalf of a co-plaintiff or a co-defendant as to any matter in which he is not jointly interested or liable, he is entitled to pay as a witness. *Penny v. Brink*, 75 N. C. 68.

The rule that a witness may refuse to be sworn unless the expenses of his attending the assize, as well as his traveling expenses, were paid him when he was summoned, however, does not apply where the witness was a party to the action, who was present necessarily for the purpose of his defense, and not merely under the subpoena of the other party. *Reed v. Fairless*, 3 Fost. & F. 268, 8 L. T. N. S. 858.

And a party testifying before an auditor is not entitled to fees as a witness in New Hampshire, whether testifying in his own favor or for his adversary, and he cannot refuse to testify because such fees have not been paid. *Whitney v. Pierce*, 40 N. H. 114.

So, one who is present in court may be compelled to testify without the payment of his fees, under Wis. Rev. Stat. § 4057, providing that no person 89 L. R. A.

shall be subject to attend as a witness unless his fees are paid or tendered him. *Rozek v. Redzinski*, 87 Wis. 525.

And it has been held generally that if a witness be in court, having come there on other business, he cannot refuse to be sworn, though his expenses were not tendered. *Blackburn v. Hargreave*, 2 Lewin, C. C. 206; *Rex v. Sadler*, 4 Car. & P. 218. But the contrary was held in *Hurd v. Swan*, 4 Denio, 75.

And in *Bowles v. Johnson*, 1 W. Bl. 36, it was held that the service of a subpoena without the tender of expenses is not sufficient to bring a witness into contempt though he comes to court and refuses to be sworn.

So, an action for a penalty may be maintained against a witness for nonattendance though his fees had not been paid, where he had expressly waived such payment. *Hurd v. Swan*, 4 Denio, 75.

It is to be observed, however, that some of the states have made provision in specified cases for the payment of fees and expenses of witnesses by the county on proof of service as a witness, or for

volves upon him as a citizen, and in view of the protection which he receives from the laws of the country, in the matter of his personal liberty, and in the matter of the protection of his property, this duty devolves as much upon a physician who is required to testify as an expert witness in answer to hypothetical questions as it does upon the ordinary witness testifying to facts within his knowledge. In *Vise v. Hamilton County*, 19 Ill. 78, we held that an attorney appointed by the court to defend a criminal could not recover for his services from the county in which the prosecution was conducted, and that a court might compel an attorney, as one of its officers, to defend a prisoner, in case of his inability to employ counsel. It has never been supposed that to require the performance of such professional services without compensation was the taking of property without just compensation. If the precedent is once established that expert witnesses must be paid a reasonable compensation for their testimony, then it will not be long before such testimony will be offered to the highest bidder. The temptation will be to give opinions in favor of that party to the suit who will pay the highest price. The testimony of expert witnesses will thus become partisan and one-sided. The theory upon which such witnesses are required to testify in cases like this is that they are *amici curiæ*, and that, testifying under the sanction of an oath, they do so, not with intent to take the part of either contestant in the suit, but with a view to arriving at the truth of the matter, and for the purpose of aiding the court to pronounce a correct judgment. In Redfield on the Law of Wills (marginal page 155, § 15, note 46), it is said: "It being purely a matter of conventional arrangement between professional experts and those who desire to employ them as witnesses, both in regard to their acting as such, and also their making preparations to enable them to give such testimony, it virtually places a price upon such testimony in the market, and its price is likely to range somewhat according to its ability to aid one or other of the parties litigant. The tendency of this is to render it partisan and one-sided, as a general thing." Moreover, if a physician is to be

allowed extra compensation as an expert witness, then men pursuing other occupations which require special experience will have the same right to demand extra fees. A banker will claim that he has earned extra compensation, a merchant will make the same claim, and so with men engaged in other branches of business. It will be easy to say in such cases that the testimony called for is the result of special knowledge and acquired skill, and therefore should be paid for. Almost every lawsuit involves testimony which is in the nature of opinion, in addition to testimony which speaks of the mere facts within the knowledge of the witness. For instance, A sells B a certain quantity of wheat, and delivers the same, and sues for the price of the wheat. One witness testifies as to the contract, which he heard the parties make. Another testifies to the delivery of the wheat, which he saw delivered. These witnesses testify to actual facts heard and seen. But still another witness, who may know nothing about the facts, may yet be required to state the value of the wheat at the time of the contract, or at the time of the delivery; and he may be required to testify from his knowledge of the market prices of wheat, as given in the market quotations. Such a witness, however, as to the value, and as to market prices, is not regarded as an expert witness who is entitled to extra compensation.

Counsel for appellant also claim, as a third ground, that the accumulated knowledge and skill of the expert witness may be treated, if not as property, yet as "particular services." This contention is based upon the reasoning of the court in the case of *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75, which is the leading case upon the subject in opposition to the views here expressed. That case proceeds mainly upon the ground that the services called for are included within "particular services," as those words are used in the Constitution of Indiana. Section 21 of the Indiana Bill of Rights provides that "no man's particular services shall be demanded without just compensation." The Indiana court there held that the services of an expert witness were "particular services," and

their collection by methods other than prepayment by the party calling the witness. Under such provisions it is obvious that prepayment could not be demanded as a condition precedent to attendance and service. But the cases decided under such provisions have turned upon other points, and have therefore been omitted.

For an example or illustration of such provisions, see *Smith v. Barger*, 9 Yerg. 322, and *Morris v. Rippey*, 4 Jones, L. 583, *supra*, 1.

In the courts of the United States witnesses are obliged to obey a subpoena to attend as a witness if they have the means to travel, and attend whether the fees are advanced or not, and are liable to punishment for contempt for failure to do so. *Norris v. Hassler*, 23 Fed. Rep. 581; *United States v. Durling*, 4 Biss. 500.

And if a witness has not such means it is the duty of the proper officer of the government to furnish him with them, and an attachment will issue and the court will punish him where he could pay his expenses and would not come because the money was not tendered. *United States v. Durling*, 4 Biss. 500.

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But a person subpoenaed as a witness in a civil cause pending in a United States court who demands his traveling fee and fee for one day's attendance at the time, which are not paid, is not subject to attachment for contempt for failing to obey the writ where the statute of the state in which the action arose provides that a witness who makes such a demand is not obliged to obey in case of refusal. *Re Thomas*, 1 Dill. 420.

b. Sufficiency of payment or tender.

An attachment will not issue against a witness for failure to attend court in response to a subpoena where the payment or tender of fees and expenses was insufficient. *Horne v. Smith*, 6 Taunt. 9; *Chapman v. Pointon*, 2 Strange, 1150; *Brocas v. Lloyd*, 23 Beav. 129, 26 L. J. Ch. N. S. 758.

Thus, a witness who is paid his traveling fee for one day's attendance, and attends on that day, must be tendered his fees for each succeeding day if he is wanted for a further day; but it is not necessary that he should be served with a subpoena each time, where the statute makes no express pro-

that, therefore, under the Constitution, they should be paid for. No such provision as the one referred to as being contained in the Constitution of Indiana exists in the Constitution of Illinois. Counsel for appellant say, however, that article 2 of the ordinance of 1787 provided as follows: "No man shall be deprived of his life, liberty, or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary for the common preservation, to take any man's property, or to demand his particular services, full compensation shall be made for the same." It is to be here noted that by the use of the expression, "to take any man's property, or to demand his particular services," the article seems to draw a distinction between property and particular services. Therefore, if the knowledge of the expert witness is included within the meaning of particular services, it cannot be regarded as property. However this may be, the ordinance of 1787 is not in force in the state of Illinois. In the recent case of *People, Woodyatt, v. Thompson*, 155 Ill. 451, this court held that the ordinance of 1787 was passed by the Congress of the Confederation for the government of the Northwest Territory, and has no force in Illinois, except so far as its principles are embodied in the state Constitution. In that case the whole subject is elaborately discussed, and many authorities are referred to, sustaining the position there taken. The decision in *Buchman v. State, supra*, was rendered by a divided court, consisting of five judges. Two of the judges (Chief Justice Biddle and Judge Niblack) dissented from the opinion in that case. The views of the dissenting judges are given in the case of *Dills v. State*, 59 Ind. 15, and the reasoning there is cogent and convincing; and the opinion adopts the views of the supreme court of Alabama, as announced in the case of *Ex parte Dement*, 53 Ala. 889, 25 Am. Rep. 611. The latter case is the leading case in this country in favor of the views herein expressed, and its line of reasoning is substantially adopted in what has been here stated. The case holds that the law allows no excuse for withholding evidence which is relevant to the matters in

question before its tribunals, and is not protected from disclosure by some principle of legal policy; that, the administration of justice being a source of mutual benefit to all the members of the community, each is under the obligation to aid in furthering it, as a matter of public duty, and that "the same principle which justifies the bringing of the mechanic from his workshop, the merchant from his store-houses, the broker from his 'change, or the lawyer from his engagements, to testify in regard to some matter which he has learned in the exercise of his art or profession, authorizes the summoning of a physician, or surgeon, or skilled apothecary, to testify of a like matter, when relevant to a cause pending for determination in a judicial tribunal," and that "a physician, like any other person, may be called to testify as an expert in a judicial investigation, whether it be of a civil or criminal nature, without being paid for his testimony as for a professional opinion, and upon refusal to testify is punishable as for a contempt." This decision of the supreme court of Alabama has been followed and adopted in the following cases: *State v. Teipner*, 36 Minn. 535; *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573; *Larimer County Comrs. v. Lee*, 8 Colo. App. 177; *Flinn v. Prairie County*, 60 Ark. 204, 27 L. R. A. 669. Upon this subject, Mr. Rogers, in his able and exhaustive work on *Expert Testimony* (2d ed. p. 424, § 188) says: "There can be no doubt that professional men are not entitled, in this country, to claim any additional compensation when testifying as ordinary witnesses to facts which happened to fall under their observation. But another question arises when they are summoned to testify as to facts of science with which they have become familiar by means of special study and investigation, or to express opinions based upon the skill acquired from such researches, as to conclusions which ought to be drawn from certain given facts. Whether they can be compelled to testify in such cases, when no other compensation has been tendered than the usual fees of witnesses testifying to ordinary facts, is a point upon which the cases are not in harmony. In this country

vision for such a case. *Mattocks v. Wheaton*, 10 Vt. 498.

And a witness subpoenaed and paid for one day's attendance who attends on the day named and then applies to the party subpoenaing him for further payment of fees, which is refused, and he thereupon leaves court, does not incur the statutory penalty for nonattendance. *Courtney v. Baker*, 3 Denio, 27.

And a capias will not issue where the witness had been in attendance the day before and had been paid his fees for that day, and had not been paid or tendered any fees for further attendance, though he had not asked for them. *Atwood v. Scott*, 99 Mass. 177, 98 Am. Dec. 728.

So, a witness who is subpoenaed to attend court on Tuesday, and is paid his *per diem* fees from Wednesday to Saturday inclusive, who returns to his home and is offered 60 cents on Saturday evening as his *per diem* for the next Monday, which he refuses, and neglects to appear on Monday when the cause is tried, is not subject to the penalty imposed by law for nonattendance, as he is entitled to a tender of his fees for attendance on Sunday as 39 L. R. A.

well as other days of the week during the sitting of the court. *Muscott v. Runge*, 27 How. Pr. 85.

In *Holden v. Shove*, 1 R. I. 287, however, it was held that a witness upon whom subpoena was served and fees paid him for one day only, who does not attend when the case is reached about a month later, may be attached, as he is bound to attend at the trial unless he has given notice that he will refuse to appear without payment of the fees due to him, but that in case of such notice his fees must be paid up to and including the time when his testimony is required.

In England an attachment will not be granted against a witness for not obeying a subpoena to attend at a trial unless the whole expenses of the journey and of the necessary stay at the place of trial be tendered at the time of serving the subpoena. *Fuller v. Prentice*, 1 H. Bl. 49; *Ashton v. Haigh*, 2 Chitty, 201.

And a witness is entitled to her reasonable expenses for traveling in the mode suited to her station of life, and the particular circumstances in which she may then happen to be placed. And where such witness has a sick child which is obliged

the cases are nearly balanced, and the question must be regarded as still an open one although the weight of authority rather inclines to the theory that the expert may be required to answer the question without additional compensation." As has already been stated, we prefer to adopt the views announced by the supreme court of Alabama, and in the cases following the Alabama decision. We cannot close this opinion without quoting and indorsing the following views expressed by the Texas court of appeals in *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 578: "It is to be regretted that a member of a profession so distinguished for liberal culture and high sense of honor and duty should refuse to testify

in a cause pending before the courts of his country, involving the life or liberty of a fellow being and the rightful administration of the laws of a common country. Dr. Spohn has doubtless been misled, in taking the position he did, by the misconceptions of certain writers on medical jurisprudence."

For the reasons above stated, we have arrived at the conclusion that the judgments below were correct. Accordingly the judgments of the Appellate Court and of the Circuit Court are affirmed.

Boggs, J., having passed upon the case in the appellate court, took no part in this decision.

TENNESSEE SUPREME COURT.

STATE of Tennessee

John HENLEY *et al.*

(98 Tenn. 665.)

1. **The legislature has unlimited power** to act in its own sphere of legislation except so far as restrained by the Constitution of the United States and the Constitution of the state.
2. **A statute which does not violate some provision** of the Constitution cannot be annulled by the courts whether its provisions are wise or unwise, or whether its operations be hurtful or beneficial.
3. **Ordinary services such as may be required of all citizens** or officials by general or valid special laws are not particular services within the provision of Const. art. 1, § 21, providing that no man's particular services shall be demanded without the consent of his representatives, or just compensation.
4. **The constitutional guaranty of compulsory process** to require witnesses to attend court and give evidence does not require the state to provide for the expense of obtaining their attendance.
5. **A statute providing that the state or county will pay costs** of criminal prosecution only in certain classes of cases is not partial or class legislation.

6. **A statute denying fees and costs or mileage to witnesses** who reside within 5 miles of the place at which attendance is required, while allowing them in other cases, is not so unreasonable and capricious a classification of witnesses as to make the statute partial and unconstitutional.

7. **The right to a fair trial, involved in the constitutional provision for trial by jury**, is not infringed by a statute making the costs and fees payable to officers and witnesses in a criminal case depend on conviction, where this provision does not apply to the jury and applies to a justice of the peace only in cases where his power is merely to bind over the accused for trial in a tribunal in which the justice has no voice.

8. **Reference to laws repealed** is not necessary in a statute which repeals them only by necessary implication.

(Snodgrass, Ch. J., dissents.)

(May 29, 1897.)

A PPEAL by the state from a judgment of the Criminal Court for Shelby County taxing costs to the clerk, sheriff, justice of the

to travel with her she must be tendered a sufficient amount of money to pay for the conveyance of the child in the manner required by its condition, as well as for her own conveyance. *Dixon v. Lee*, 1 Cramp. M. & R. 645, 5 Tyrw. 180, 8 Dowl. P. C. 259.

And a witness who is served with a subpoena, and given conduct money only, no tender of a reasonable amount for her expenses in going back having been made, who goes to the place where the court is sitting without making any further demand, but refuses to proceed to the court-house unless such expenses are paid, is not subject to attachment for disobedience to the subpoena. *Newton v. Harland*, 1 Scott, N. R. 502, 1 Mann. & G. 968, 9 Dowl. P. C. 16, 1 Wollaston, P. C. 63, 4 Jur. 992.

So, a witness who is paid a shilling upon being summoned as a witness, and receives a promise to pay as much more as would be required when the witnesses came, is not bound to attend, under the English statute providing that the person summoning the witnesses shall pay sufficient charges

for travel according to the distance, as the witness is not bound to accept such promise. *Goodwin v. West*, Cro. Car. 540.

And a witness is justified under 5 Eliz. chap. 9, in refusing to give evidence before the examination unless he was first paid for his attendance at the rate of one guinea a day, and an attachment against a witness for not obeying a subpoena will not be granted under that act, unless the whole of the necessary expenses of going to the place of trial and of returning from it, and also during the stay there, has been tendered him together with one guinea a day for expenses of living. *Re Working Men's Mut. Soc.* L. R. 21 Ch. Div. 581, 51 L. J. Ch. N. S. 850, 80 Week. Rep. 938.

An attachment against a witness for nonattendance pursuant to the command of a subpoena will not be denied, however, on the ground that no conduct money was tendered, where the witness resided at the place where the cause was to be heard. *Jacob v. Hungate*, 8 Dowl. P. C. 456.

peace, and witnesses in a proceeding against defendants for grand larceny, of which charge they were acquitted. *Reversed.*

The facts are stated in the opinion.

Mr. G. W. Pickle, for the State:

No right to costs existed at common law. Costs are a purely statutory creation.

Mooney v. State, 2 Yerg. 578; 5 Am. & Eng. Enc. Pl. & Pr. 110; *Morgan v. Pickard*, 86 Tenn. 208.

As regards the state's or government's liability for costs, the strictest rule prevails.

State v. Odom, 98 Tenn. 446.

The general government and the states are exempt from the payment of costs, or suit or judgment for same, except where costs shall be given as a matter of grace and favor the statute.

8 Bl. Com. 899; 4 Am. & Eng. Enc. Law, pp. 314, 316, 828; 8 Am. & Eng. Enc. Pl. & Pr. 151, 152; *United States v. Barker*, 15 U. S. 2 Wheat. 395, 4 L. ed. 271; *The Antelope*, 25 U. S. 12 Wheat. 546, 6 L. ed. 723; Endlich, Interpretation of Statutes, § 161.

A statute making the state liable for all costs of criminal cases is construed to mean only state costs, and not to embrace defendant's costs.

State v. Barton, 3 Humph. 18; *Prince v. State*, 7 Humph. 137; *Tucker v. State*, 2 Head, 556.

The counties share the rights and exemption of the state in this respect.

State v. Blackburn, 61 Ark. 407.

Courts have nothing to do with the mere policy, or impolicy, of any legislation.

Sutton v. State, 96 Tenn. 698, 33 L. R. A. 589; *Ballentine v. Pulaski*, 15 Lea, 684; *Lynn v. Polk*, 8 Lea, 229; *Peck v. State*, 86 Tenn. 262; *Williams v. Nashville*, 89 Tenn. 488; *Cole Mfg. Co. v. Falls*, 90 Tenn. 481; *Davis v. State*, 3 Lea, 378; *McGinnis v. State*, 9 Humph. 47, 49 Am. Dec. 697.

The legislature has unlimited power of legislation, except so far as it is constrained by the Constitution.

Davis v. State, 3 Lea, 377; *Hope v. Deaderick*, 8 Humph. 8, 47 Am. Dec. 597; *Bell v. Bank of Nashville*, Peck (Tenn.) 269; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, 12 L. R. A. 70.

That construction of constitutions and statutes will be favored which will sustain the validity of the latter.

And a witness who receives a shilling upon being summoned to attend at a place other than his residence, admitting that he had received a guinea from the opposite party, and that the shilling was a reasonable sum, is bound to attend, and will be held liable in an action for not obeying the subpoena. *Betteley v. M'Leod*, 3 Bing. N. C. 405.

So, an attachment will issue against a witness who positively refused to attend, where he was regularly summoned and money tendered him for his expenses, which he did not object to on account of insufficiency. *Andrews v. Andrews, Coleman*, 119, 2 Johns. Cas. 109.

And it is not necessary to an attachment against a witness for failure to attend court in response to a subpoena that the sum tendered by way of expenses was insufficient where the witness made no objection on that ground at the time, but offered to pay his own expenses. *Goff v. Mills*, 2 Dowl. & L. 23, 18 L. J. Q. B. N. S. 227, 8 Jur. 758.

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Illinois C. R. Co. v. Crider, 91 Tenn. 506; *Horne v. Memphis & O. R. Co.* 1 Coldw. 74; *Cole Mfg. Co. v. Falls*, 90 Tenn. 486; *Meyer v. Berlanti*, 39 Minn. 438, 1 L. R. A. 777.

The statutes are not declared invalid unless their unconstitutionality appears beyond any reasonable doubt.

Cole Mfg. Co. v. Falls, 90 Tenn. 466.

Mere ordinary services, such as are or may be required in due and regular course of administration of the laws and of the public service, of all citizens or officials, or of such classes as may be designated by general or valid special laws, are not "particular services."

Neely v. State, 4 Baxt. 179; *House v. Whitis*, 5 Baxt. 690; *Wright v. State*, 3 Heisk. 256.

The question is not one to be settled by consideration of the hardship that may result. It is a question of constitutional power, not a question of policy or expediency.

Avery v. State, 7 Baxt. 328.

The power to disallow costs and fees, even of innocent persons, has been freely exercised by the courts when required for the protection of the public.

Daly v. Mulnomah County, 14 Or. 20; 1 Bishop, Crim. Proc. § 806; *Vise v. Hamilton County*, 19 Ill. 78; *Rove v. Yuba County*, 17 Cal. 61; *Huntingdon County v. Com.* 72 Pa. 80; *Posey v. Mobile County*, 50 Ala. 6; *Arkansas County v. Freeman*, 31 Ark. 266; *Johnston v. Lewis & Clarke Counties*, 2 Mont. 159.

The "particular services" clause of the Indiana Constitution has been invoked successfully in behalf of expert witnesses.

Buchman v. State, 59 Ind. 1, 26 Am. Rep. 75; *Dills v. State*, 59 Ind. 15.

The Indiana decisions as to experts stand alone, and are opposed to the entire current of recent decisions.

Ex parte Dement, 58 Ala. 389, 25 Am. Rep. 611; *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573; *State v. Teipner*, 36 Minn. 535; *Larimer County Comrs. v. Lee*, 3 Colo. 177; *Flinn v. Prairie County*, 60 Ark. 204, 27 L. R. A. 669.

Ordinary services of nonexpert witnesses are not "particular services."

Israel v. State, 8 Ind. 467; *Washington v. Nashville*, 1 Swan, 177; *Rogers, Expert Testimony*, 2d ed. 425; *Bennett v. Kroth*, 37 Kan. 235; *Avery v. State*, 7 Baxt. 331.

The legislature determines for itself, and:

And see *dictum* in *Hurd v. Swan*, 4 Denio, 75, citing *Goodwin v. West*, Cro. Car. 540, to the same effect.

Professional witnesses have a right, under 15 & 16 Vict. chap. 78, providing for a scale of allowances to different witnesses according to their station in life, to demand compensation for loss of time at the rate of a guinea a day before they submit to be examined, although they reside in the town in which the examination was conducted. *Clark v. Gill*, 1 Kay & J. 19, 23 L. J. Ch. N. S. 711, 2 Week. Rep. 652, L. R. 2 Eq. 1108.

And an auctioneer summoned as a witness in the chancery division is entitled to one pound and one shilling a day for his loss of time, together with first-class return railway fare from his place of abode, and he may refuse to give evidence until this amount is tendered him. *Re Working Men's Mut. Soc. L. R. 21 Ch. Div. 861*, 51 L. J. Ch. N. S. 850, 30 Week. Rep. 938.

F. H. B.

conclusively, whether a law is good or bad, and whether it is "contrary to the public good."

Sutton v. State, 96 Tenn. 698, 38 L. R. A. 589; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 511, 12 L. R. A. 70; *Davis v. State*, 8 Lea, 377.

Fair and impartial trial is to be understood in a practical, not an Utopian, sense.

The Constitution requires the preservation of jury trial in its essential elements, such as its composition of twelve men, unanimity of verdict, etc., in all cases where it existed at the formation of the Constitution.

McGinnis v. State, 9 Humph. 47, 49 Am. Dec. 697; *Trigally v. Memphis*, 6 Coldw. 382; *Hogan v. Chattanooga*, 2 Tenn. Legal Rep. 12; *Eason v. State*, 6 Baxt. 475; Cooley, Const. Lim. 390, note.

Statutes which by direct enactment make reasonable regulations as to evidence do not violate the right of trial by jury.

State v. Yardley, 95 Tenn. 563, 34 L. R. A. 656; *Illinois C. R. Co. v. Crider*, 91 Tenn. 506.

In the matter of the qualification of jurors, number of challenges, etc., the power of the legislature is unlimited, except by the requirement as to an "impartial jury."

Burke v. State, MSS. (Jackson, 1875); *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578.

Mr. James M. Greer, also for the State: The legislature is supreme on any question of policy.

Washington v. Nashville, 1 Swan, 181; *Barrow v. Page*, 5 Hayw. (Tenn.) 97.

When an emergency exists which threatens the life of the community the executive may demand a particular service from or seize the property of the individual member of the community.

Washington v. Nashville, 1 Swan, 180; *Wright v. State*, 3 Heisk. 256; *House v. White*, 5 Baxt. 692; *Neely v. State*, 4 Baxt. 174.

An act which lays down a new rule, as the Jarvis law does as to fees, however much this rule may conflict with existing laws, is valid.

Illinois C. R. Co. v. Crider, 91 Tenn. 506.

Messrs. Vertrees & Vertrees, for appellees:

This Jarvis law is unconstitutional and void, because it deprives accused persons of a fair and impartial trial.

The Constitution of 1796 provided that all laws then in force in the territory should continue in force until altered or repealed.

Const. 1796, art. 10, § 2; Schedule, § 1.

The "law of the land" in existence when a Constitution is adopted, is the existing statute law, as well as the existing common law.

Mauldin v. Greenville, 43 S. C. 298, 27 L. R. A. 284.

The right of trial by jury, mentioned in article 6, must be understood to be the right, as it existed when the Constitution was adopted.

Trigally v. Memphis, 6 Coldw. 382.

The right of trial by jury, as ordained and secured by American Constitutions, is not the right known to the common law as administered in brutal ages by Kings.

The question is, What is now the right of trial by jury under the Constitution of a free republic?

The Bill of Rights was not made for men, 39 L. R. A.

but for man. It was not made for the majority, but for the minority.

Anderson, Const. Law, 87.

The right of trial, secured by the Bill of Rights, is the right to a fair and impartial jury trial.

Clapp v. State, 94 Tenn. 186; *Logan v. United States*, 144 U. S. 298, 36 L. ed. 441; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *State v. Poe*, 8 Lea, 654; *People v. Murray*, 89 Mich. 276, 14 L. R. A. 809; *Staples v. State*, 89 Tenn. 231; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *Stokes v. State*, 5 Baxt. 619.

This right of trial by jury is this: The right to a fair and impartial jury trial from start to finish.

Stokes v. State, 5 Baxt. 619, 30 Am. Rep. 72; *Clapp v. State*, 94 Tenn. 186.

Under this act the witness gets nothing unless the accused be convicted. Compensation surely follows every conviction.

The man who is taken from his business to testify for the state feels that he ought to be paid. The judgment of the people hitherto has been that he ought to be paid; for he has been paid.

When it is considered that the average man is poor, and needs to be paid; and feels that it is just and right that he should be paid; and knows that he will not be paid if the accused is acquitted; and knows that he will be paid if the accused be convicted,—the constant presence of a temptation dangerous to the accused cannot be denied.

This act tempts the honest, but poor or needy, witness to be silent when he should speak. It threatens, as he enters the witness box, to turn him empty away if he speaks that which will acquit the accused. It hires every bad-hearted witness to convict.

Nor is this all. It tends to convert the clerks and sheriffs into auxiliaries of the attorney general.

When the sheriff has a pecuniary interest in the conviction of an accused person, that person has not had a fair and impartial trial.

Clapp v. State, 94 Tenn. 186.

A man does not have a fair and impartial trial in a civil case where the juror's fees are taxed to the losing litigant.

Neely v. State, 4 Baxt. 174.

A juror pecuniarily interested in the result, however little, is not an "impartial" juror in the constitutional sense.

Davis v. Allen, 11 Pick. 466, 22 Am. Dec. 886; *Com. v. Brown*, 9 Am. St. Rep. 748, note, 147 Mass. 585, 1 L. R. A. 620.

This is true even where the interest is incidental and contingent.

Smull v. Jones, 6 Watts & S. 122; *Com. v. Brown*, 9 Am. St. Rep. 748, note, 147 Mass. 585, 1 L. R. A. 620.

No man can have a fair and impartial trial where, by terms of law, the witnesses against him go supererogatory to bed upon his acquittal, but return home rewarded with money upon his conviction.

Pecuniary interest in the result of any proceeding affects the judgment, and influences the conduct of most of the actors in that proceeding.

1 Gilbert, Ev. 242.

Statutes which make arbitrary classifications

violate the "law of the land," and are therefore void.

It must be so framed as to embrace, equally, all persons who are or may be in the like situation or circumstances. The classification must be natural and reasonable, not arbitrary or capricious.

Sutton v. State, 96 Tenn. 696, 33 L. R. A. 589; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 500, 12 L. R. A. 70; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 245, 28 L. R. A. 796.

The classification must rest upon some reason which can be defended—some "sound and legal reason."

Dugger v. Mechanics' & T. Ins. Co. 95 Tenn. 256, 28 L. R. A. 796; *Cooley*, Const. Lim. 390.

A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate upon a class, and not generally upon all.

Ex parte Jentsch, 112 Cal. 468, 32 L. R. A. 664; *Bank of the State v. Cooper*, 2 Yerg. 600, 24 Am. Dec. 517; *Anderson*, Const. Law, 37.

A statute wanting in either of the "two indispensable qualities" above mentioned is void, for the reason that it violates the "law of the land."

Stratton Claimants v. Morris Claimants, 89 Tenn. 542, 12 L. R. A. 70; *Knob v. State*, 9 Baxt. 202; *State v. Staten*, 8 Coldw. 233.

Whether the nature of the crime, or its effects upon the public, or the degree of punishment, be considered, the classification is arbitrary, indefensible, and absurd.

A law which compels a freeman to attend court as a witness for the state exacts from him that which has three elements of value. It takes from him his time—time which would otherwise be employed in acquiring the means of support. It demands his labor, for he cannot attend the court without effort. It takes from him his money, for he must pay his fares, tolls, ferrriages, and feed and hotel bills.

The right to labor is property.

Prentice, Pol. Powers, 306; *Ritchie v. People*, 155 Ill. 101, 29 L. R. A. 79; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 663; *Ex parte Jentsch*, 112 Cal. 468, 32 L. R. A. 664.

The property which a man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.

State v. Goodwill, 83 W. Va. 179, 6 L. R. A. 621.

It is true that in the time of Henry I., and even thereafter, English jurors were not paid any fees; but it is also true that in the territory south of the river Ohio, and in the early days of the Republic, jurors in criminal cases were paid.

Acts 1803, chap. 2, § 6, p. 27; 1 Haywood & Cobb, 211; Acts 1811, chap. 72.

There is a power of sovereignty not limited by, and superior to, any written Constitution. It is the power of state preservation. It, so far, has found expression only in the assertion and exercise of those powers known as war powers, police powers, taxation, and eminent domain.

Randolph, Em. Dom. § 8.

39 L. R. A.

The police power is above the law of eminent domain.

Prentice, Pol. Powers, § 6; *Mills*, Em. Dom. 2d ed. § 9.

Animals infected with deadly contagious diseases may be killed. Even healthy animals which have been exposed may be killed to prevent the spread of the contagion; but they must be paid for, as the peril is not "imminent."

Miller v. Horton, 152 Mass. 540, 10 L. R. A. 116; *Randolph*, Em. Dom. § 23.

Persons infected with contagious diseases may be forcibly taken to a pest-house or hospital.

Tiedeman, Pol. Powers, § 42.

A building may be taken for a pest-house, but it must be paid for.

Markham v. Brown, 37 Ga. 277, 92 Am. Dec. 73; *Randolph*, Em. Dom. § 9.

Taxation is another extraordinary power. It is in the form of taxes that every man contributes his share of the public expense.

Randolph, Em. Dom. § 24.

The war power may demand personal service, or food and supplies; the police power may burn and destroy, to prevent the spread of pestilence and death; the taxing power may demand money in ruinous sums, but, after all, it is sovereignty asserting one of its inalienable powers, under overruling necessity. It is not a case where one of the powers of government is being exercised in the ordinary administration of the public business or affairs.

Using the words "sovereignty" and "government" to express the distinction above made, we would say that the "government" is always bound by the Constitution, while "sovereignty" is not.

Witness-service is a government, not a sovereignty, service. It is therefore to be performed under the Constitution, not under the "reserved power" of the state.

As a contributor, B, who now does witness service for nothing, contributed precisely like A formerly did when he paid a tax to be used to compensate C for witness-service. The burden, however, is not the same. Citizen A now bears it all, whereas it was then borne by A and all other citizens equally and alike.

He who performs witness-service for the state without pay bears an unequal share of the public expense. Inequality is unlawful.

Messrs. C. R. Barteau and Peter Turney also for appellees.

Wilkes, J., delivered the opinion of the court:

The question involved in this case is the validity and constitutionality of the act of the general assembly of Tennessee passed February 8, 1897, commonly known as the "Jarvis Law." The contest arises upon motions made in the criminal court of Shelby county to tax against the state certain costs, which motions were allowed, and the costs taxed, upon the ground that the act referred to is unconstitutional and void. The state has appealed. The act in question is in the words and figures following:

An Act to Regulate and Restrict the Payment of Costs and Fees in Criminal Prosecutions.

Sec. 1. Be it enacted by the general assembly of the state of Tennessee, that neither the state of Tennessee, nor any county thereof, shall pay or be liable in any criminal prosecution for any costs or fees hereafter accruing except in the following classes of cases:

(1) Cases of homicide, rape, robbery, burglary, arson, embezzlement, incest, or bigamy, when the prosecution has proceeded to a verdict in the circuit or criminal court.

(2) Cases under the small offense law where the defendant has submitted before a justice of the peace and been sent to the workhouse; and,

(3) All cases where the defendant has been convicted in the court of record and the execution issued upon the judgment against the defendant has been returned *nulla bona*; provided,

That neither the state of Tennessee, nor any county thereof, shall be liable for, or pay any costs in any criminal case where security has been accepted by the officer taking the security, and an execution afterwards returned *nulla bona* as to the defendant and his securities.

Provided, that the compensation for boarding prisoners, expenses of keeping and boarding juries, compensation of jurors, costs of transcripts in cases taken to the supreme court by appeal or writ of error, mileage and legal fees for removing or conveying criminals and prisoners from one county to another, or from one jail to another, and compensation or mileage of witnesses for the state duly subpoenaed and required to attend before any court, grand jury, or magistrate in a county other than that of their residence, and more than 5 miles from such residence, and where any witness for the state shall be confined in jail to await the trial in which he is to testify, shall be paid in all cases as heretofore.

Sec. 2. Be it further enacted, that neither the state of Tennessee, nor any county thereof, shall pay or be liable in any criminal case or prosecution for the fees, costs, or mileage which may hereafter accrue in favor of any witness who shall, at the time of his attendance as such witness, before any court, grand jury, or magistrate, reside within 5 miles of the place where he attends as such witness.

Sec. 3. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

Passed February 2, 1897.

After the passage of this act and while it was in force, on the 17th of March, 1897, John Henley and others were indicted in the criminal court of Shelby county for grand larceny, and were tried and acquitted. If the defendants had been convicted, officers and witnesses who rendered services in the case, but received no compensation under the act, would have been entitled to fees or compensation as follows:

Hunter, the clerk of the court, \$4.30.

Carnes, the sheriff of the county, \$5.

Taylor, a justice of the peace, who bound the defendants over for trial, \$2.65.

Witnesses for the state.

Marlet, fees and mileage, \$6.

Wilkins, fees and mileage, \$6.

Shore fees and mileage, \$6.80.

Hall, fees and mileage, \$6.80.

Kelley, fees and mileage, \$6.96.

Battle, fees and mileage, \$6.80.

It is said the act in question is unconstitutional and invalid, because it demands the particular services of individual citizens as officers and witnesses, and takes their property for public use without compensation; that the law is partial in its application, and not a general law of the land; that it deprives persons accused of a fair and impartial trial; and that it amends or repeals quite a number of former acts, but does not, in its body or caption, recite or refer to such acts. To be more explicit as to the grounds of objection, it is said that witnesses and officers are required to give their time and services and to pay their own expenses upon the trial of certain cases, and are refused any fees therefore. It is insisted that time and labor and money expended by witnesses while at trial or *en route* represent just so much property which is thus taken without compensation, and the officers and witnesses are in this way required to give to the state, without pay, that which is valuable to themselves, and necessary to their families, while other citizens of the state in such cases are required to contribute nothing. It is urged with much earnestness and force that the services and property of the citizen are protected by the same section of the Bill of Rights, and that under it his time and services can no more be taken without compensation than can his farm or his flocks, and it is tersely said that the state has no more right to require an individual's time and services to make a convict, without compensation, then it has to take the same individual's corn or wheat without pay to feed the convict after he is made, and that such requirement violates the rights of the individual, even though it may be a benefit to the public. It is further insisted that when the Bill of Rights was declared, in 1796, the common law in America was that witnesses for the state should be paid for their services, and the Constitution provides that the laws then in force should be preserved and remain in existence as though the Constitution had not been framed. It is conceded that there is a sovereign power to the Constitution, and not limited by it, and that it is the prerogative, as well as the duty, of this sovereign power to preserve the state in great emergencies, and, if necessary, to take the property, time, and services of individuals for this purpose, and, if need be, without compensation. To illustrate: A man's property, time, and services, it is said, may be required without pay in case of war or invasion, or an individual may be placed in quarantine, and temporarily deprived of his liberty, if the public safety demand; but these, it is argued, are emergencies, and not matters arising in the ordinary administration of the government. In the ordinary conduct and operation of the government no such emergencies can arise, and in the usual course of administering the affairs of the state no such demands can be made of the citizen. It is insisted that if a justice of the peace, or sheriff, clerk, or witness is required to render service for the state without compensation, it is, to that extent, taxing his property and labor, and requiring him thus to bear an unequal part of the burden of the pub-

lic expense, and that inequality in burdens, whether in the shape of taxes imposed, services required, or property taken, is contrary to the letter and spirit of the Constitution, and to the genius of our government. Again, attention is called to the fact that it is claimed by the state that it is the object and purpose of the law to relieve the state from the immense burden of criminal costs, and it is said that, while this is a laudable purpose, and may result in the relief of the state to the extent of many hundreds of thousands of dollars now annually paid out for the prosecution of criminals, still the act is so framed as to operate unjustly, inasmuch as it does not prevent or extinguish these costs, but simply shifts the burden of bearing them from the body of taxpayers onto the shoulders of the few who, from locality, situation, or other circumstances and conditions, are required to bear them. In other words, the argument is that costs remain the same as heretofore, but they are required to be borne by the few whose time and services are taken without pay, while the many, who contribute neither time nor service, can give the proceeds of their labor to their own advancement, and the benefit of their estates and families, relieved of all burdens. Again, it is insisted that the law is partial in its application and operation, and not the law of the land, which affects all individuals alike. It is said there is a discrimination made between witnesses and officers that is arbitrary, and based upon no legal or reasonable ground. To illustrate: In eight named felonies witnesses are paid whenever trial is had, no matter what the result may be, but, unless a verdict is reached, there is no compensation. Attention is called to the fact that a prosecution for one of these offenses may be pending for a time, and costs may accrue. It may then be terminated by death, or by the state refusing to further prosecute. In these contingencies witnesses receive no pay, while, if, the case had proceeded to verdict, they would be paid. At the same time they have no voice in saying whether the case shall proceed or not; but in each case they are compelled to give the same time and service, and incur the same expense, during the trial or trials. Again, in other cases witnesses are paid only in the event the accused is convicted. To illustrate: When trials are had, but no convictions result, if the crime is rape, the witness is paid; if it is attempt to rape, he is not paid. In bigamy he is paid; in attempt to poison he is not paid. In embezzlement he receives pay; in fraudulent breach of trust he does not. As a summary, it is stated that in homicide, rape, robbery, burglary, arson, embezzlement, incest, bigamy, witnesses and officers are paid if a verdict is reached, no matter what that verdict may be; but in horse stealing, masked marauding, corrupting jurors, suborning witnesses, bribe taking, railroad wrecking, and a large number of other felonies, embracing the great body of criminal offenses, costs are not paid by the state unless the defendant is convicted, and the costs cannot be made out of him. Again, it is said a witness who attends court from another county than that in which the prosecution is had receives his *per diem*, but, if from the same county, he receives nothing. It is in-

sisted that the discrimination between witnesses is thus made to turn upon the result of the trial or the local situation of the witness, whether in or out of the county, and not upon the legal nature of the offense, nor, in every case, upon the magnitude of the crime; and the argument is that the inevitable tendency is to prejudice the accused in his trial, and lead to his conviction. So, also, as to the fees of justices of the peace, the contention is that they are dependent upon the final conviction of the accused. But conviction cannot result unless the accused is bound over for trial upon the merits, and hence the justice is interested to the extent of his fees in binding the accused over to trial, and securing his conviction. And the same rule applies, as to sheriffs and clerks, inasmuch as their compensation depends upon conviction. It is therefore argued that the justice's court cannot be an impartial tribunal, since his own interest always weighs in the balance in favor of the guilt of the accused. So also with clerks and sheriffs; to the extent of their influence and opportunity they will be tempted to use them to secure the conviction of the defendant, inasmuch as their compensation depends upon it. Again, it is said the act inevitably operates to prevent a fair and impartial trial of the accused. The argument is that under its provisions officers and witnesses are, to the extent of their compensation, interested in the conviction of the accused in a large number of cases, since it is only in the event of conviction they can obtain any compensation. It is argued that not only is this true, but, as to witnesses especially, they are compelled to bear their personal expenses while attending court, and can only look for reimbursement of actual outlays if the accused is convicted, and thus their money is required without any compensation or reimbursement. It is urged with great earnestness that the result is to make officers and witnesses alert to secure convictions, and thus to prejudice the accused upon his trial. Finally, it is said also that the act is in conflict with many other laws standing upon the statute books, and yet these conflicting laws are not repealed, modified, or even referred to in the act, and it is insisted that for this reason the act is imperative, unconstitutional, and void, under article 2, § 17, of the Constitution, which provides that all acts which repeal, revive, or amend former laws shall recite, in their caption or otherwise, the letter or substance of the law repealed, revived, or amended.

We have thus briefly gone over the several objections which have been urged to the constitutionality and validity of this act, but we have not dwelt upon the details, nor referred to the many able arguments and reasons, which have been urged in support of the views advanced. Some of them will be referred to in the further discussion of the matters involved, but all of them cannot be presented in any reasonable space of time. We are admonished by the subject-matter of the act of its extreme importance. We are cognizant also of the intense public interest which hangs upon the decision of the case. We approach its consideration with a due sense of the responsibility which rests upon us. With the wisdom, propriety, desirability, and policy of the act this court can have nothing to do. These are matters which

appeal to the intelligence, patriotism, and discretion of the general assembly, and upon that department of the government rests the responsibility for the wisdom and sound public policy of the law. That body is composed of representatives fresh from the bosom of the people, and charged by the people with the duty of providing such legislation as will correct the abuses of the body politic, and at the same time provide wise measures for the benefit of the state. These representatives are, or should be, in touch with the people; should know their wishes, their burdens, their plans for relief; and this court, in passing upon an act designed to affect the whole people, and to correct what is said to be a great public evil, can question the act only so far as it touches the fundamental law, and measure it by the provisions of that law, and determine whether it has in any particular passed the limits placed upon the power and discretion of the legislature by the Constitution. Mr. Cooley, in his work on Constitutional Limitations, says: "Except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it act according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them. . . . The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the Constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference." Cooley, Const. Lim. 6th ed. 200, 201. Our own decisions are thoroughly in accord with this view: *McGinnis v. State*, 9 Humph. 47, 49 Am. Dec. 697; *Washington v. Nashville*, 1 Swan, 180; *Davis v. State*, 3 Lea, 378; *Baillentine v. Pulaski*, 15 Lea, 634; *Lynn v. Polk*, 8 Lea, 229; *Peck v. State*, 86 Tenn. 262; *Williams v. Nashville*, 89 Tenn. 488; *Cole Mfg. Co. v. Falls*, 90 Tenn. 481; *Sutton v. State*, 96 Tenn. 698, 33 L. R. A. 589. It is the settled rule in Tennessee and in the United States generally that the legislature has unlimited power to act in its own sphere of legislation, except so far as restrained by the Constitution of the United States, and the Constitution of the state. *Bell v. Bank of Nashville*, Peck (Tenn.) 269; *Hope v. Deaderick*, 8 Humph. 8, 47 Am. Dec. 597; *Davis v. State*, 3 Lea, 377; 39 L. R. A.

Stratton Claimants v. Morris Claimants, 89 Tenn. 497, 12 L. R. A. 70; 8 Am. & Eng. Enc. Law, p. 689. If the act, therefore, does not violate some provision of the Constitution, this court has no jurisdiction or power to lay hands upon it, and arrest its execution, whether its provisions are wise or unwise, whether its operation be hurtful or beneficial. If, in the opinion of this court, however, it does in any material respect violate the fundamental law of the land, it is the duty of this court to so declare and prevent its enforcement. This court does not exercise arbitrary powers in construing either statutes or Constitutions. Ordinarily, it will indulge every reasonable intendment favorable to the constitutionality of a statute passed with the required formalities, and a law upon trial for its constitutionality is entitled to the benefit of every reasonable doubt. *State, Morrell, v. Fickle*, 3 Lea, 81; *Garvin v. State*, 13 Lea, 162; *State v. Yardley*, 95 Tenn. 550, 34 L. R. A. 656; *Cole Mfg. Co. v. Falls*, 90 Tenn. 466; *Ellis v. State*, 92 Tenn. 93; Cooley, Const. Lim. 6th ed. 218; 3 Am. & Eng. Enc. Law, pp. 678, 674; Sutherland, Stat. Constr. § 382. Not only is this so, but that construction will be favored which will sustain the law, if it admits of question and doubt. *Horne v. Memphis & O. R. Co.* 1 Coldw. 74; *Illinois C. R. Co. v. Crider*, 91 Tenn. 506; *Ellis v. State*, 92 Tenn. 93; *Cole Mfg. Co. v. Falls*, 90 Tenn. 466; *State v. Yardley*, 95 Tenn. 546, 547, 34 L. R. A. 656. Hence it is the settled rule of this court that he who insists upon the unconstitutionality of an act must point out the specific provision of the Constitution which it expressly or by unavoidable implication violates. It cannot be annulled upon supposed natural equity, the inherent rights of freemen, or upon any general or vague interpretation of a provision of the Constitution beyond its plain and obvious import. *Davis v. State*, 3 Lea, 377; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, 12 L. R. A. 70. Mr. Cooley tersely says: "Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words." Cooley, Const. Lim. 6th ed. p. 204. And whether a statute is contrary to the genius of a few people is a question for the legislature, and not the courts. As bearing upon this question, we cite: *Bell v. Bank of Nashville*, Peck (Tenn.) 269; *Hope v. Deaderick*, 8 Humph. 8, 47 Am. Dec. 597; *Demonville v. Davidson County*, 87 Tenn. 220; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 511, 12 L. R. A. 70; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 159, 34 L. R. A. 725; *Davis v. State*, 3 Lea, 377; *Luehrman v. Shelby County Taring Dist.* 2 Lea, 438.

It is insisted that the act violates § 21, art. 1, of the Constitution, which is in these words: "That no man's particular services shall be demanded or property taken or applied to public use without the consent of his representatives or without just compensation being made therefor." It is evident that the term "particular services," used in this section, must be given some significance and meaning. It will be noted also that a distinction is made between "particular services" and "property," or both would not have been mentioned in the same

connection. This provision has been debated before us in the main as though it read that particular services should not be demanded without both the consent of the representative and just compensation, and we will so treat it in the disposition of the case. It will be noted, however, that the disjunctive conjunction "or" is used, and a plausible, if not the natural, construction would be that either the consent of the representative or just compensation would warrant the taking of such services. It is not, however, desired to place the determination of the case upon such construction. We have not had the opportunity to trace the history of this phrase "particular services," in order to ascertain its origin or its primary application. It is found in identically the same language in the Constitutions of 1796, 1834, and 1870. It comes first into our judicial history with the ordinance of the Continental Congress passed in 1787, for the government of the territory northwest of the Ohio river, and in 1790 was extended to the territory southwest of that river. It was not carried into the Federal Constitution, and has been inserted, so far as our investigation has gone, into the Constitutions of only three states,—Tennessee, Indiana, and Oregon. Particular services must mean peculiar services, limited services, not ordinary or general services of an individual. It is not an easy matter to draw the distinction between particular and ordinary services in every instance; still some general rules may be given to mark the line. It seems clear that ordinary services, such as may be required of all citizens or officials by general or valid special laws, are not particular services. A single illustration may suffice: A physician cannot be required to give his time and services and skill and scientific knowledge in making an examination to qualify him to speak as an expert witness. If, however, the same physician may have already made an examination, and come into the possession of facts material to be disclosed to attain justice and administer the law, he may be required to testify to them as any other witness may. In Indiana, the constitutional provision is: "No man's particular services shall be demanded without just compensation." Ind. Const. art. 1, § 21. In *Israel v. State*, 8 Ind. 467, it was held that the services of witnesses in criminal suits were not "particular services," within the meaning of the provision, but were general services, such as every individual was bound to render when called upon for the public welfare as well as his own individual good. In Oregon, the constitutional provision is: "Nor [shall] the particular services of any man be demanded without just compensation." Or. Const. Bill of Rights, art. 1, § 18. In the case of *Daly v. Multnomah County*, 14 Or. 20, this provision was construed. An act was passed to prescribe the fees of witnesses in Multnomah county, and it provided that in all criminal proceedings and actions witnesses residing within 2 miles of the place of trial, when they were required to appear and testify, should not have either witness fees or mileage. Or. Sess. Laws 1885, p. 10. It was contended this was contrary to the provision of the Constitution. The court held, in the language of the Indiana case above cited, that, "It is as much the duty and interest of every

citizen to aid in prosecuting a crime as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in furnishing to all, high and low, rich and poor, every facility for a fair and impartial trial when accused; for no one is exempt from liability to accusation and trial. These are matters of general interest and public concern—are vital, indeed, to the very existence of free government, and render the services of witnesses on such occasions matters of general public interest, and not 'particular' in the sense of the Constitution." This construction is approved also in the cases of *Buchman v. State*, 59 Ind. 12, 26 Am. Rep. 75, and *Dills v. State*, 59 Ind. 18. In our own state we have the case of *Washington v. Nashville*, 1 Swan, 180. In it the laying of a sidewalk in front of his own property was refused by Washington, upon the ground that it was the "taking of his particular services" without compensation. The court held the contention not maintainable, and said: "The principle upon which this power of legislation is exercised is that plain and universal one, indispensable in the administration of government, that the public has a right to the contributions of the money and personal service of all its citizens, whenever the public interests and exigencies may demand it, in consideration of the protection it affords to life, liberty, reputation, and property." In *Wright v. State*, 3 Heisk. 256, it was held that the services of an attorney might be required to defend a prisoner, and without compensation, and this was reaffirmed in *House v. Whitis*, 5 Baxt. 692, where the court says: "The principle of the organic law which forbids the demand of any man's particular services . . . has no application to such a case. . . . Where a lawyer takes his license he takes it burdened with these honorary obligations. But it is said that attorneys are officers of the court, and for this reason their services can be required. So, also, are sheriffs and clerks officers of the court, and, upon principle and analogy, service may be required of them also. If the lawyer takes his license burdened with the obligation to defend pauper prisoners, so the sheriff and clerk must take their offices burdened with similar conditions and requirements. In *Neely v. State*, 4 Baxt. 174, it was held that service upon the jury was not a "particular service" for which compensation might be demanded or the service refused. The court in that case said: "It is one of the implied and necessary conditions upon which men form governments, that sacrifices must sometimes be made by individuals for the common good, for which no compensation can be claimed. Such sacrifices of time or personal service, or of property, are compensated for in the protection which the government furnishes for their rights of person and of property. Hence, whenever, in the judgment of the legislature, it becomes necessary to require the services of jurors in carrying on the courts, their services may be required, and, if need be, even without compensation; but this must be required in pursuance of laws enacted for that purpose by the legislature." Citizens may be required to work on the public roads, were required to serve in the militia, to serve as officers at elections, witnesses may be

compelled to appear and testify for insolvent suitors, clerks may be compelled to issue process in such cases, a sheriff may be compelled to execute such process, jurors may be compelled to serve for a day. In all such cases the only compensation received is that benefit which results to the community at large. There are numerous other cases in which officers and witnesses are denied compensation out of the public treasury for their services. A witness who is a prosecutor in a misdemeanor case is allowed no compensation. Shannon's Code, § 7600. Witnesses are allowed for only one day before the grand jury, and for only a prescribed number of days and cases at the same term. District attorneys are allowed only half fees when paid out of the county treasury upon conviction and return of *nulla bona*. Id. § 6379. They get no fees upon a *nolle prosequi* of a misdemeanor, or when the indictment is ignored, or the prosecution fails by their fault. Id. §§ 6380, 6383, 7590. Only half fees are allowed on acquittals. Id. § 6376. And numerous similar instances may be cited.

But there is another view of this matter of costs against states and counties that must be considered. The right to costs is not a common-law right, but depends wholly upon statute. The rule was that the King should neither pay nor receive costs. The former was his prerogative, and the latter beneath his dignity. The same rule is applied to the United States in suits, either civil or criminal, in which the Federal or state governments, including county and municipal corporations, when acting as an arm or agency of the state, are parties; and they are accordingly only liable for costs when the lawmaking power by statute has made them so. 5 Am. & Eng. Enc. Pl. & Pr. 151. Hence a court cannot *ex officio* give costs for or against anyone. *Mooneys v. State*, 2 Yerg. 578; *Morgan v. Pickard*, 86 Tenn. 208. And in all cases the strictest rule prevails in construing the liability of the state therefor. *State v. Odom*, 93 Tenn. 446. And the same rule applies in regard to counties. *State v. Blackburn*, 61 Ark. 407. So a statute making the state liable for all costs of criminal cases is construed to mean only state costs and not costs of defendant. *State v. Barton*, 3 Humph. 18; *Prince v. State*, 7 Humph. 137; *Tucker v. State*, 2 Head, 556. And a statute giving costs in general terms, though unqualified, will not make the state liable therefor. 3 Bl. Com. 399; 3 Am. & Eng. Enc. Pl. & Pr. 151, 152; 4 Am. & Eng. Enc. Law, pp. 314, 316, 323; Endlich, Interpretation of Statutes, § 161. The courts and legislatures have always treated the granting of costs against the state and county as a matter of purely legislative discretion and policy, and not a matter to be left to the courts except as to their apportionment between the parties in equity cases. As to what costs shall be allowed against the state and county is a matter which addresses itself solely to the wisdom and discretion of the general assembly. It is true, costs have been allowed by statute from time to time until it is asserted a vast system has grown up and settled down upon the public treasury until, in the opinion of the legislature, the payment has become burdensome, and a menace to the interests of the public. It was this 89 L. R. A.

condition of affairs which prompted the passage of the act in question by which the legislature in effect refuses to pay costs, or allow judgments, or appropriate money for such purposes out of the public treasury, in certain cases. The Constitution (art. 2, § 24) provides that no money shall be drawn from the state treasury but in consequence of appropriations made by law, and it is further provided that the state shall be liable to suit only in such manner and in such courts as the legislature may direct. Const. art. 1, § 17. Under this provision of the Constitution it is held that, even if the state consent to suit, she may withdraw that consent, even while the litigation is pending. *State v. Bank of Tennessee*, 8 Baxt. 393; *State, Bloomstein, v. Sneed*, 9 Baxt. 479. The state has accordingly refused to allow herself to be sued, even upon her solemn bonds, impressed with her great seal, and containing upon their face a pledge of the faith and credit of the state, and this court has upheld the law. *Lynn v. Polk*, 8 Lea, 121. It may result in an apparent or real hardship to officers and witnesses to be denied fees; still it is not a question of constitutional authority, but of legislative policy and wisdom. In *Avery v. State*, 7 Baxt. 331, Judge McFarland said: "There is an apparent hardship in requiring the clerk to perform services for which he may, in the event the defendant is insolvent, and in other events, receive no compensation, as there is in requiring a defendant who is found not guilty to defend himself at his own expense; but so the law is written, and there are, perhaps, other equally hard cases for which the law makes no provision." The legislature has from time to time attempted to check the evil of excessive costs. By the Code of 1858, "officers are forbidden under severe penalties to demand fees when not authorized by law." Section 4517. In no case are they entitled to payment from the state or county unless expressly allowed. Id. § 5561. One article of the Code of 1858 was entitled "Provisions to Prevent the Accumulation of Costs" in criminal cases. It required the court to designate a day for the call of the state docket, and to adopt rules that would "tend to diminish the costs of such cases." The attorney general is required to have indictments ready, and "to so manage the state's business as to detain witnesses only one day to go before the grand jury." The clerk is forbidden to issue subpoenas for state witnesses, except upon the written order of the attorney general. Witnesses are allowed only one day's attendance before grand jury, "unless longer retained by order of the court." The judge and attorney general are required to examine and certify all bills of costs, and the controller and chairman of the county court are forbidden to pay except upon such certificates, and are also required to examine the bills. These provisions and others of a like character indicate that even prior to 1858 there was some appreciation of the difficulties of keeping this matter of criminal costs within due bounds. Code 1858, §§ 5594, 5604.

But the provisions of the Code of 1858, stringent as they were, proved ineffectual to protect the public treasury against the payment of unjust, excessive, and fraudulent bills

of cost. To remedy or mitigate this evil, several statutes have been enacted since 1858. Only the more important of these will be noticed. Acts 1879, chap. 210, undertook to discourage the accumulation of costs by making it a misdemeanor to speculate in witness's or officer's fees, except "witness fees traded for merchandise or hotel bills." The constitutionality of this act was promptly and vigorously assailed. This court, at its December term, 1879, sustained the act, saying that the argument impeaching it was "made to turn on general principles, rather than on any specific provisions of the Constitution." Of the object of the act the court says: "The legislature intended to break up a particular kind of speculation in these fees, which it thought detrimental to the public interests," etc. "Of the wisdom of the legislation, the lawmaking power is the exclusive judge." *Davis v. State*, 3 Lea, 376. While this act continued in force, the occupation of the speculator in fees was gone. Professional witnesses, unable to get ready cash for their fees, were greatly discouraged. This act was, however, repealed by Acts 1881, chap. 51, having been in operation about two years. Acts 1889, chap. 189, was afterwards enacted, authorizing and requiring the judges and attorney generals whose duty it is to certify justice's bills of costs for payment to go behind the justices' certificates as to their correctness, and to examine and inquire into such bills fully, and to disallow them if it should appear that the prosecution "is frivolous, malicious, or commenced to procure fees." This statute, it is alleged, was brought about by the acts of justices and constables and witnesses who, in many instances, it is charged, had conspired together to defraud the state and oppress the people for the selfish, mercenary purpose of gain. This act met with vigorous opposition. It was not strictly enforced. Finally, however, it came before the supreme court at Knoxville, and this court approved and sustained the act. Upon authority of this opinion many thousands of dollars of costs was stricken out in Knox county alone. By Acts 1891, chap. 22, Ex. Sess., another advanced step was taken in this matter by the legislature. This statute changed from the state to the county the costs of the prosecution of felonies when the cases were disposed of before trial. The striking reform features of the act, however, were that it authorized and required the judges and attorney generals to examine all bills of cost in criminal cases, and to disallow any that might be "illegally or wrongfully taxed against the state or county," and authorized and required the controller and judge or chairman of the county court to examine into all certified bills of cost, and to disallow any that had been "illegally or wrongfully taxed against the state or county," and provided finally that "the state controller and judge or chairman of the county court may disallow any and all cost taxed against the state or county on account of malicious, frivolous, or unnecessary prosecution, in the event the judge or attorney general, by mistake or otherwise, approved any of such bills." This act has been before this court more than once for construction, and its validity has never been seriously questioned. *Stout v. State*, 91

Tenn. 405. The next in order of time is the act of 1895, defining larceny, and making the counties liable for costs of prosecution for that offense. Acts 1895, chap. 205. This act was declared unconstitutional on account of a defective caption. *Shelton v. State*, 96 Tenn. 521. This was the last effort of legislation to suppress the growing evil of criminal costs before the passage of the present act. Every act passed by the general assembly to prevent the accumulation of unnecessary and improper costs has been upheld by this court, if the act was passed with the formalities required by the Constitution, and without any question as to its wisdom. The necessity of some further legislation appears from the fact that all former efforts seemingly well directed to remedy the evil and diminish criminal costs had failed in a large measure of the desired results. In the arguments we are furnished the following table, prepared by the state controller, which indicates the extent of the state's liability for costs of criminal prosecution:

Table of Amounts Paid for Criminal Prosecutions from 1876 to 1894, Inclusive.

Dec. 20, 1876, to Dec. 19, 1878..	\$893,406 71
Dec. 20, 1878, to Dec. 19, 1880..	399,443 20
Dec. 20, 1880, to Dec. 19, 1882..	357,895 15
Dec. 20, 1882, to Dec. 19, 1884..	373,255 89
Dec. 20, 1884, to Dec. 19, 1886..	385,112 69
Dec. 20, 1886, to Dec. 19, 1888..	378,181 11
Dec. 20, 1888, to Dec. 19, 1890..	398,708 82
Dec. 20, 1890, to Dec. 19, 1892..	415,214 11
Dec. 20, 1892, to Dec. 19, 1894..	490,680 40
Dec. 20, 1894, to Dec. 19, 1896..	417,615 34

The above does not embrace salaries of judges or prison expenses. The cost paid by the counties is a little more than double the amount paid by the state.

In a recent case of *Leary v. State*, this court disallowed fifty-eight out of sixty-eight bills of cost sent up by a justice of the peace from Knox county to the county judge of that county. The cases were declared frivolous, and the entire bills of cost, amounting to thousands of dollars, including fees of witnesses even, disallowed. The protection of the public from improper costs was a paramount consideration, and this was done by this court in pursuance of statutes enacted by the legislature. The constitutional guaranty of compulsory process to require witnesses to attend court and give evidence does not require the state to provide for the expenses of obtaining their attendance. *Avery v. State*, 7 Baxt. 331. And witnesses may be compelled by the state to attend and give evidence without compensation. *Bennett v. Kroth*, 37 Kan. 235. If it be conceded that there is an absolute obligation to give compensation, it is equally imperative that such compensation be just. And yet it is well known that the service of one witness may be worth many times that of another. The service of any expert in one department is much more costly than that of another in a different department.

It is said the act is a revenue measure. This is not correct. It is not a mode of taxation. It is a measure, not to collect money, but to protect that which has already been collected

from the taxpayers. There is also a marked difference between taking the services of an individual and taking his property under the law of eminent domain. *Taylor v. Chandler*, 9 Heisk. 380. It is proper to remark also that there is nothing in the act in question that requires any service of certain officers or witnesses. The act nowhere provides that witnesses shall attend or that officers shall do service of any kind. These matters are all provided by other acts which are not brought in question in this suit, but none of them are required by the terms of this act. No officer or witness has declined to render service, and the question is not presented whether such witness or officer can be required to render service where he will not receive compensation. When some officer or witness does refuse such services, the question may arise whether they can be required in view of the fact that they will not or may not receive compensation. Here the service has been rendered without protest or objection, and the only question is whether the state shall be required to pay for such service contrary to the provisions of this act. But it is said the act is not general, and thus made the "law of the land," but is partial in its operation, and limited to classes, and these classes are not marked by natural and reasonable lines, but by tests which are arbitrary and capricious. "The law of the land" is defined to be a law which embraces all persons who are already or who may thereafter come into similar situations, conditions, and circumstances. *Alexandria v. Dearmon*, 2 Sneed, 104; *State v. Rauscher*, 1 Lea, 97; *Davis v. State*, 3 Lea, 376; *Maney v. State*, 6 Lea, 221; *Hatcher v. State*, 12 Lea, 371; *Woodard v. Brien*, 14 Lea, 523; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 499, 12 L. R. A. 70. It is also held that if a law is intended to affect particular classes only it must, in order to be valid, not only apply to all persons who are or may be in like circumstances, situations, or conditions, but the classification must be natural and reasonable, not arbitrary and capricious, and must rest upon some sound and legal ground. *Bank of the State v. Cooper*, 2 Yerg. 600, 24 Am. Dec. 517; *State v. Staten*, 6 Coldw. 233, 245; *Knox v. State*, 9 Baxt. 202, 207; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 542, 12 L. R. A. 70; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 245, 258, 28 L. R. A. 796; *Sutton v. State*, 96 Tenn. 696, 710, 33 L. R. A. 589; *Anderson, Const. Law*, 37; *Cooley, Const. Lim.* 390; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664; 3 Am. & Eng. Enc. Law, p. 697. These cases lay down the general rules of law relating to the matter of classification. It is difficult to see how these cases or the matter of classification can apply in this case. The law already provides that neither the state nor county is liable for any costs unless the legislature has so provided. It is therefore simply a question whether the state and county will pay costs for certain services, and is not a matter of partial or class legislation. But, if it were, from the very nature of the case, the general assembly must to a very large degree be the judges as to whether the classification adopted is reasonable or capricious. That body, more than others, is acquainted with the evils and abuses which it is desired to correct, and with

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the ways and means at their command to remedy such abuses and evils. Its members come from every section of the state and can take a wider view of the entire situation than can be taken by the courts. So it may, in its wisdom, deny costs altogether, or allow in such cases, and to such extent as it may deem best in the exercise of sound public policy. While, therefore, it is not incumbent on this court to critically question the classification adopted, and it would be improper to do so, still it is easy to see the general idea and system which have been adopted, and the reasons for the discriminations made. It is the evident general purpose to insure the vigorous prosecution of the eight principal felonies named, because they are the most heinous crimes, and at the same time offenses in which frivolous and unfounded prosecutions are most rarely met with. In regard to the small felonies and misdemeanors, the evident purpose is to discourage and prevent the large number of frivolous and groundless prosecutions which have caused such a burden of expense on the state and county.

This evil of frivolous prosecutions for misdemeanors and the smaller felonies, it is claimed, has gone to an enormous extent, and it is stated that they are not, in a majority of cases, prompted by any other motive than a desire to tax up fees and costs, and to certify them for payment to the treasurer of the state and counties; and, while it is conceded that abuses may result from the operation of the act in question, it is maintained that they cannot reach such proportions as now obtain in the unfounded prosecutions set on foot and pressed, not for the public good, but to create fees for officers and witnesses.

The classifications of the law in regard to the compensation of witnesses are likewise based upon what is called the attendance and service of professional witnesses. It is alleged that there is a class who make a business of giving testimony, especially in minor criminal offenses. These are found residing around the court-houses and places of trial, and hence the law provides no fees, costs, or mileage for a witness who resides within 5 miles of the place when he attends as a witness. In case of such witnesses when worthy of any fees, attendance is not such a burden as it is when he lives more remote, or beyond the limits of the county. Whether the classifications as to the witness and as to crimes may prove the best that can be made, may admit of question: at any rate they are not without grounds and reasons which the legislature deemed sufficient.

We come now to inquire whether the law deprives a man of a "fair and impartial trial." It seems to have been assumed in many quarters, but not in argument, that the Constitution provides that every accused person shall have a "fair and impartial trial." The Constitution does not contain such provision. Its provisions are that the accused shall have the right to trial by a jury, and that right shall remain inviolate. In what does the right consist, and what is its extent, so far as the Constitution goes? Is it that the trial shall be speedy and public, that the jury shall be impartial, that the accused shall have the right to compulsory process for his witnesses to have

them present in person at the trial to meet them face to face, that he shall have the right to be heard by himself and counsel, and that he should not be compelled to testify against himself, and that he shall have a copy of the accusation against him. There is no provision for impartial sheriffs or impartial clerks or impartial witnesses. Indeed, such a requirement would go beyond the power of the legislature. It is true that our cases speak of "fair and impartial trial," but these are at best but comparative terms. It is beyond the reach of legislature to secure a trial absolutely fair and impartial, and when the term is used it means a trial under the Constitution and according to law. *Clapp v. State*, 94 Tenn. 186. Let us look for one moment at this matter of an impartial trial as it affects the witnesses in a case. It is a matter of common observation that witnesses are partisan, prejudiced, and often directly interested, either in conviction or acquittal of the accused. To such an extent is this true that the principal office of counsel is to point out the untrue, biased, and prejudiced statements of witnesses, and one of the chief difficulties in reaching justice is in penetrating their evasions, deceptions, and prevarications. Every charge to the jury warns them to be aware of this interest and bias of witnesses. No constitutional convention or general assembly ever supposed for a moment that witnesses could, by any legislative means, be rendered impartial. On the contrary, under the law defendants are allowed to testify in their own cases when it is evident that their evidence cannot be impartial. So, also, the prosecutor is allowed to testify when, in a large number of cases, he cannot, while smarting under the wrong inflicted on him, and in his desire to bring the accused to punishment, be impartial. It is said, however, that a moneyed inducement is offered to officers and witnesses to convict the defendant: in other words, it is only in cases of conviction that fees and compensation can be secured. If we grant this to be true, still it is a matter which addresses itself to the wisdom and discretion of the general assembly. *Grundy County v. Tennessee Coal, I. & R. Co.* 94 Tenn. 295. It cannot be denied that designing men can prostitute almost any proceeding to selfish, improper and corrupt purposes. The state is as much interested, and even more concerned, in preventing the annoyance and vexation of the citizen by unfounded and frivolous prosecutions, as she is in bringing real offenders to trial and punishment. If the new law says, in effect, "Convict, and you shall be paid," the old law says, "Prosecute, and you shall be paid whether you convict or not." If the new law offers an inducement to convict, the old law offers a still more potent and ready inducement to prosecute whether there is or is not ground for it. It is placing a low estimate upon the integrity of the citizen to assume that for a paltry sum he will be willing to perjure himself and do injustice to his fellows, and the general assembly may have acted upon this view and been content to trust the honor and integrity of the people, as it must do in every law and under every emergency. It is claimed that under the existing system abuses of gigantic magnitude have sprung up, and have grown and flourished and fattened

upon the public treasury. We are told that this has gone to such an extent that speculation in prosecutions has become a business in the cities and towns. Whether it is a greater evil to incur the remote probability that some innocent man may be convicted from mercenary motives, or to encourage the present wholesale bringing of trivial and baseless charges and prosecutions in order to obtain fees, can hardly admit of question. It will be noted that the act guards the jury from any supposed improper influence by providing for its payment in any event, as heretofore. Also as to justices of the peace it is evident that the influence supposed to operate upon them is quite remote and indefinite. In the event of submission,—which is the only case in which the justice disposes of the matter finally,—provision is made for his fees. In all other cases he has power only to bind over the accused to be tried in another tribunal, and in that tribunal the justice has no voice. It is evident that under this act the court and jury are left impartial as before,—nothing that affects them is left to depend upon the result of the trial. The fees of the sheriff or other officers for summoning and attending upon the jury are still paid out of the treasury, and not taxed as costs in the cases tried. *Sherman's Code*, § 6403, subs. 10, 11, 25, § 6410, subs. 8. The clerk is but an amanuensis of the court to enter its orders. If any officer is disqualified because of interest, his place may be supplied as was indicated in the *Clapp Case*. It will thus be seen that the act jealously guards the prisoner's right to a fair and impartial jury.

The voice of this act is not, we think, one of temptation to bribery, but one of caution and warning. To officers and witnesses it utters salutary words. In effect it says: "Beware that you do not set on foot frivolous, vexatious, or malicious prosecutions that burden the public with costs, and oppress and annoy the citizens. The name and funds of the state must not be used for this end. Bring only just and substantial and well-founded charges into courts,—such as will not only secure a favorable judgment before the committing magistrate, but before the grand jury, and before the trial jury. If you oppress and annoy the citizen with charges that are dismissed by the committing magistrate, or ignored by the grand jury, or dismissed without a trial, or cannot be sustained on a trial, then you lose your time and labor. The state and county will refuse to pay you for the fruitless and oppressive business. An exception will be made, however, as to acquittals of the eight principal felonies, as it is of great public concern that they should be prosecuted, and as they are seldom the subject of frivolous prosecution, and from their character cannot be." Justly construed in the light of the true situation, this is the meaning of the act in question. It is true, as stated by counsel, that when the Constitution of 1796 went into effect, officers and witnesses were entitled under the law theretofore existing to receive pay for their services, and it is also true that that instrument provided that all laws in force when it was adopted should remain in force, and rights then existing should continue as though no Constitution had been made; but it is also

true that the same section provides that all such laws might be altered, amended, or repealed by subsequent legislation. Const. 1796, art. 10, § 2, Schedule, § 1. When by § 6 of article 1 it was declared that the right of trial by jury should remain inviolate, it did not mean that no law should in the future be passed to regulate such trials, and prescribe the practice in such cases, but that the right should not be denied to the citizen, with its material and substantial benefits. *Eason v. State*, 6 Baxt. 475; *McGinnis v. State*, 9 Humph. 47, 49 Am. Dec. 697; *Trigally v. Memphis*, 6 Coldw. 882; *Hogan v. Chattanooga*, 2 Tenn. Legal Rep. 12. Accordingly it has been held that statutes which by direct enactment make reasonable regulations as to evidence do not violate the right of trial by jury. *Yardley Case*, 95 Tenn. 563, 34 L. R. A. 656; *Illinois C. R. Co. v. Crider*, 91 Tenn. 489. New classes of witnesses—for example, parties in civil suits and defendants in criminal cases—are admitted, and this does not violate the Constitution in letter or spirit. The witness at best has but a scintilla of interest, and this goes to his credibility. The right of trial by jury was not violated by the act prescribing that parties must demand it in order to obtain it. No one questions but that the accused is entitled to a fair and impartial trial, but it equally means a trial under the Constitution and law.

It is also true that the entire body of the common law as it existed when the Constitution went into effect was made the law of the land by that instrument. *McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697; *Trigally v. Memphis*, 6 Coldw. 882; *Neely v. State*, 4 Baxt. 180. But it was never for a moment supposed that these laws could not be altered, amended, repealed, or added to by subsequent legislation, as they, in their wisdom, might deem best; the only restrictions being those thrown around such legislation by the Constitution.

Again, it is said the act is unconstitutional, because it is amendatory of the general law on the subject of fees and costs, and yet does not refer to the laws thus amended. This is not an amendatory act. It is a new and original law. If it can be held to be a repealing law or an amending law, it is so only by necessary implication, and in such cases the acts repealed or amended need not be referred to in the caption or certificate of the new law. *Home Ins. Co. v. Shelby County Taring Dist.* 4 Lea, 660; *Maney v. State*, 6 Lea, 218; *Illinois C. R. Co. v. Crider*, 91 Tenn. 506; *Knoxville v. Lewis*, 12 Lea, 181; *State v. Yardley*, 95 Tenn. 548, 559, 34 L. R. A. 656; *Ballentine v. Pulaski*, 15 Lea, 633; *Poe v. State*, 85 Tenn. 495; *Hunter v. Memphis*, 93 Tenn. 571. We are of opinion, therefore, that the act in question is free from constitutional objection, and this court has no power to refuse its enforcements, whether it is wise or unwise, whether hurtful or beneficial, in its tendencies and operations.

The judgment of the court below is therefore reversed, and the costs allowed are stricken out as unwarranted against the state and county, and the parties interested therein will pay the 39 L. R. A.

costs of this proceeding in this court and in the court below.

Judges **Caldwell**, **McAlister**, and **Beard** concur in this opinion. Chief Justice **Snodgrass** does not concur, and states the grounds of his dissent.

Snodgrass, Ch. J., dissenting:

Aware of the careful and painstaking consideration this case has received, and with profound respect for the opinion of the majority, I most earnestly dissent from its conclusion that the act under consideration is a constitutional law. No less than any one of them do I respect the expression of legislative will, and recognize the freedom of that department (so far as the policy of legislation is involved) from judicial interference. I have as little inclination as anyone to invade the legislative province, or to assume the power to do so. The people have trusted the legislature as the residuary depositary of public wisdom, and, except in those constitutional restrictions which the people have themselves imposed as permanent barriers against the possibility of improbable mistakes by the legislature, and those natural barriers of reason against impossible legislation, and arbitrarily capricious exercise of conceded authority, the legislature is supreme. There is no power to question its motive, its policy, or its wisdom. I recognize the fact that a legislature without constitutional control would be practically omnipotent. But the people did not turn loose any such unrestrained agency without guarding carefully its power to do irreparable injury or monstrous injustice to the individual citizen. They realized that, while all legislatures are presumptively wise and conservative, some would in fact be no wiser than other ordinary mortals, and no more conservative than the temper of the times might permit, or the hasty determination of great questions occasion; and therefore limitations on legislative power were in great numbers adopted in our organic law. These limitations in the Constitution of 1870 were not experiments. In the main they were reproductions of similar checks on legislative power embodied in the Constitutions of 1834 and 1796, and correspond substantially with those ingrafted in the Constitutions of other states, older and younger, and are the safeguards which human wisdom taught, and experience has proved necessary to the preservation of the rights of the citizen against the haste, the unwisdom, the caprice, or the folly of temporary authority, lodged though it be in the selected legislative agents of the people themselves. Our theory of government in different departments as arranged in the Constitution is a theory of checks and balances on power in favor of the liberty and highest rights which can be accorded to the individual. To carry out its purpose, therefore, it is essential that no restraint be put by the judicial department on the legislative not demanded in our organic law, and none can be relaxed which is so demanded.

The two departments, legislative and judicial, have their well-defined limitations and powers. The limitations on legislative action

were made a subject of judicial power, for these limitations are only to be declared and enforced by that department, speaking through the Constitution, but for the public, and for the ultimate public purpose, as it is the controlling and final one. Too much stress is often put upon the phrase "the people speaking through their representatives" in reference to legislative action. It is true that they so speak, but it is equally true that they speak through every other department of the state government, and that the final expression of their will is made in the determination of the validity, interpretation, and construction of law by their judicial representatives. All the power exercised by the courts is that of the people vested in them by the same Constitution, which, for wise purposes of government, limits the scope of legislation and the power of their legislative representatives. In respect to the declaration of law, the people, therefore, speak first through the legislature, and last through the courts, as it is in them they have vested the power, not only of construing acts of the legislature, but of the Constitution itself, and enforcing through judicial process the observance of their thus permanently declared will. What dire and disastrous results would have happened in this country in national and state legislation without constitutional restrictions, and courts wise enough and independent enough to enforce them, need not be elaborated here. The courts have stood always above the work of hate and haste, excitement, passion, sectional animosity, oppression, and folly, and limited its operation within the bounds of justice and conservatism.

To them we owe the fact that since the late war we had neither executions nor confiscations; that social as well as civil equality was not forced upon a prostrate section of our country, and the rights of the states destroyed; and it is to the same limitations and restrictions of state institutions thus protected that the people of this state owe their escape from the enthrallment which would have followed legislation to fund in full the overwhelming debt fastened upon us by a rule not our own, which, when we were represented in a legislature of our own choosing was made obligatory and payable, and secured by a first lien on public taxes. It is the fashion now to forget these things after they are accomplished, to trust and exalt the Constitution when we have no other protection, and to revile it when we think it stands in the way of legislation in which it is unwisely supposed we are selfishly interested. If it appear, as in the case at bar, that the legislation was intended or calculated by any means, however oppressive on other individuals, to reduce expense upon that proportion of our people who are taxpayers, the appeal to the Constitution is treated with contempt by a large and respectable element of the public. The assumption is indulged that, as it is less expensive, it is necessarily valid, and that any suggestion to the contrary is merely hostility to reform. Even here arguments are made and tables exhibited showing, or supposed to show, that the abuses under existing laws have, in special instances, swelled the volume of costs enormously in favor of certain individuals in particular counties. What this can

mean is a constitutional argument I do not know, unless it be intended to indicate that present expense of administering the criminal law on account of these abuses is so great as the law now is, or was at the time, and for many years before, the passage of this bill, that any substitute is lawful. I beg to say that I take no stock in such arguments or tables. I have no reason to assume their correctness, but, so assuming, it only appears that there are abuses which need suppression, and which can be and should be suppressed. The law was ample for this purpose when they are said to have originated, and therefore the act under consideration was not required as a remedy. There is no reason why like abuses may not originate under it. The truth is, and it would best be stated plainly, the object of the law was not the correction of abuses (though incidentally it might render some of those enumerated unavailing for selfish practices), but it was to take the expense of criminal prosecutions in the main off of the state as such, and devolve it upon a special body of its citizens,—those who might hold subordinate places connected with the administration of the criminal law, as clerks, sheriffs, magistrates, constables, etc., and those who might chance to have observed the commission of crime, or be aware of such facts in relation to it as would make them witnesses. I earnestly favor an exacting and economical enforcement of law, now ample to suppress all grievances complained of, but I cannot reconcile it with my view of the constitutional rights of the great body of the people included in this classification to devolve on them individually this burden of service and expense throughout the state, and for all the people of the state, because professional witnesses in our larger cities have succeeded in fooling the constituted authorities out of a few hundred or a few thousand dollars. In the great number of counties of the state no such abuse exists, or is even alleged to exist. Their witnesses get only the poor pittance of their actual dues, and their officers earn barely living salaries while doing faithful service to the public. The conditions of abuse (doubtless much less objectionable than they are made to appear) are, at worst, exceptional. They are special, and such as always, in some form, exist under the best laws in great or rapidly growing cities, and need special correction where they exist, rather than by sweeping and oppressive general legislation which deprives the honest officers and the nonprofessional witnesses throughout the state of all expense and compensation. It must not be forgotten that the professional witness abuse, so loudly complained of, is found in only a few of the larger cities of the state. He is a pest practically unknown in the numerous country counties, and because he exists elsewhere is no reason why they should be made to bear this great burden.

Referring to it in another aspect, I think proper to call attention to the averment that this law operates as a saving of hundreds of thousands of dollars. While this is greatly exaggerated, yet let it be admitted to the full amount claimed; it only proves that so great a burden has been taken off of the taxpaying part of the public and put upon a number of indi-

viduals poorly able to bear it, and no more than all other citizens justly subject to do so. It appears in fact, however, that for several years the average state cost per year on this account is a little over \$200,000, and it is worthy of special emphasis here that the passage of this law was followed, wonderful to relate, not by a diminished, but by an increased rate of taxation! The amount saved to the treasury by loading this great public burden on a few of its needy poor (who, in the main constitute the witness class and to a large extent the subordinate office holding class) is, it would thus appear, devoted to other and supposed better uses. I cannot speak of this great wrong, which, in my judgment, it is, in terms of patience. When I contemplate a condition under which the poorest citizens throughout the state may be summoned and dragged by compulsory process from remotest limits of their own counties and from all adjacent ones to the distance of 5 miles from place of trial, and from term to term, without money or allowance by law to defray expenses, and yet compelled to incur them in order that the miserable pittance heretofore paid them by a great state for that purpose,—in order, forsooth, that this fund may be used for other and better purposes,—I bitterly regret to realize that a Constitution which has been pronounced by the most eminent of statesmen as the best in the republic, and which I have always revered as such, is powerless to prevent it. I have never believed it, and, though forced to realize it now I cannot permit that construction to go unchallenged. I am of the opinion, yet unshaken by argument and the ably expressed view of the majority, that this particular service and expense cannot be devolved upon individual officers and witnesses; that it is a taking of their particular services and of their property for expenses, in violation of the Constitution.

An analysis of the act under consideration (act February 3, 1897) shows that all fees and expenses of certain officers and witnesses (compelled to attend trials, incur expense, and render services for the state) are disallowed in the great majority of criminal cases, felonies, and misdemeanors, and before both courts and magistrates. In making this general statement and before proceeding to a more specific analysis and discussion of the act, it is essential to notice here two general propositions in the opinion of the majority. The first is that the act does not compel the service or the incurring of expense on the part of officers and witnesses, and the second that the magistrate's relation to a criminal case is such that he is not an important factor, and that the denial of his fees, so far as they are denied, or the allowance thereof, so far as they are allowed, and without regard to the terms upon which they are allowed, can work no injustice to a defendant. The first proposition results from assuming that this law is to be treated as a distinct and independent law, enacted alone, and standing alone. The obvious answer is that it is but an addition or amendment to existing laws left intact, and which become parts of it if it stands. It can no more be valid if their existence is destroyed than it could be if the courts were destroyed, for there would be

nothing left to effectuate its operation. It is precisely therefore, as if the legislature had re-enacted all the existing provisions of the law relating to officers, witnesses, and magistrates except that covering fees, and then inserted this in lieu of all legislation on that subject. Indeed, elsewhere in the opinion the majority so declares for, as to the objection that this law is a direct repealing and amending statute and does not refer to the laws repealed or amended, it states that the act is "a new and original law," and cites a number of cases on that point showing that such a law but supercedes all others on the same subject inconsistent with it, and takes their place amid and as a part of the other statutes; thus, with them, making up the whole body of the law. As to the second proposition, concerning the magistrate's inconsequential relation to criminal trials, the majority assumes this because it is only in submissions he acts finally, and when he binds over to court, in that tribunal he has no voice. The answer to this is equally obvious and I think equally destructive. The magistrates get their primary fees only upon submissions, it is true; and if we assume that this will never be made an oppression to the poor and hopeless by bringing about submissions through deception or duress, still it is ignored by the majority that the magistrates are the preliminary triors of those bound over. They do not bind over merely upon a charge, but, if there is no submission, hear the evidence, and bind over or not, as they think proper. This affords the chance and the temptation for oppression. But passing this also with a bare notice and coming to the proposition that they have "no voice" in the trial court, I deny wholly that they are not factors, and affirm that they can (and the effect of this law is to induce them to do so) make themselves most important factors in conviction in a large proportion of criminal cases, because they (assembled in county court) select the men who compose the grand juries which find all indictments and presentments, and the traverse juries which try all the misdemeanors, and which, as a rule, are tendered along with others in nearly all special venirens ordered from which the felony juries are made up.

Having disposed of these two points, I return to a specific analysis of the act for more particular application, and to serve as a basis for such argument as I wish to make against its constitutionality, a clear understanding of it being necessary to proper appreciation of the objections on that ground. It is entitled "An Act to Regulate and Restrict the Payment of Costs and Fees in Criminal Prosecutions," and has three sections. Taking them up in inverse order, and beginning with the second (for the third contains nothing but a provision that the act take immediate effect), we find in it a sweeping and general disallowance of fees, costs, and mileage to all witnesses for the state, in all cases, and without regard to county of residence, where the witnesses reside within 5 miles of the place where attendance is required. The 1st section declares that no fees or costs shall be allowed against the state or any county in favor of anyone (including here, or course, both witnesses and officers) except as therein after classified, and in the classification pro-

vides for payment of costs of prosecution in all cases of conviction, saving two exceptions,—one already stated in the analysis of § 2, denying costs to witnesses within 5 miles; and the other where defendant, on conviction has given security for the costs, and it cannot be made out of him and his sureties on execution. It provides further, for payment of costs in eight felony cases,—homicide, rape, robbery, burglary, arson, embezzlement, incest, and bigamy,—where the prosecution has proceeded to a verdict, whatever the verdict may be, whether of conviction or acquittal, and whether there was or not a judgment pronounced upon it (this, of course, subject to exception of § 2). It also provides for payment, as heretofore of the compensation for boarding prisoners, expenses of keeping and boarding juries, compensation of jurors, costs of transcripts in cases taken by appeal or writ of error to the supreme court, mileage and legal fees for removing or conveying criminals from one county to another, or from one jail to another, and compensation and mileage of witnesses for the state required to attend as such outside of their county where they reside more than 5 miles from the place of attendance, and for compensation to state witnesses when confined in jail to secure their attendance.

Having analyzed this act and stated its effect in the order in which I wish to consider it, I return to the consideration of the constitutional objections to its validity. Though quoted by the majority, I deem it necessary to restate in part, in connection with the views I desire to express, the constitutional provisions assumed to be violated. The Bill of Rights (art. 1, § 21, of the Constitution) declares "that no man's particular services shall be demanded or property taken or applied to public use without the consent of his representatives or just compensation being made therefor." The "consent of his representatives" here can only mean the consent of anyone authorized to represent him in yielding such service or property to any demand or taking which may by law be made. It cannot mean, I think, as may possibly be implied from a statement in this connection in the majority opinion (though nothing was predicated of it), the consent of his "legislative" representatives, because the section is itself a limitation on legislative power. If it had been intended to mean unless "demanded or taken by the legislature," it would have been useless and meaningless, and in lieu of it the provision would have been, "shall not be demanded or taken unless the legislature demands and takes it." But it is useless to argue this proposition. If any one question has been settled, it is that the legislature cannot demand and take particular services or property (of any kind) for public use without consent, or just compensation, and cannot take for private use at all. See cases collected in note to this section in Shannon's Code, p. 48. There is as little difficulty in determining the meaning of the conjunction "or," used in the phrase "consent of his representatives, or just compensation being made therefor." It is the disjunctive, to indicate that the services may be demanded free, or the property taken without charge, if the person to be affected by it, or any representative

authorized to act for him, consent, but that, if he does not consent, or refuses to consent, they may be demanded or taken upon just compensation being made therefor. Properly elaborated and changed to an affirmative, the section would read: "The state may, by act of the legislature, demand for public use the particular services of any person free, or take and apply his property to public use without compensation, if he, or any person representing him, authorized to do so, consent; and it may so demand such services, and take and apply his property to public use without consent, or against refusal of consent, upon payment of just compensation." In this view it would seem plain that the services involved in attending court, performing duties required, and giving evidence could not be demanded by the state without compensation, or, to state it more accurately, denying compensation by express provision of law. This under the particular service clause. It would also seem equally clear that, in addition to this objectionable demand of time and service, the money which the officers and witnesses must pay for fare if transported by another, for pikeage and ferriage if they ride or walk, and for expense of boarding themselves during the service demanded, which is their property, could not be taken and applied to public use without compensation. We need not stop here to consider the fact that time and labor are property. This is too well settled for controversy. But, if they were not, the constitutional clause quoted includes both by apt words (for no services can be performed without time), and protects them equally and alike against taking by the state without compensation.

It would appear, therefore, that by the unqualified language used as to taking property for public use, and by the natural construction of the phrase "particular services" as applied to the services which may be exacted of individuals, that both are protected by the plain terms of this provision. But it is said that there is something in the meaning of the word "particular," used in connection with "services," which must be held to disentitle these citizens suing in this case to this protection, because the "services" they rendered are not the "particular" services intended to be protected; that the services of officers and witnesses, "such as may be required of all citizens or officials by general or valid special laws," are "ordinary" and not "particular," and may be taken without compensation. This is illustrated by the case of a physician, who, it is said, may be compelled to testify without compensation, but cannot be compelled to examine into the matter inquired about, and then testify; and, indeed, just such a case in Indiana actually arose, and was so decided. But in my judgment, speaking with due respect for that court, it frittered away a great constitutional principle over a controversy about nothing, for the court finally held, in effect, that the clause did not cover services which might be demanded under the police or sovereign power of the state, and that witnesses' services were such because they were "such as any individual was bound to render when called upon for the public welfare." If their theory be true, their conclusion was erroneous, because under

that power any services may be demanded, and any property taken or destroyed, without compensation. As justly said by counsel for defendants: "Strange as it may appear to some, there is a power of sovereignty not limited by and superior to any written Constitution. It is the power of state preservation. It, so far, has found expression only in the assertion and exercise of those powers known as war powers, police powers, taxation, and eminent domain." Randolph, Em. Dom. §§ 8, 9, 23, 24; Prentice, Pol. Powers, § 6; Mills, Em. Dom. 2d ed. § 9; *Miller v. Horton*, 152 Mass. 540, 10 L. R. A. 116; *Tiedeman*, Pol. Power, § 42; *Markham v. Brown*, 37 Ga. 277, 92 Am. Dec. 73. These are the great reserved powers of the state. *Chicago, B. & Q. R. Co. v. State, Omaha*, 47 Neb. 549. Not uncontrollable or despotic, but practically controlled alone by the wisdom and justice of the judges, "subject to the discretionary coercion of courts (1 Vent. 66) to the judicial determination of its appropriate limits." *People v. Budd*, 117 N. Y. 15, 5 L. R. A. 559. Like the attempt to define "due process of law," it comes at last to the gradual process of judicial inclusion and exclusion. *Davidson v. New Orleans*, 96 U. S. 97-104, 24 L. ed. 616-619. This is a well-recognized power, and nowhere more fully than in this state (*Theilan v. Porter*, 14 Lea, 626, 52 Am. Rep. 173), but it is a distinction and not an exception to the constitutional inhibition we are considering. It is not a question of what services, "particular" or otherwise, may be taken under these sovereign powers outside and above the Constitution. It is a question of what the purpose of the taking is. So, in the case cited (*Theilan v. Porter*, 14 Lea, 626, 52 Am. Rep. 173) it is said: "But this inhibition has no application as a limitation of the exercise of those police powers which are necessary to the safety and tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments." This was a case of the destruction of private property without compensation, because it was unhealthy and a nuisance, and the state's right to do it or permit it to be done by a municipality was upheld and justified upon authority. It was rested upon the principle announced by Chief Justice Shaw, and his opinion quoted to this effect: "Every holder of property, however absolute his title, holds it under the implied liability that his use of it shall not be injurious to others, nor to the rights of the community. If it be hurtful, he is restrained, not because the public makes any use of it, or takes any benefit or profit from it, but because his own use would be a noxious use." *Com. v. Alger*, 7 Cush. 84. It cannot be doubted that in such a case physicians could have been compelled to examine it, and furnish evidence of its condition for the public good. So, I think, it clearly appears that the Indiana court, in holding that such services could not be taken because "particular" or "extraordinary," misconceived and misapplied the rule relating to sovereign power. That court assented to the taking of the witness's service—"ordinary service"—under the rule suggested, but denied its application to the very act to which, as to all others, it did apply,—to the taking of extra-

ordinary or special service. With such a misconception I respectfully insist they misapplied the rule in the leading case cited by the majority,—*Israel v. State*, 8 Ind. 467. There it was held directly; but in holding it the court stated the rule regarding sovereign power, and justified its decision in this language: "It is as much the duty and interest of every citizen to aid in prosecuting crime as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in furnishing to all, high and low, rich and poor, every facility for a fair and impartial trial when accused; for none is exempt from liability to accusation and trial. These are matters of general interest and public concern,—are vital, indeed, to the very existence of free government, and render the services of witnesses on such occasions matters of general public interest, and not particular, in the sense of the Constitution." The other Indiana cases cited followed this, and were based upon it.

The Oregon court, in the case cited by the majority (*Daly v. Multnomah County*, 14 Or. 20), in a brief opinion simply adopted the view of the Indiana court, and in the exact language of its expression, thus practically making but one judicial exposition of the law; and this demonstrably, if not confessedly, upon the application of a principle wholly outside of the constitutional clause under consideration.

These precedents, I respectfully insist, therefore, go for nothing. There are no others. The question was not involved in the Tennessee case cited (*Neely v. State*, 4 Baxt. 174), which uses somewhat the same language, for there the point in judgment was whether the legislature could pass a constitutional law taxing the losing party with jury fees. It was held it could not. What was said outside of this was pure *dictum*, was not matter involved, argued, or considered, and is entitled to no weight as authority. The other Tennessee cases were not in point. *Washington v. Nashville*, 1 Swan, 180, was a case involving the police power of the state, and the cases in 3 Heisk. [*Wright v. State*, 256], and 5 Baxt. [*House v. Whitis*, 690], were *sui generis*, to which no law in particular was applied. They were cases holding that a lawyer might be required to defend a prisoner or act as guardian *ad litem* for a minor without compensation, and put upon the ground that "where a lawyer takes his license he takes it burdened with these honorary obligations." It was expressly held that the constitutional clause we are considering had no application, and it was not pretended that the service was demanded under the sovereign power. It seems to have been assumed to be an obligation of honor and duty resting on him as an officer of the court to obey its orders to defend the helpless. The majority, putting it this way, say: "As sheriffs and clerks are officers of the court, so may they be required to render services, and so do they take their offices (as the lawyer takes his license) burdened with similar conditions and requirements." This view is erroneous in several respects: First. They are not required by this law to render similar services; they are not to defend a few of the helpless, but to aid in the prosecution of nearly all criminals without compensation. It cannot be doubted that law-

yers could not be required to perform such services without compensation. Second. They are not officers of the court in the sense that lawyers are. They do serve before courts, it is true; they are officers, and, in a sense, are officers of court; but they are constitutionally elected officers of the counties in which they serve, and are given by law and by constitutional requirement fees of office; for when the election of these officers was provided for by the Constitution without fixing salaries it was implied that they were to hold them substantially as they had always been held, and to render service in them with their general functions and the material, if not particular, amounts of compensation unimpaired. Legislative acts are void which attempt to take from constitutional officers defunctions or the substantial emoluments of office. *State, Kennedy, v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84; *King v. Hunter*, 65 N. C. 608, 6 Am. Rep. 754; *Pope v. Phifer*, 3 Heisk. 682; *Warner v. People*, 2 Denio, 272, 43 Am. Dec. 740. I regret that the length to which this opinion must be extended forbids quotation of these cases. They should be read in connection with it, to appreciate the full force and merit of the proposition they are cited to sustain. Compensation to these officers was always a matter of legal provision and of right. The lawyer's compensation was never a matter of legal provision, and only of later years a matter of right. He once took his license burdened with the "honorary obligation" of rendering all service free. It is no great deprivation that his present right and custom to charge for his services should remain yet burdened by the obligation to serve the helpless free when ordered to do so by the courts. But if the case was authority for depriving clerks and sheriffs of their fees, and taking their services without compensation, it avails nothing as an authority in this case. If the decision needs the support of this authority, it must fall, because, confessedly, justices of the peace and witnesses are not officers of the court, and the principle could not sustain the law construed, because that law deprives these also of compensation.

Nor do the cases holding that citizens may be compelled to serve in the militia or work on public roads without compensation help the decision. The right to the first service without compensation is clearly a right of sovereignty under the war power. If the citizen can be compelled by the state to serve in war, he may be required to prepare for such service in peace; and the right to the second was probably asserted on the same principle. When first this service was required, the country was a wilderness, and its inhabitants, without roads, were beset by foes, native and foreign. The object of opening and guarding a great highway through this territory (now state) from Clinch Mountain to Nashville was made the subject of legislation by North Carolina in 1786, and a battalion organized for this purpose among others. N. C. Acts 1786, chap. 1, § 15. In this and like manner originated the work of building, guarding, and working roads, when the country was new. It was freely accepted as proper then. The system, with modifications, continued, and became an unquestioned one. The emergent sovereign

necessity long since ceased, but the system was established, and continues without objection. The necessity having passed, it is no longer justifiable, perhaps, but it is recognized and continued. Properly, now, it is supported by no well-recognized principle. It is certainly not to be extended or used as a precedent for innovations upon the Constitution, or infractions of settled limitations on legislative power.

After all, the validity of the law involved in the case before us must depend on whether the services demanded are such as may be demanded under any sovereign power suggested, or whether they are particular services, which cannot be demanded for public use under the Constitution. The majority treats the word "particular" as "peculiar" or "extraordinary." That it should have this or any other meaning is, as I think has been shown, wholly immaterial, but I most earnestly insist that this is an erroneous interpretation of the word as used in the Constitution. Its primary meaning in single words, as defined by Mr. Webster, is "separate," "sole," "single," "individual," "specific." Its secondary signification of "peculiar," adopted by the majority, is not "peculiar" in the sense of "extraordinary," implied by them, as illustrated by reference to ordinary and extraordinary services of physician. Mr. Webster does, indeed, give this as one of its secondary meanings, but in this connection: "Of or pertaining to a single person, class, or thing; belonging to one only; not general; not common; hence, personal, peculiar, singular. 'Thine own particular wrongs.'"

In this sense "peculiar" is made to mean "one's own," and this, too, is the primary meaning of "peculiar" as he elsewhere defines this word. Why shall we look for secondary meanings at all, and why is it necessary to give such secondary meaning another not allowable its own primary definition, to destroy the application of this beneficent constitutional provision. It must mean, and in my opinion it can mean, nothing, in the place employed, but individual, specific, and separate service, in contradistinction to that general service which might be required of all citizens under the sovereign power,—say, in case of insurrection or invasion. The limit must be placed, the line of distinction drawn, somewhere. If not here, where can it be? If the view of the majority be correct, that it means any service to the state in the way of witnesses, jurors, etc., then it extends to all service the state requires, including the highest as well as subordinate official service; and every citizen may be required to serve the state in every capacity without compensation, and not only to serve the state, but to bear his own expenses while doing so.

The fundamental error in the majority opinion is in classifying the service of officials and witnesses as "sovereign" instead of "government service;" as service required in emergent conditions of the government's life, and therefore belonging to the sovereign, instead of service performed in the usual administration of public affairs, and therefore to be performed only under the Constitution, and only to be required under the Constitution and upon its terms, and not under the reserved power. If

this be not true, what is the meaning of the phrase, "applied to public use" in the provision declaring that "particular services shall not be demanded or property taken or applied to public use" without compensation? It was not to guard against its application to private use. It cannot be taken for private use at all. It was to provide against its taking for public use, and it does so in the most express terms possible. To give the phrase any meaning, it must be held to prevent the "application" of individual services or property to the ordinary service of the government, and such unquestionably is its prosecution of criminals,—its administration of law. These, indeed, are the ordinary purposes for which government is organized. They are public, important, necessary purposes, it is true, but at last they are but the usual and ordinary purposes of government. They are not emergent, they are not like, they do not belong to the class relating to war, famine, pestilence, and other extraordinary conditions, when the necessity of the government, like it is said of necessity in the abstract, "knows no law." It is true it is a public purpose to convict a criminal, but it is equally true it is a public purpose to keep a criminal in confinement as a punishment for crime, and to protect the community. If the services of the citizen can be taken to convict, they may be taken to guard and keep, the prisoner; and, indeed, they may be taken for all public purposes, and the constitutional provision made a mockery. The only rule that can save it is that which holds it applicable to all usual, ordinary government service, and inapplicable when those extraordinary emergencies arise which call for the resistless power of sovereignty over and above any law, when, as in case of troubles like that of war, all laws are silent.

But, again, if there was any controversy as to the services which can be taken because of the use of a qualifying word, there can be none as to the "property." The language of the Constitution in reference to it is not "particular" property, but "property," any property, in reference to the taking of which this inhibition speaks. So the cases on the construction of the word "particular" could not support the opinion, because this law takes not only the services, but the money, of officers and witnesses required to pay their traveling and boarding expenses while attending court and rendering the services taken, whether they be "particular" in the sense used in the majority opinion or not. If the act, therefore, was not invalid because of taking the services, it would be on account of taking the property, for, to be valid at all, it must be valid against both inhibitions.

So far I have been considering this constitutional provision in disconnection from all others but, if both propositions maintained here are erroneous, and such services and property as are involved in this case might be taken by a proper law under this clause of the Constitution, or despite its prohibition, if it stood alone, then I insist that they could not be taken by this act, because the taking and application thereof on its terms violate other provisions of the Constitution preserving and guaranteeing to a defendant the right of inviolate trial by

an impartial jury. In other words, if the state can demand and take such services and property as has been done here absolutely and without compensation, and apply them to the public use, without more,—as, for illustration, if it can require all officers and witnesses to serve the state in such capacity, and pay their own expenses, without compensation in any or all cases,—it cannot do it on terms of this law, which offer a compensation for such service and property only to accomplish, and when it accomplishes a conviction, and thus encumber and embarrass the right of trial by jury with conditions which, in their practical operation, impair or violate that right, or obstruct its free and full enjoyment. This court, in construing another constitutional provision involved in this case, and to be considered later on, said: "Another essential to the validity of every legislative classification, whether it be made under art. 11, § 8, or under art. 1, § 8, is that it must not violate any other provision of the Constitution, whether such provision be expressed or implied." *Stratton Claimants v. Morris Claimants*, 89 Tenn. 535, 12 L. R. A. 70, that is, that though an act might be valid *per se*, if authorized by one provision, it would not be valid, though so authorized, if not framed to be unobjectionable under every other.

The only answer to all this which we find in view of the majority is that there is no provision in the Constitution for impartial officers and impartial witnesses. Granted; but this is not the question for determination. It is freely conceded that there may always exist partiality in both, as a natural human sentiment; but what I am combating is the constitutional right of the legislature to make them so by terms of law,—to provide for it in the face of the constitutional provision for an impartial trial. Heretofore, when any special reason for partiality appeared in an officer, it was held that the constitutional provisions, followed in legislative acts, were ample to exclude him from acting; and in the *Clopp Case* [94 Tenn. 183], it was held that where the sheriff was interested in the result (as an accident) the defendant's right to a fair and impartial trial was violated, and there was in the meaning and spirit of these provisions of the Constitution abundant power to declare it, and protect the defendant. Now, when made interested and partial by terms of law, we hold that defendant is not entitled to protection. The same argument applies in respect to witnesses. I am not contending that the Constitution or any former laws made impartial witnesses. The law never did create or require impartial witnesses. But what I am contending is that the Constitution does not permit, in fairness and justice to the citizen, that the legislature shall make them partial by terms of law by bidding for the service of conviction. This point has been expressly decided. In the case already referred to, in which it was said, but not decided, that a juror could be compelled to serve without compensation, it was directly held that this could not be done upon conditions which impaired the right to such a trial. I quote from that case: "The Bill of Rights [article 1 of the Constitution] guarantees to all citizens the right of trial by jury, unim-

paired and without violation. This manifestly means that the right shall never be embarrassed or encumbered with conditions which, in their practical operation, may impair or violate the free and full enjoyment of the right." *Neely v. State*, 4 Baxt. 184. This was on the point in judgment, and the only one for which the case is authority. *Louisville & N. R. Co. v. Davidson County Ct.* 1 Sneed, 639, 695, 62 Am. Dec. 424. The guaranty to the citizen that the right of jury trial shall remain inviolate, and that he has the right to be heard in his case by himself and counsel, before an impartial jury, would be a hollow mockery if it did not, by unavoidable implication, express that he was guaranteed such a hearing and such an inviolate trial by such a jury as was itself, in its formation, in all the elements, and in all the conditions of its relation to results, fair and impartial; and so I deny that the expression in the *Clapp Case* (which is but a reiteration of similar expressions scattered through all preceding opinions), that a fair and impartial trial is guaranteed to a defendant under the Constitution and the laws (meaning laws whose enactment was compelled by its provisions) is a misuse of terms, or expresses more strongly than the Constitution itself does this precise proposition. It is but the formulation, in other words, of exactly the same meaning of that guaranty of a fair and impartial trial which the Constitution makes; and I most earnestly dissent from any interpretation or construction which denies for any purpose of argument or decision that our Constitution does not expressly and without the aid of any "law" or "laws" secure such primal and inestimable right of freemen in their litigations with the state or between each other. The right of a fair and impartial trial, said this court in the *Neely Case*, already quoted, is one which can "never be embarrassed or encumbered with conditions which, in their practical operation, may impair or violate the free and full enjoyment of the right." In that case—and I am pleased to select it because it is the principal Tennessee case on which the majority relies—it was held that the taxation of jury costs against the losing party violated the citizen's right to a fair and impartial trial. What have we here under terms of the law we are considering? The state arranges the machinery for the trial of a defendant. It gets in readiness to secure him that fair and impartial trial; how? First. By directing the sheriff (who has arrested defendant, and lodged him in prison, or taken his bond for appearance, summoned the witnesses, and thus accumulated costs in the officer's favor) to summon this (to be) impartial jury. Second. By devolving upon the clerk (who has issued the warrant and subpoenas, and entered essential orders relating to the case, whereby costs have accumulated in his favor) the duty of making provision for drawing this impartial jury, and making all the entries in respect thereto down to final judgment. Third. By turning this jury over to an officer to be attended from day to day until verdict, who may also have costs dependent upon the result of the trial. Fourth. By bringing all state witnesses before the court from every quarter of the county in which the trial is had and 5 miles

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beyond, to give evidence, and then "by terms of law" assuring them all that for their services in the case upon conviction they shall be specially compensated,—if they convict they shall be paid; if they acquit they shall not only not be paid, but shall be denied expenses. Thus, by a state reward, is leagued against a defendant the men who summon and guard his jury, who provide for its drawing and keep the record of his trial, and who give evidence against him, and whose combined fees and expenses in particular cases may, and often do, amount to hundreds, and sometimes thousands, of dollars.

The state says: "I summon you to trial. I invite you to a fair and impartial trial. Behold the sheriff who arrested and committed you, who summoned the witnesses and the panel from which you are to select your triors,—the final judges on whose decision hangs your liberty or life,—the clerk and the officers of court and the witnesses. I have promised them all payment only on condition that they convict you. Take your seat. If you think, against the facts of the case, against the usual human bias in disfavor of a man or woman charged with a criminal offense, in the distress oftentimes of poverty and friendlessness, the embarrassment and odium of imprisonment, you can defeat this combination of selfish interest and law-created league against you, proceed to do it, and attest, with constitutional reverence, that, considering your desperate chances, you have had a fair trial,—as fair, at least, as that of running the gauntlet."

In this connection I note that the majority lays special stress in favor of the fairness of the trial under the present law, because the sheriff's fees for summoning the special panel are not taxed to the defendant, but are paid out of the treasury. It is true that under that act of 1882 such cost is taxed to the county. Whether, under the general provisions of the act under consideration, providing that in the majority of criminal cases no costs shall be taxed to the state or county, and only as a result of verdict of conviction in others, this law of 1882 is repealed, it is not necessary to determine here. Let it be granted that it is not affected by the act we are construing, and that this part of the sheriff's costs is not dependent upon the result of the prosecution; this is the smallest item in his account in such cases. The act of 1882 gives only 5 cents for the summoning of each juror ordered in special venire, while for all other services in the case a much larger charge is provided for, and expressly the compensation for these services is so dependent. If the law would be objectionable with that in it, as seems to be implied from the reference to it in the majority opinion, it is impossible to see why it is not so with the more largely compensated service in the case so dependent. The same suggestion is made as to the officer attending the jury. The majority assumes this is paid as heretofore, because the expenses of "keeping and boarding" juries is provided for in the act. I think it clear that this expression has reference only to payment of jury expenses proper,—that is, if they are but supplied with food, their "boarding" expenses are paid; if they are kept and furnished lodging, this expense

of "keeping" too is paid; and hence the entire expense of "keeping and boarding" is provided for. This is demonstrated by an examination of former statutes on subject of jury board.

The first used the term "boarding and finding." Code, § 4032. In the others the word "keeping" is used as the term for "boarding." Mill. & V. Code, § 6454. This was the act of 1859-60, chap. 6, p. 4, § 2, and was amended by an act which in its caption used only the term "boarding," and in the body, as expressing it, the word "keeping." In the succeeding section the bill of person authorized to receive it was to be for "boarding." Shannon's Code, §§ 7607, 7608; Acts Ex. Sess. 1885, p. 76. The officer attending them never was paid under any fee-bill head of "keeping" a jury, which he in no sense does, unless he should happen to be an innkeeper, or temporarily act as such. His compensation has been paid heretofore for attending and waiting on the jury under the fee bill in favor of officers for "attendance on court" (Code, § 4564, subsec. 26; Shannon's Code, § 6402, subsec. 25) and "for attending on grand jury and waiting on court" (Code, §§ 4571, 4572, subsec. 9; Shannon's Code, §§ 6409, 6410, subsec. 8). It is under these sections the compensation is provided for, and it is these, and these only, which fix the amount. There is no distinct fee for waiting on a "trial jury" in these terms, but such fee has been paid by accepted construction because in such service the officer is, in a proper sense, in "attendance on" and "waiting on court." These are the only statutes governing this matter. The item of cost is in the regular fee bill. No reason is perceived why this fee paid heretofore by the public is not now eliminated by the general implied repeal of this statute, under which all charges except those provided for in the act are swept away.

But, again, it is to be observed that the officer may be the sheriff himself, or a deputy, who has other costs in the case, or a constable, who may have earned preliminary costs in it before a justice; and, whether this special cost of attending the jury be dependent upon the result or not, he may be otherwise more interested in other costs; so that to save this point is not to help the opinion. If it needed to be saved, the remaining costs leave a remaining interest, which would vitiate equally without this as with it. Here, however, we are told that if any such officer be interested he may be objected to, as was done in the case of *Clapp v. State*.

This will not answer to help the law, for it must be remembered that the sheriff's interest in that case was held to be a special one of fact which the law would not tolerate in an officer who might influence the jury. Under the construction given to the act here involved, it is held that the interest it vests in officers to fees upon conviction will not affect them, or be objectionable by defendant; and this holding is a necessity to sustain the law, because these officers are interested in all cases, and if upon defendant's objection they could be disallowed to serve in the cases their whole service would be rejected. The very act, therefore, which is upheld because the services can be

unobjectionably performed, would be made to mean that they were objectionable, and should not be performed if objected to. I cannot, therefore, understand what meaning under this law is to be given to the suggestion in the opinion, "that if any officer is disqualified because of interest, his place may be supplied, as was indicated in the *Clapp Case*, 94 Tenn. 186." It cannot mean that the allowance of cost in case of conviction shall disqualify the officer, for the whole opinion is devoted to combating the idea that there is anything wrong or illegal in this. As applied therefore in connection with the suggestion of the majority that "it will thus be seen that the act jealously guards the prisoner's right to a fair and impartial jury," I must confess my inability to see how any exception on the grounds implied can be made, or, if made, how it could be sustained, without abrogation of the law. I therefore most earnestly deny that it can "thus" or otherwise "be seen that the act jealously guard's the prisoner's right to a fair and impartial jury."

The various cost statutes to which the majority refers, which are supposed to help in establishing the validity of this law, I need not discuss. It is sufficient to say that no other statute, valid or invalid, just or unjust, to the citizen, can afford any aid to this act on the constitutional questions involved. Nor need I discuss the state's abstract right to disallow taxation of costs against itself or its counties, its various divisions of sovereignty, where that power is exercised, or its right of denial of suit to its wronged citizens. It can be readily admitted that the last three propositions, in the abstract, are true, and then as readily proved that it cannot do so if in the same act or by pre existing act, it provides for demanding the particular services or taking the property of the citizen for a public use without compensation, if that compensation depends upon taxation of costs or right of suit against the state, in which event the refusal to allow such taxation and the denial of suit would be admitted by the courts, but the right to demand the service or take the property would be denied; as, for instance, if the state should be without a capitol, and provide by law for suit or condemnation to take from an owner such property as it preferred for that purpose without providing for payment, and in the same act, or by pre-existing act, declare that in such suit no costs should be taxed to the state, and no suit (or remedy) given to the owner for obtaining compensation, the right not to be taxed with costs without its consent would be conceded, the right to deny its liability to suit would be confessed, but the right to take property and force the owner to incur costs in such a suit would be denied, because of the constitutional provision we have been considering. These propositions, I think, are not relevant. I am presenting specific objections to the validity of this law. It is no more valid if other statutes are invalid than invalid if they are valid. Each must stand on its constitutional merit. Some of them perhaps have as little as this, but want of time and space to me, even more than irrelevancy in them, forbid extending this opinion for their analysis and discussion..

I wish to present one more constitutional objection to this act, and that is, that it is class legislation arbitrarily capricious, and therefore void. Article 1, § 8, of the Constitution declares that "no man shall be taken or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land." Under this provision it has been held that an act is not the "law of the land" when the classification upon which it is based is unnatural, arbitrary, and capricious. *Stratton Claimants v. Morris Claimants*, 89 Tenn. 541, 12 L. R. A. 70. Whether the statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this state, the basis of such classifications must be natural and not arbitrary. If the classification under this section is made for the purpose of subjecting a class to the burden of some special disability, duty, or obligation, there must be some good and valid reason why that particular class should alone be subject to the burden. *Ibid.* Distinctions in these respects must not only be natural, and not arbitrary, but must rest upon some reason upon which they can be defended,—some sound legal reason. Cooley, Const. Lim. 890; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 258, 28 L. R. A. 796. Elsewhere I have shown that the general object of the bill was to take the principal expense and burden of criminal prosecutions off of the whole body of the state, and devolve it upon a few; and in this sense the law in its general scope and purpose is obnoxious to this provision of the Constitution. But, analyzing it more particularly, its special classifications are unnatural, arbitrarily, capricious, and in my judgment absolutely indefensible. I quote here the admirable analysis of defendant's counsel on this point: "When the act passed, February 8, 1897, the law was, and long had been, that witnesses for the state should be paid in all cases, regardless of the disposition which might be made of them. Such being the law, this act, discriminating among persons who belong to the class, called witnesses as follows, was passed: (1) The witnesses in eight named kinds of felonies are paid when the case proceeds to a verdict, and consequently the witnesses in such cases which do not proceed to a verdict are not paid. It often happens that after repeated continuances, mistrials, and reversals a felony case (of one of these eight kinds) is nolle, or the case terminated by the death of the accused. The witnesses have attended alike in all cases. In no case do they control it. In one case there was a verdict. In the other the case was nolle. In the third the defendant died. Can anyone give even the pretense of a reason why the witnesses should be paid in one case, and not in the others? An apt illustration exists in the following case: A murder is committed in a remote district. Henry and James are suspected and indicted. They sever. After repeated continuances and mistrials, Henry is acquitted. After repeated continuances and mistrials, James dies. The witnesses are from the same neighborhood, pass through the same toll

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gates, cross the same ferries, or come on the same train, and alike leave their plows standing in the field. The witnesses in Henry's case are paid. The witnesses in James's case are not. As the witnesses ride home, discussing the situation, what argument can the witnesses in Henry's case, with the money in their pockets, make to the witnesses in James's case, who returned empty-handed, which will satisfy them of the justice of the discrimination? Again, why should the witnesses in a manslaughter case be paid if the case proceeds to a verdict, and not be paid in a case of assault with intent to commit murder, which has proceeded to a verdict? Why, in cases of rape, but not in cases of attempt to rape? Or in bigamy, but not in attempt to poison? Why in embezzlement, but not in fraudulent breaches of trust? Why should they not be paid when the case proceeds to a verdict in railroad wrecking, official bribery, corrupting jurors, suborning witnesses, horse stealing, and masked marauding? Witnesses living more than 5 miles distant, going to another county, are paid, while those living within 5 miles are not. Conceded, for argument, that the discrimination as to mileage can be defended, that as to witnesses' fees cannot. A day at court is a day of time, whether the witness came 5 miles or ten. The truth is that, whether the nature of the crime, or its effects upon the public, or the degree of punishment, be considered, the classification is arbitrary, indefensible, and absurd. But, if it be possible, a more indefensible classification yet remains to be noticed. The witnesses for the state in eight named felonies are to be paid when the case named proceeds to a verdict; but in fifty other felonies, and many misdemeanors, they cannot be paid, even though the case has proceeded to a verdict, unless it be one of conviction. The inconvenience to the witness, and the loss of time, and the fares and tolls are not determined by the legal nature of the case, but by the circumstances of the witness. They are the same to him in all cases. Moreover, he cannot absolutely control, however much, under this act, he may influence, the verdict. Consequently, a statute which discriminates between witnesses, in respect to their compensation in criminal cases, according to the jury's verdict, is cruel, arbitrary, and indefensible. It is indefensible and arbitrary because it unreasonably discriminates between witnesses; it is cruel because it stabs the accused." I need add nothing, if, indeed, anything can be added, to this view of the act on this question. What is presented in it is, to my mind, absolutely conclusive.

Though I have extended this opinion to great length, and am conscious that I will be less heard for much speaking, I am also aware, and suggest in deprecation of adverse judgment on this account, that much has been omitted which could have been, and perhaps ought to have been, said, and particularly as the clear, able, and thoroughly matured opinion of the majority upholding the validity of this act presents all that can be said in its support, fully suggesting the objections to it and evading none. The question, too, is a great one, and worthy of the profoundest consideration. These, and my earnest conviction that the law is in viola-

tion of some of the dearest rights which citizens of Tennessee have been permitted to enjoy for a hundred years, are my excuse—if not justification—for the length and the earnestness of this dissent. But I am aware that strength of conviction is often quite inconclusive of accuracy of judgment, and that this is more often true when the conviction is not in accord with that of any other member of the court, all of whom are as earnest, as fixed in opinion, and certainly as able to exercise as good, if not better, judgment than my own. With the construction given, however, in favor of the act, I desire to record my dissent as fully and as strongly as I am able to express it.

Viola HOCKING *et al.*, *Appls.*,

v.

VIRGINIA FIRE & MARINE INSURANCE COMPANY.

(.....Tenn.....)

A mortgagee of land cannot recover on an insurance policy taken out by the mortgagor payable to the mortgagee "as his interest may appear" where the mortgagor burned the insured building for the purpose of realizing on the policy.

(November 3, 1897.)

APPEAL by plaintiffs from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court for Knox County in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Junius Parker and H. T. Cooper for appellants.

Messrs. Webb & McClung for appellee.

Beard, J., delivered the opinion of the court:

This bill is filed by Viola Hocking and her

NOTE.—For rights of a mortgagee to the benefit of insurance taken in the name of the mortgagor, see *Chipman v. Carroll* (Kan.) 25 L. R. A. 305, and *note*; also *Palmer Sav. Bank v. Insurance Co. of N. A.* (Mass.) 32 L. R. A. 615.

As to the effect of a mortgage slip attached to an insurance policy, see *Phoenix Ins. Co. v. Omaha Loan & T. Co.* (Neb.) 25 L. R. A. 679, and *note*.

husband, who sue in their own right, and for the use of J. E. Hancock, to recover on a policy of fire insurance, issued by the defendant company to and upon the application of Viola Hocking upon her dwelling house, the policy reciting on its face that "the loss, if any, was payable to J. E. Hancock, as his interest may appear." The property covered by this policy was destroyed by fire during its life, and the question here presented is, Can a recovery be made for the use and benefit of Hancock, the mortgagee, when the record discloses beyond all doubt that the mortgagor, Viola, burned the house for the purpose of realizing on this insurance policy? It is conceded that Mrs. Hocking, by her conduct, has forfeited all right to recover, but it is insisted that this forfeiture does not affect the mortgagee. While a mortgagee, to whom the loss under an insurance policy issued to the mortgagor, and covering the property of the latter, is made payable "as his interest may appear," is, in a large sense, an assignee to the extent of his interest (*Donaldson v. Sun Mut. Ins. Co.* 95 Tenn. 280), yet he does not acquire a full and absolute right, and, in case of loss, recovers in the right of the party assured, and not in his own. In the present case, it was the property of Viola Hocking that was insured and destroyed by fire, and it was she who took out this policy for his benefit. If at any time after its issuance the mortgage in question had been discharged the interest of the mortgagee in this policy would have terminated, and Mrs. Hocking alone would have been entitled to its proceeds. Claiming through the assured, Hancock had no higher or greater right against the defendant company than she; and, as it is clear that she, being the incendiary of this property, would be repelled, he (the mortgagee) must abide the forfeiture which the conduct of his mortgagor has brought about. A large number of cases recognizing this sound principle are to be found in the reports. Among them are: *Illinois Mut. F. Ins. Co. v. Fir.* 53 Ill. 151, 5 Am. Rep. 38; *Hale v. Mechanics' Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410; *Pupke v. Resolute F. Ins. Co.* 17 Wis. 379, 84 Am. Dec. 754; *Grossenor v. Atlantic F. Ins. Co.* 17 N. Y. 391.

We agree with the court of chancery appeals that the forfeiture of all right under the policy, resulting from the conduct of the assured, the mortgagor, extends to and extinguishes the right of the mortgagee, and the decree of that court is therefore, *affirmed*.

ILLINOIS SUPREME COURT.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appl.*,

v.

Margaret O'KEEFE, Admr., etc., of John O'Keefe, Deceased.

(168 Ill. 115.)

1. A person must be expressly or im-

NOTE.—As to when a person who has started for a train becomes a passenger, see *note* to *Webster v. Fitchburg R. Co.* (Mass.) 24 L. R. A. 521; *Wood v.* 39 L. R. A.

pliedly received as a passenger before he can sustain that relation to a carrier.

2. The holder of a free pass on a railroad who gets on the front platform of a baggage car next the tender when the train is in motion and after it has left the depot, and then tries to open the baggage car door, does not thereby become a passenger so as to make

Pennsylvania R. Co. (Pa.) 35 L. R. A. 199; and *Western & A. R. Co. v. Voils* (Ga.) 35 L. R. A. 655.

the railroad company liable for his protection as such, when he is killed by a collision while he is on the car platform.

3. A conductor's knowledge that someone has boarded his train while in motion by getting on the platform between the tender and baggage car is not sufficient to show that he has accepted him as a passenger, when he does not know who the person is or what he is there for.

(Carter, J., dissents.)

(November 1, 1897.)

A PPEAL by defendant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Union County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of defendant's intestate. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. William H. Green and James Fentress for appellant.

Messrs. William A. Schwartz and Kar-raker & Lingle, for appellee:

Appellant should be held liable in this action for damages, because deceased was killed through what the law presumes to have been negligence on the part of appellant.

Pittsburg, C. & St. L. R. Co. v. Thompson, 56 Ill. 141; *North Chicago Street R. Co. v. Cotton*, 140 Ill. 494; *Byrne v. Boadle*, 2 Hurlst. & C. 722; *Scott v. London & St. K. Docks Co.* 3 Hurlst. & H. 598; *Lavis v. Wisconsin C. R. Co.* 54 Ill. App. 641; *Carpus v. London & B. R. Co.* 5 Ad. & El. N. S. 747.

The law calls upon appellant to show and prove by a preponderance of the evidence that the accident resulted from a cause for which it should not be held liable. Even where no special relation like that of passenger and carrier exists between the parties.

North Chicago Street R. Co. v. Cotton, 140 Ill. 494.

A passenger who goes from one car to another of a moving train to find a seat does not, while so upon the platform, take the risk of collision with another train.

Devire v. Boston & M. R. Co. 148 Mass. 348, 2 L. R. A. 166; *Stewart v. Boston & P. R. Co.* 146 Mass. 605.

It was a question for the jury, under all the circumstances, whether or not O'Keefe was using proper care.

Hutchinson, Carr. 2d ed. § 658; *Werlev. Long Island R. Co.* 98 N. Y. 650; *Noland v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345.

O'Keefe was riding on the platform by the permission of the company, and he could not be charged with contributory negligence in doing so.

Hutchinson, Carr. § 654; *Lammert v. Chicago & A. R. Co.* 9 Ill. App. 888.

Judgments of the trial court will not be reversed where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict.

Shevlier v. Seager, 121 Ill. 569.

Care and negligence are questions of fact for the jury.

Lowry v. Lynch, 57 Ill. App. 323.

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The contract of carrier and passenger may be implied from slight circumstances.

North Chicago Street R. Co. v. Williams, 140 Ill. 288.

O'Keefe was a passenger because he was a traveler by an "established conveyance" on a regular passenger train, upon a pass issued to him by appellant for the purpose of expediting his work.

Gordon v. Grand Street & N. R. Co. 40 Barb. 546; *Hutchinson*, Carr. 2d ed. § 566.

Whether or not O'Keefe was a passenger was a question of fact for the jury, and they were fully instructed upon that question.

Chicago, B. & Q. R. Co. v. Mehlsack, 181 Ill. 62.

Without any proof of the cause the jury might justly find that a collision, on the same track, of two cars or trains of a passenger carrier is due to the negligence of the carrier.

North Chicago Street R. Co. v. Boyd, 57 Ill. App. 536; *West Chicago Street R. Co. v. Martin*, 154 Ill. 529.

The jury properly found appellant was guilty of the greatest and grossest negligence.

Chicago & N. W. R. Co. v. Traves, 38 Ill. App. 307; *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 162.

O'Keefe was not a gratuitous passenger.

Hutchinson, Carr. 2d ed. § 564; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502; *Jacksonville S. E. R. Co. v. Southworth*, 135 Ill. 253.

Cartwright, J., delivered the opinion of the court:

This case was before this court on a former appeal, and the judgment appealed from was reversed. *Illinois C. R. Co. v. O'Keefe*, 154 Ill. 508. The case has been again tried, resulting in a verdict and judgment for \$3,000, and the appellate court has affirmed that judgment. The facts will be found stated in the former report of the case, and will not be repeated in full in this opinion. The ground upon which defendant was charged at the trial with liability for the death of O'Keefe was that he became a passenger on defendant's train from Anna to Carbondale, and was killed through the negligence of defendant in the collision with the other train. At the close of the evidence the defendant asked the court to instruct the jury that such evidence was not sufficient to authorize a verdict for the plaintiff, and that they should find the defendant not guilty. The instruction was refused, and the defendant excepted. The contention here is that the instruction should have been given, because the evidence did not fairly and legally tend to prove that deceased was a passenger, or that he was exercising ordinary care and prudence when killed, while it was necessary for the plaintiff to establish both these propositions by some affirmative evidence in order to recover.

Considering the latter of these propositions first, a reference to the opinion of the court upon the former appeal shows that the judgment was reversed for error of the court in instructing the jury, as matter of law, that it was not negligence, of itself, for O'Keefe to ride on the steps or platform of the car. It was further said that an assumption of negligence on

the part of the defendant, or that the deceased was not negligent, could not be stated, under the facts of the case, as a matter of law. The evidence did not greatly differ in the two trials, and we adhere to the previous holding that on the question of negligence the case might properly have been submitted to the jury.

It was also necessary for the plaintiff to prove that the relation of passenger and carrier existed between the deceased and defendant. This relation, which was claimed to exist, is a contract relation. A railroad company holds itself out as ready to receive and carry, and is bound to receive and carry, all passengers who offer themselves as such at the places provided for taking passage on its trains, and who take such passage in the cars provided for passengers. When one so presents himself, the contract relation under which he acquires the rights of a passenger may be either express or may be implied from the circumstances. If a person goes upon cars provided by the railroad company for the transportation of passengers with the purpose of carriage as a passenger with the consent, express or implied, of the railroad company, he is presumptively a passenger. 4 Elliott, Railroads, § 1578. Both parties must enter into and be bound by the contract. The passenger may do this by putting himself into the care of the railroad company, to be transported, and the company does it by expressly or impliedly receiving him and accepting him as a passenger. The acceptance of the passenger need not be direct or express, but there must be something from which it may be fairly implied. One does not become a passenger until he has put himself in charge of the carrier, and has been expressly or impliedly received as such by the carrier. *Bricker v. Philadelphia & R. R. Co.* 132 Pa. 1; *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L. R. A. 521; 4 Elliott, Railroads, § 1581. Deceased was the holder of a free pass on the road, but that fact alone would not create the relation of passenger and carrier. The purchase of a ticket does not make one a passenger unless he comes under the charge of the carrier, and is accepted for carriage by virtue of it. If a ticket holder should offer himself as a passenger, and should be refused transportation, there would be a liability for consequent damages; but it would not be a liability to him as a passenger, or on account of the relation of passenger and carrier, but would be a liability for the refusal to enter into that relation, and to permit him to become a passenger. The uncontroverted evidence bearing upon the question whether O'Keefe became a passenger was as follows: He lived about 300 yards north and 50 yards east of defendant's station at Anna. The limited vestibuled train on defendant's road came from the south, and stopped at the station, while he was sitting at the table at home eating breakfast. The train consisted of a baggage car, two coaches, and a sleeping car. It was a solid vestibuled train, the vestibules filling the spaces between the cars, with a door at each entrance and exit to and from the platforms of the passenger coaches. These doors are opened at the stations to discharge passengers who have reached their destination and to receive those desiring to become passengers, and these

are the places where passengers present themselves to take passage. While this train was at the station at Anna, it was prepared for the reception of passengers desiring to be transported to other stations by opening the doors, and passengers for Anna were discharged at the station. When the doors are closed, a person on the outside cannot get in, and when the business at that station had been done the doors designed for the admission of passengers were closed, and the train left the station as a solid train, closed and inaccessible up to the platform next the tender in front of the baggage car. When the train was moving from the station, O'Keefe took his hat, and ran out of the door, and ran to the railroad track, and south towards the approaching train. When he met the train, it was going 3 or 4 miles an hour, and he climbed on the platform next the tender at the front end of the baggage car. As he passed his house, his wife saw him standing on the platform, with his back against the baggage-car door. The engineer and conductor saw him climb on the platform, but did not see him afterwards, and the conductor did not know who he was. He was not seen, after his wife saw him, until he was found dead, sitting on the step of the platform, holding the guard rail with one hand. When found he had a piece of paper in one hand, and a pencil was lying on the ground. After leaving Anna, the conductor went through the train, commencing at the north end of the first passenger coach next the baggage car, and going the entire length of the train. He then came back, unlocked the door to the baggage car, and went in, as he said, to see about the person who got on the platform, and, seeing the other train approaching, he and the baggage man jumped off through the side door. The question is whether these facts fairly tend to establish the relation of passenger and carrier between O'Keefe and the defendant by showing that he had put himself in the care of the defendant as a passenger, and had been expressly or impliedly received and accepted as such by the defendant through any authorized agent. We think that they do not. He did not go upon the train at the station provided for the reception of passengers, and did not take any place provided for the reception, accommodation, or carriage of passengers. He did not comply with any of the ordinary customs under which defendant held itself out as ready to receive and carry passengers, or under which they are received or carried. It is said that he no doubt tried to open the baggage-car door, and the inference intended is that he tried to put himself in charge of defendant as a passenger in a proper place. There is no evidence of the supposed fact, and, if there were, it could make no difference. It will certainly not be claimed that defendant was bound to have the baggage-car door open so as to give access to its passenger coaches by way of the baggage car; but, even if that were a wrong to him, he could not become a passenger by attempting to get in that door any more than if he had attempted to open one of the vestibule doors, which was locked, and had failed. He had not put himself in the care of the defendant as a passenger. Of course, the fact that the

engineer knew that deceased climbed upon the train would not make him a passenger, since an engineer is not authorized to act for the defendant in such a matter, or to accept passengers. Nor do we think that the mere fact of the conductor knowing that someone had boarded the moving train on the platform between the tender and baggage car, and might still be there, is evidence tending to show that defendant accepted him as a passenger. The conductor did not know who he was, or what he was there for, whether as a passenger or otherwise. As conductor, he performed the usual duties after leaving the station, and had not reached this platform next the tender when the accident occurred. He had done nothing in the matter one way or the other. The train was moving slowly when O'Keefe climbed on, but that fact is only material on the question of negligence on his part in boarding a moving train. The train had left the station, and there would be no difference, so far as creating a relation of passenger and carrier was concerned, whether he got on there or at some other place between stations where the train was moving slowly. Of course, he might have ridden on the platform in safety but for the collision, and so, also, he might on the engine or tender or elsewhere on the train where passengers are not carried. That fact concerns only the question of negligence, and is not material on the question whether he became a passenger. As we have concluded that there was no evidence tending to establish one necessary element for a recovery,—that deceased was a passenger on defendant's train,—it follows that for such failure of proof the instructions asked should have been given.

The judgments of the Appellate Court and Circuit Court are reversed, and the cause is remanded to the circuit court.

Carter, J., dissenting:

I do not concur in the decision rendered by this court in this case. It is held, as it was held when this cause was before us at a former term (154 Ill. 508), that it was a question for the jury to determine whether the deceased was himself guilty of negligence or not, and the judgment below is not reversed for lack of evidence showing due care on his part for his own safety. So far I am satisfied with the decision, but I dissent from the conclusion reached that there was not sufficient evidence to go to the jury tending to prove that the deceased was a passenger on appellant's train when he was killed. It is established that the collision of the two trains which caused O'Keefe's death was caused by the negligence of appellant. This question is not controverted, but this, the second judgment for appellee, is reversed on the sole ground that, considered as a question of law, not of fact, O'Keefe was not a passenger at the time of the accident. It seems clear to me that, if he was not a passenger, he was a trespasser. If not, what was his relation to the company? Now, if he was a trespasser, he was guilty of negligence in getting upon the train under the circumstances shown by the evidence and riding on the platform as he did; but it has been twice held in this case that that was a question of fact upon which this

court cannot set aside the finding of the jury. So, also, in my opinion, is the judgment below conclusive upon the question whether he was a passenger or not. That is equally a question of fact under the evidence. When the jury found that O'Keefe was not a trespasser, and was in the exercise of due care for his own safety, and when this court confirms that finding, it logically follows, as it appears to me, that he was rightfully on the train as a passenger, for there was no pretense that he was there in any other capacity. The evidence shows that O'Keefe had a contract with appellant to deliver to it a large number of railroad ties, and in connection with this contract had received from the company a pass over its road to enable him to travel to and from different points in carrying out the terms of the contract. He had occasion frequently to pass over appellant's road, using this pass, and sometimes, with knowledge of the trainmen, riding in the baggage car. For purposes connected with his contract relating to the delivery of ties, it became important on the morning in question that he should take the train upon which he afterwards met with the accident at Anna for another station on the road. Failing to get to the depot in time to take the train, he was compelled, to avoid being left, to climb on the forward platform of the baggage car while the train was passing him, and was moving at the rate of 8 or 4 miles an hour; the train being a fast one, and the passenger coaches vestibuled. The engineer and conductor saw him get upon the train, but the conductor testified that he did not know at the time that it was O'Keefe; but he did not do anything to indicate that he objected to the carrying of O'Keefe in the manner now complained of. About fifteen minutes after the train had left Anna, the collision occurred in which he was killed. The deceased was found sitting upon the steps crushed between the forward end of the baggage car and the tender. Whether, after getting upon the train, he could have passed through the door at that end of the baggage car, and by that means have proceeded to the passenger coaches, was a controverted question under the evidence. It is apparent that O'Keefe entered upon the train for the purpose of taking passage and of becoming a passenger. He was not injured in the act of boarding the train, so that it was immaterial whether he got upon the train at the station or afterwards, when it was in motion, unless it could be considered as affecting the question whether, by getting upon the train where he did, he became a passenger or not; and that would be a question of fact settled in the appellate court. The jury were authorized from the evidence to find that he did all he could under the circumstances to become such passenger; that he had the right of passage on the train; that he was upon the train with the implied consent of appellant; and that while on such train, and before he could enter a passenger coach provided for the carriage of passengers, he was killed through the negligence of appellant. If they so found, then I think it follows that they must have found that he was a passenger. The jury had the right to find from all the circumstances, including the fact that, after

the conductor saw him get on the front end of the baggage car, he went from the other end of that car through the train, taking the fares of passengers, without saying anything to O'Keefe, and without interfering with him in any way, that he did not object to his riding in that way; that is, to find implied consent on the part of the company. In *Thomp. Carr.* 42, 43, it is said: "The whole matter seems to depend upon the intention of the person at the time he enters the boat or cars," etc. See also *North Chicago Street R. Co. v. Williams*, 140 Ill. 275; *Chicago, B. & Q. R. Co. v. Mehlback*, 131 Ill. 61. It is said by Mr. Elliott, in his late work on Railroads (vol. 4, § 1578): "We think it safe to say that the general rule is that everyone on the passenger trains of a railroad company, and there for the purpose of carriage, with the consent, express or implied, of the company, is presumptively a passenger." It is, I think, clear, from the authorities, that it was a question of fact whether or not the deceased was a passenger at the time he was killed, and that this question does not come within the rule laid down by this court in *Simmons v. Chicago & T. R. Co.* 110 Ill. 346, and other cases, that, "when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." By the verdicts of two juries, followed by two judgments of the trial court, and two judgments of affirmance by the appellate court, it has been determined as a question of fact from the evidence that the relation of carrier and passenger existed between appellant and the plaintiff's intestate. The first judgment was reversed by this court without any intimation that upon the record (substantially the same as the one now before us) the plaintiff had no case, and the cause was sent back for another trial for what purpose? Simply for the plaintiff to be told after such trial, and another weary journey to this court, that she never had any case to be submitted to a jury.

Lawrence W. POTTS, et al., School Directors,
Appts.,

v.
Jennie BREEN et al., by Next Friend.

(187 Ill. 87.)

1. Power to require children to be vaccinated as a condition of attending school is not given to a board of health by a statute providing that it shall have general supervision of the interests of health and life of the citizens, and shall have authority to make such rules and regulations as it may from time to time deem necessary for the preservation or improvement of the public health, when the remainder of the statute imposes and confers specific duties and

powers by which the general language of the statute is limited.

2. It will not be supposed that the legislature has by mere implication conferred on an administrative board power to require vaccination as a condition precedent to the exercise of the constitutional and statutory right of a child to attend school.

3. School directors and boards of education have no authority to exclude children from public schools for refusal to submit to vaccination, unless in cases of emergency in the exercise of police power it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox.

(May 10, 1897.)

A PPEAL by defendants from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Lawrence County awarding a writ of mandamus to compel defendants to admit plaintiffs into the public school and awarding nominal damages for their refusal to do so. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gee & Barnes, for appellants:

It is undisputed that the smallpox was raging in the state of Illinois at the time the order of January 1, 1894, was issued by the state board.

When it is conceded that the entire control of our common schools is subject to the hand of legislation, it would seem manifest that the power can be delegated to a board, such as a health board, to enforce the primal necessity to the pupil—health protection.

Abeel v. Clark, 84 Cal. 228; *Lawton v. Steele*, 152 U. S. 183, 38 L. ed. 385; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

Messrs. C. J. Borden and C. F. Breen, for appellees:

It is not made the duty of school directors to enforce orders of the state board of health. *Hurd's Rev. Stat.* § 2, chap. 126a.

School directors have no health powers.

Id. chap. 189, § 127.

The life and liberty of the citizen can only be restricted by law when the welfare of the public demands it. In the case at bar there is no evidence to show that it was necessary to enforce this order for the benefit of the public health, and unless such necessity is shown it cannot be enforced.

Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; *Re Smith*, 146 N. Y. 68, 28 L. R. A. 820.

The state board of health has no judicial powers, and when it acts by its own order and not under the judgment of a court of competent jurisdiction, then, in order to justify its action, it must show the existence of a state of facts sufficient to authorize it to act, and no sufficient facts are shown in this case.

People, Copcutt, v. Yonkers Bd. of Health, 140 N. Y. 1, 23 L. R. A. 481; *Re Smith*, 146 N. Y. 68, 28 L. R. A. 820.

Carter, J., delivered the opinion of the court:

Two suits between the same parties were begun, one a petition for a writ of mandamus to compel appellants to admit appellees to the

NOTE.—As to compulsory vaccination, see note to *Duffield v. Williamsport School Dist.* (Pa.) 25 L. R. A. 152, and note; *Re Smith* (N. Y.) 28 L. R. A. 820; *Bissell v. Davison* (Conn.) 29 L. R. A. 251; *State, Adams, v. Burdge* (Wis.) 37 L. R. A. 157. 39 L. R. A.

public school of their district, and the other an action of trespass to recover damages for the exclusion of appellees from such school. The cases were tried together upon the following facts agreed upon, *viz.*: Jennie Breen and Jim Breen, appellees, were the children of Michael Breen, a resident and taxpayer of district No. 5, township 2, range 12, Lawrence county, Illinois, of which district the appellants were directors. These directors acting under a certain rule and order of the state board of health, made a general order, applicable to all schools in their district, requiring that all pupils should be vaccinated before being admitted to such schools. They also employed a physician to vaccinate the pupils, and instructed and ordered the teacher of the school in question to impart no instruction to appellees until they should comply with said order; and appellees were refused admission to the school on the sole ground that they had failed and refused to comply with such order, the father of appellees absolutely refusing to permit his children to be vaccinated. The directors acted in good faith, under the belief that they were performing a duty imposed upon them by law, and used no direct force upon appellees, but simply denied them admission to the school, after repeated refusals to obey the orders relating to vaccination. In their answer to the petition, the directors alleged that the state board of health made and promulgated the following order: "Resolved, that, by the authority vested in this board, it is hereby ordered that on and after January 1, 1882, no pupil shall be admitted to any public school in the state without presenting satisfactory evidence of proper and successful vaccination;" and that at the January meeting, 1894, the said state board of health passed the following resolution: "Resolved, that the power of the state board of health, under the law creating said board of health, to order the vaccination of all school children, is clear and unquestionable. The consequent duty of the board of school directors to see that such order is strictly enforced in their respective districts is equally clear, and the said order of the board of health is their sufficient authority for so doing." These orders of the state board of health were sent to the superintendent of schools of said Lawrence county, and were by him transmitted to the appellants, with written directions of the state board of health to enforce the same; and appellants made an order that all children attending the said school in their district should be vaccinated, or should show a physician's certificate of previous vaccination, as a condition of attendance upon the said school. The trial court rendered judgment against appellants, granting the peremptory writ of mandamus as prayed, and assessed appellees' damages in the trespass case at one cent. These judgments have been affirmed, on appeal, by the appellate court, and appellants have prosecuted this appeal to this court. So far as the record discloses, appellees had not been exposed to infection by smallpox, but were in perfect health, and there was no reason for their exclusion except that they had not been vaccinated. There was no epidemic of smallpox prevailing or apprehended in the vicinity of the school.

The record presents the question whether or not the state board of health, or the appellants, as such school directors, acting under its orders or otherwise, had any power to impose, as a condition of the admission of appellees to the public schools, the requirement of vaccination; and, further, if such power existed, and could be enforced as a police regulation, for the preservation of the public health, and to prevent the spread of contagious and infectious diseases, was the regulation and its enforcement, under the facts appearing in the record, a reasonable one? Section 2 of the act creating the board of health (Laws 1877, p. 208), is as follows: "The state board of health shall have the general supervision of the interests of the health and life of the citizens of the state. They shall have charge of all matters pertaining to quarantine, and shall have authority to make such rules and regulations, and such sanitary investigations, as they may from time to time deem necessary for the preservation or improvement of public health; and it shall be the duty of all police officers, sheriffs, constables, and all other officers and employees of the state to enforce such rules and regulations, so far as the efficiency and success of the board may depend upon their official co-operation." Section 3 provides that the board of health shall have supervision over the state system of registration of births and deaths, as hereinafter provided." They shall make up such forms and recommend such legislation as shall be deemed necessary for the thorough registration of vital and mortuary statistics throughout the state. The secretary of the board shall be superintendent of such registration." Section 4 makes it the duty of all physicians and accoucheurs to report to the county clerk "all births and deaths which may come under their supervision, with a certificate of the cause of death, and such correlative facts as the board may require in the blank forms furnished as hereinafter provided." Section 8 requires county clerks to render complete reports of all births, marriages, and deaths to the state board of health; and § 9 requires the board of health to prepare the necessary forms. Section 12 provides for an annual report by the board to the governor, "and such report shall include so much of the proceedings of the board, and such information concerning vital statistics, such knowledge respecting diseases, and such instruction on the subject of hygiene, as may be thought useful by the board for dissemination among the people, with such suggestions as to legislative action as they may deem necessary." By reference also to the act of the general assembly to regulate the practice of medicine in this state, which was passed at the same session of the legislature, and which makes reference to the state board of health, and provides for the examination and licensing by said board of persons desiring to practice medicine, it clearly appears that one of the most important duties of the board was to ascertain and certify to the qualifications of practising physicians and surgeons, and to detect quacks, and to prevent them and all ignorant pretenders from imposing upon the sick and helpless. It is clear that no such power as claimed by the state board of health has been conferred upon it, unless by

the broad and general language of the 1st section of the act creating it. But the general terms there employed must be construed in relation to the more specific duties imposed and powers conferred by the act taken as a whole, and, when thus construed, these general terms are restricted so as to express the true intent and meaning of the legislature. Take, for example, the first sentence, *viz.*: "The state board of health shall have the general supervision of the interests of the health and life of the citizens of the state." The scope of the language there employed is practically unlimited, and were it not held to be restricted by well-known legal principles, applicable in the interpretation and construction of statutes, it would appear to confer more power on this board than the legislature itself possessed. Plainly, it was not intended that any general supervisory power over the health and lives of citizens of the state should be exercised by the board otherwise than in conformity to law, and such as may be necessary within reasonable limitations, in the performance of the administrative duties which were or should be imposed upon the board by statute. It had and could have no legislative power. Its duties were purely ministerial, and the provision of the statute authorizing the board to make such rules and regulations as it should from time to time deem necessary for the preservation or improvement of the public health cannot be held to confer that broad discretionary power contended for, to prescribe conditions upon which the citizen of the state may exercise rights and privileges guaranteed to him by public law. In *Huesing v. Rock Island*, 128 Ill. 465, it was contended that the city had the power, under clause 78, § 1, art. 5, of the city incorporation act, to construct and maintain a city abattoir, as a sanitary measure. This clause is as follows: "To do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease." This court, however, held that, in view of the fact that the same section contained other provisions authorizing the city council to do certain specified acts for the preservation of the health of the city and the suppression of disease, the general provision did not enlarge the powers conferred by the special provisions.

As recently held by the supreme court of Wisconsin in a similar case, we are of the opinion that the powers of the board are limited to the proper enforcement of statutes or provisions thereof, having reference to emergencies requiring action on the part of the agencies of government to preserve the public health, and to prevent the spread of contagious or infectious diseases. It will be observed that after the 1st section the powers and duties of the board with reference to different subjects are minutely specified, and it is required "to make reports to the governor, and to include therein such information concerning vital statistics, and such knowledge respecting diseases, and such instruction on the subject of hygiene as may be thought useful for the board for dissemination among the people with such suggestions as to legislative action as they may deem necessary." Its duty to recommend legislation is repeated more than once in the act,

in connection with specifications of the powers and duties of the board; and from no point of view can we regard it as having been within the legislative intent to confer, by the 1st section, plenary powers upon the board in all matters pertaining to the public health, without regard to other provisions of the statute, or further action by the legislature. Section 1 of article 8 of the Constitution provides that "the general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." And the statute provides that the directors "shall establish and keep in operation for at least one hundred and ten days of actual teaching in each year . . . a sufficient number of free schools for the accommodation of all children in the district over the age of six and under twenty-one years, and shall secure to all such children the right and opportunity to an equal education in such schools." And the statute further provides that they shall adopt and enforce all rules and regulations for the management and government of the schools, and may suspend or expel pupils who may be guilty of gross disobedience or misconduct. The statute also contains provisions of similar import relating to schools in more populous districts and cities. It is therefore seen that the right or privilege of attending the public schools is given by law to every child of proper age in the state, and there is nowhere to be found any provision of law prescribing vaccination as a condition precedent to the exercise of this legal right. Whether the legislature has the power to make such a requirement or not, it is not necessary here to consider; it is sufficient that it has not done so, and it cannot be supposed that the legislature has undertaken, and not expressly, but by mere implication from the general language used in creating the state board, to confer upon that mere administrative body such vast power over the rights and liberties of the individual citizen as to deprive him of his constitutional and statutory rights, unless he shall submit his body to be inoculated with vaccine virus, as a mere precaution against some possible future contagion of smallpox. It is doubtless true that in a large number of school districts in interior parts of the state no case of smallpox has ever existed in the history of the state, and yet, by this order of the board, no citizen who has children to educate, although compelled by law to pay taxes to support the public schools, can send his child to such schools without first having such child vaccinated, as a precaution against a disease which had never appeared, and where there was no apparent danger that it would ever appear, in the vicinity.

The power to compel vaccination, or to require it as a condition precedent to the exercise of some right or privilege guaranteed to the citizen by public law, can be derived from no other source than the general police power of the state, and can be justified upon no other ground than as a necessary means of preserving the public health. Without the necessity, or reasonable grounds upon which to conclude that such necessity exists, the power does not exist. As such the board of health has no more power over the public schools than over

private schools or other public assemblages, and, its order applying to public schools only, requiring vaccination as a prerequisite to the exercise of the right to attend a public school could be justified only upon reasonable grounds appearing that the contagion of smallpox would more likely originate in or be disseminated from the public schools than from other assemblages. Whether or not it might be invested with more power in this respect is a question not involved here and not necessary to consider. While school directors and boards of education are invested with power to establish, provide for, govern, and regulate public schools, they are in these respects nowise subject to the direction or control of the state board of health, and, as before pointed out, they have no authority to exclude children from the public schools on the ground that they refuse to be vaccinated, unless, indeed, in cases of emergency, in the exercise of the police power, it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox. Undoubtedly, also, children infected or exposed to smallpox may be temporarily excluded, or the school may be temporarily suspended; but, like the exercise of similar power in other cases, such power is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases. No one would contend that a child could be permanently excluded from a public school because it had been exposed to smallpox, or that the school could be permanently closed, because of the remote fear that the disease of smallpox might appear in the neighborhood, and that, if the school should then be open and children in attendance upon it, the public would be exposed to the contagion. And, upon the same line of reasoning, without a law making vaccination compulsory, or prescribing it, upon grounds deemed sufficient by the legislature as necessary to the public health, as a condition of admission to or attendance upon the public schools, neither the state board nor any local board has any power to make or enforce a rule or order having the force of a general law in the respects mentioned.

We are not called upon to consider whether or not vaccination is a preventive, or the best known preventive, of smallpox. That it is so seems to be the consensus of opinion of a learned and honorable profession, borne out by the history of its use for a century, and we can only so regard it; but, when compulsorily applied, it must, like all other civil regulations, be applied in conformity to law. However fully satisfied, by learning and experience, a board might be that antitoxine would prevent the spread of diphtheria, no one would contend that a rule enforcing its use as a condition precedent to the admission of a child to the public schools would, as the law now is, be valid. It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, except when necessary for the public health and in conformity to law, be deprived of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be.

39 L. R. A.

The same conclusion was reached by the supreme court of Wisconsin in *State, Adams, v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, in a case similar in all respects to this. In that case the court also, upon the question of the power of the legislature to delegate to such board the power to make a rule having the force of a general law, cited *Doubling v. Lancashire Ins. Co.* 92 Wis. 68, 31 L. R. A. 112, which held that the legislature could not delegate the insurance commissioner the power, essentially legislative, to prepare, approve, and adopt a form of "a standing fire insurance policy" for use in that state, and which use was to be enforced by penal sanction of the act. See also, on this subject, *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L. R. A. 715, and *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 28 L. R. A. 609. See also *Tugman v. Chicago*, 78 Ill. 405. As said in *State, Hahn, v. Young*, 29 Minn. 478: "It is a principle not questioned that, except where authorized by the constitution, as in respect to municipalities, the legislature cannot delegate legislative power, cannot confer on any body or person the power to determine what shall be the law. The legislature only must determine what it shall be." *Hurst v. Warner*, 102 Mich. 238, 26 L. R. A. 484. This was an act of the Michigan legislature which provided that, in certain contingencies specified in the act, the state board of health should be authorized to establish a quarantine, and to make rules for the disinfection of baggage belonging to persons coming from a country where contagious disease exists, and, through an inspector acting thereunder, to detain for disinfection baggage of passengers, passing through the state, and coming from localities where a dangerous communicable disease exists. It was held by the court that the act did not authorize a rule subjecting the baggage of all immigrants to disinfection, whether such immigrant came from a part or locality where any dangerous, communicable disease existed or not. The case of *Abeel v. Clark*, 84 Cal. 326, was a mandamus proceeding to compel the principal of a public school to admit Abeel as a scholar, who had been refused admission because he had not complied with the vaccination act. This act provided that the school trustees and board shall "exclude from the benefit of the common schools any child or any person who has not been vaccinated." The act was held constitutional. The court says: "Vaccination, then, being the most effective method known of preventing the spread of the disease referred to [smallpox], it was for the legislature to determine whether the scholars of the public schools should be subjected to it." The case of *Duffield v. Williamsport School Dist.* 162 Pa. 476, 25 L. R. A. 152, was a mandamus proceeding to compel the admission of the plaintiff's minor child into the common schools of Williamsport. The facts in this case were that there was an ordinance in the city of Williamsport in force providing that no pupil "shall be permitted to attend any public or private school in said city without a certificate of a practising physician that such pupil has been subjected to the process of vaccination;" that smallpox was then existing in Williamsport, and had been epidemic in many near-by cities and

towns; that the board of health and the school board, in view of the general alarm prevailing in the city over the report that a case of smallpox was in the city, had adopted a resolution in conformity with said city ordinance. The questions raised related to the power of the school board to adopt reasonable health regulations, and to the reasonableness of the particular regulation complained of, and the action of the board was sustained. But the case was unlike the one at bar in the fact that smallpox was then in the city, and was prevalent in adjoining communities. A similar conclusion was reached in *Bissell v. Davison*, 65 Conn. 183, 29 L. R. A. 251, but the general statute of Connecticut had expressly conferred upon the school committee the power exercised by it. The cases of *Re Walters*, 84 Hun. 457, and *Abel v. Clark*, 84 Cal. 226, involved the constitutionality of statutes requiring all children to be vaccinated before being admitted to the public schools, and such statutes were held to be constitutional. That question is not involved here, and the reasoning employed in those cases does not apply where this legislative power is exercised by an administrative board, and not by the legislature itself. Nor can the rule in question be regarded as a reasonable one where, as in this case, smallpox did not exist in the community, and where there was no cause to apprehend that it was approaching the vicinity of the school, or likely to become prevalent there. The record wholly fails to show that there were any grounds upon which the board could have any reasonable belief that the public health was in any danger whatever. Neither the board of health nor the board of directors having any power to make and enforce the order in question under the facts of this case, it follows that appellees were unlawfully excluded from the school. The powers of school officers under the statute have been considered by this court in numerous cases. *Rulison v. Post*, 79 Ill. 587; *Trustees of Schools v. People*, *Van Allen*, 87 Ill. 303, 29 Am. Rep. 55; *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163; *Chase v. Stephenson*, 71 Ill. 898; *People, Longress, v. Quincy Bd. of Edu.* 101 Ill. 908, 40 Am. Rep. 196, and other cases. But nothing said in any of those cases sustains the contention of appellants.

The judgment of the Appellate Court affirming the judgment of the Circuit Court is affirmed.

Fred LEIFERMAN, *Appt.*,

v.

Carl OSTEN.

(167 Ill. 93.)

1. Failure of the justice of the peace to send up the complaint in an action for forcible entry and detainer is waived by going to trial on appeal to the circuit court without objecting to its absence.

NOTE.—As to the effect of a partial eviction upon liability for rent, see *Edmison v. Lowry* (S. D.) 17 L. R. A. 275, and note; also *Collins v. Lewis* (Minn.) 19 L. R. A. 822.

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2. Eviction of a tenant of the first floor of a building is not effected by moving the building to another part of the lot so as to relieve him from the payment of rent if he retains possession of his rooms.

(May 11, 1897.)

A PPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to obtain possession of apartments in a building. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cruikshank & Atwood for appellant.

Mr. Albert Martin, for appellee:

In order for appellant to be evicted he would have to show that he was in the possession of something of the use of which he was deprived.

A tenant has an easement in the unobstructed passage of light only by a covenant or express agreement in the lease.

Keating v. Springer, 146 Ill. 481, 22 L. R. A. 544.

The lessee takes only such an interest in the subjacent land as is necessary to the enjoyment of the premises, and upon their destruction by fire he has no interest in the land of which an eviction can be predicated, and the subject-matter of the demise has ceased to exist.

2 Taylor, Land. & T. 8th ed. § 520; *Central Mills Co. v. Hart*, 124 Mass. 123; *Holladay v. Chicago Arc Light & P. Co.* 55 Ill. App. 463.

Possession retained after an alleged constructive eviction is a waiver of the right of abandonment.

Barrett v. Boddie, 158 Ill. 479; *Patterson v. Graham*, 40 Ill. App. 399, 140 Ill. 531; *Burnham v. Martin*, 90 Ill. 488.

The omission of the complaint in the justice's transcript should have been urged at the earliest possible moment.

Stillman v. Palis, 184 Ill. 582; *Armstrong v. Crilly*, 152 Ill. 646; *Brown v. Keller*, 33 Ill. 154, 33 Am. Dec. 258; *Center v. Gidney*, 71 Ill. 557.

Unless urged in apt time it may be waived.

Clifford v. Eagle, 35 Ill. 444; *Tisdale v. Minonk*, 46 Ill. 9.

The record may be amended at any subsequent term as to any matter of form in the judgment or proceedings.

Duncan v. McAfee, 4 Ill. 98; *Atkins v. Hinman*, 7 Ill. 450; *Lyon v. Boilvin*, 7 Ill. 629; *Cook v. Wood*, 24 Ill. 295; *Coughran v. Gutcheus*, 18 Ill. 390; *Cairo & St. L. R. Co. v. Holbrook*, 72 Ill. 419; *Church v. English*, 81 Ill. 442.

Taking an appeal or suing out a writ of error and making the same a supersedeas is no obstacle to the amendment, and it may be made either in the court where the record remains or in any other court to which the record may be taken by appeal or writ of error.

Frink v. Schroyer, 18 Ill. 419; *Thompson v. Turner*, 22 Ill. 390; *Gage v. Schmidt*, 104 Ill. 108; Rev. Stat. chap. 7, ¶ 7. *Amendments, etc.*; *Dunham v. South Park Comrs.* 87 Ill. 185; *Owen v. Stearns*, 78 Ill. 446; *Gebbie v. Mooney*, 121 Ill. 258; *World's Columbian Exposition v.*

Seala, 55 Ill. App. 210; *Jones v. Albes*, 70 Ill. 40; *Terry v. Eureka College*, 70 Ill. 238; *People, Hubbard, v. Anthony*, 129 Ill. 220; *Sullizan v. Eddy*, 154 Ill. 199.

Carter, J., delivered the opinion of the court:

Appellee recovered a judgment before a justice of the peace, and on appeal in the circuit court of Cook county, in forcible entry and detainer, for the recovery from appellant of the possession of the first floor of a two-story frame building at 1255 Wolfram street in Chicago. This appeal is taken from the judgment of affirmance of the appellate court, a certificate of importance having been granted. Appellant had occupied the first-story flat, as it is called, of the building, as tenant of appellee for about five years, at the end of which period appellee, against the objection of appellant, and while appellant was living in the house, moved the building, which occupied about half the lot, to the other side of the lot, and built a new building on the corner, the former site. The building removed retained the same number. Appellant did not vacate or surrender possession, but continued in the occupancy of the same part of the building, but refused to pay any rent thereafter, claiming that he had been evicted, and was by such eviction discharged from the further payment of rent. After the rent became due appellee served appellant with a written demand for rent, and notice to quit in five days if not paid. The alleged eviction, and the fact that there was no written complaint on file in the circuit court when the cause was tried there on appeal, constituted the grounds of defense in the appellate court, and are the ones relied on here. There was a written complaint in due form before the justice of the peace, but the justice neglected to send it up with his original transcript, and its absence was not noticed by either party during the trial in the circuit court. The defendant there assigned as one of the grounds for a new trial the absence of such complaint. The circuit court overruled the motion for a new trial, and also a motion in arrest of judgment. At a subsequent term of the circuit court the justice filed an amended transcript containing the complaint, and, on the suggestion of a diminution of the record in the appellate court, leave was granted to supply the omission, and it was supplied in that court.

Upon the errors properly assigned here, it is urged that the complaint was jurisdictional, and without it the circuit court had no jurisdiction to try the cause, that it could not amend its judgment in matter of substance and to cure a jurisdictional defect at a subsequent term, and that in fact no amendment was made, nor leave to file the amended transcript given, and that the subsequent filing of the complaint in the circuit and appellate courts was wholly ineffectual to cure the error. There was a sufficient complaint before the justice of the peace, and he had jurisdiction of the subject matter and of the parties. On appeal the circuit court had the same jurisdiction, and, if the attention of that court had been called to the fact that the justice had not sent up the complaint, the omission could then have been supplied. By going to trial without ob-

jection, the defendant waived the question which he is now urging here. The court had jurisdiction of the subject-matter and of the parties, and the filing of a written complaint in the circuit court related only to the mode of procedure, and any irregularity in that respect must be availed of promptly, else it will be waived. It is a well-settled rule that all dilatory motions going to the jurisdiction of the court must be made in apt time. In *Tisdale v. Minonk*, 46 Ill. 9, it was held that a motion to dismiss for want of the sworn complaint in an action for violating a town ordinance came too late in the circuit court,—that it should have been made at the earliest moment before the justice. In *Clifford v. Eagle*, 85 Ill. 444, the defendant appealed from a judgment against him in the justice court, and appeared and moved for a continuance in the circuit court, and at the next term moved to dismiss the suit for want of a complaint in writing; but this court said: "If this was a case in which a written complaint on oath was necessary, the appellant waived it by appearing in the cause and moving for a continuance. The motion to dismiss being of a dilatory character, should have been entered at the earliest moment." See also *Center v. Gibney*, 71 Ill. 557, in substance to the same effect. In *Evans v. Boulton*, 85 Ill. 579, a suit in replevin before a justice, the defendant did not appear, but judgment was rendered against him by default. When the cause was called for trial in the circuit court on his appeal, he moved to dismiss the suit for want of an affidavit. This court held that the motion was made in apt time; that there was no law compelling the defendant to appear before the justice, and, as the judgment was there rendered against him by default, his motion in the circuit court was not too late. But it is apparent that that case does not support the contention of appellant here. Appellant cites, also, *Stolberg v. Ohnmacht*, 50 Ill. 442, as applicable to the case at bar. But we do not think it is. In that case there was no affidavit filed before the justice, as then required by the statute, and the defendant appeared before the justice and moved to dismiss the suit. The justice overruled the motion, and allowed the plaintiff to file his affidavit, and rendered judgment in his favor. The defendant appealed, and renewed his motion in the circuit court to dismiss, which was allowed. This court affirmed the action of the circuit court, holding that the affidavit was jurisdictional, that the justice had no jurisdiction, and that the justice had no power to issue the summons without an affidavit having first been filed. But there is a clear distinction between that case and the one at bar, because here there was a sufficient complaint before the justice when the summons was issued, and, further, the defendant went to trial in the circuit court without making any objection or taking any advantage of any kind of the omission of the justice to send the complaint up with his transcript.

The next question is, Was the defendant below excused from paying rent because of the alleged eviction? There are two kinds of eviction,—actual and constructive. An eviction may be actual, as where there is a physical expulsion, or it may be constructive, which,

although an eviction in law, does not deprive the tenant of actual occupancy. 7 Am. & Eng. Enc. Law, p. 87. In 2 Wood, Land. & T. p. 1107, it is said: "Where there is an actual physical eviction from a part of the premises, the tenant may still retain possession of the other part and is absolved from the payment of any rent during the period of its continuance; and herein is the important distinction between an actual and a constructive eviction. The tenant must not only abandon the premises, but it must also appear that he abandoned them on account of the acts of the landlord, which are claimed to operate as an eviction; and if his abandonment was due to other causes, in part even, he cannot set up such acts in defense to an action for the rent." In the case at bar the lease to appellant was of the "first floor of the two-story frame building situated 1255 Wolfram street," and the question arises whether, by this lease, the appellant acquired any such interest in the land as, by the removal of the building therefrom, he was actually evicted from a part of the premises leased to him. Questions analogous to this have been passed upon in many cases in different states, and the uniform current of authority is that the land does not pass by such a lease, and that the tenant takes such an interest only in the subjacent land as is necessary to the enjoyment of the premises leased. Thus, in *Winton v. Cornish*, 5 Ohio, 477, it was said: "He [the owner] can grant the right to take all the minerals underneath, or those 20 feet below the surface only; to dig all the turf, to inhabit a cave, if there is one, to occupy a room in the third story, to occupy the second story, a room in the first story, or the cellar, or a part of the cellar. By such grants the land does not pass. . . . The leasees of the middle story of a house are limited above and below as well as on the sides, yet the land is as necessary to sustain their part of the house as that below." And in *Kerr v. Merchants' Exchange Co.* 8 Edw. Ch. 816, where there was a lease of certain apartments, it was said that it was not to be considered as a lease of land, but only of apartments in the building distinct from the land; that leases must be construed according to the intention of the parties, and with reference to the subject-matter; and that in that case no interest in the land passed. This is the rule where the building is destroyed by fire, the cases holding that, where the building containing the apartments leased was destroyed by fire, the lease had terminated. *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 220; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 806. See also *Graves v. Berdan*, 26 N. Y. 498; *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Harrington v. Watson*, 11 Or. 143, 50 Am. Rep. 465. And in *Shawmut Nat. Bank v. Boston*, 118 Mass. 125, it was said: "In cases where different rooms in the same building are leased to separate tenants, the situation of the property and the nature of the tenures exclude the idea that each tenant takes an estate for years in the land. Such estates, existing at the same time in different tenants, are incon-

sistent and impossible." There was nothing in the lease, and no evidence in the case at bar, to show that any yard privileges connected with the first flat were used in its enjoyment. None were claimed by appellant, and it does not appear that he was deprived of anything that could reasonably be held to pertain to his lease of the "first flat" of No. 1255 Wolfram street, except that a different parcel of land was substituted as the subjacent land necessary to the support of such flat. We are of the opinion that, in view of the law, the jury would not have been authorized to find that there was an actual eviction of any part of the premises leased.

In regard to the effect of a constructive eviction, inasmuch as appellant did not avail himself of his privilege of electing to treat the act of appellee as a constructive eviction, but remained in possession, it is not material to inquire whether the removal of the building was such an act as would amount to a constructive eviction or not. In *Barrett v. Boddie*, 158 Ill. 479, this court said: "The eviction sought to be shown by appellant was constructive. The possession of the premises was retained by the tenant after the alleged acts of eviction. Possession retained after an alleged constructive eviction is a waiver of the right of abandonment. No constructive eviction exists without a surrender of possession. With retention of possession after constructive eviction, liability for rent exists, according to the terms of the lease, during occupancy thereunder. *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *De Witt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58; *Scott v. Simons*, 54 N. H. 426; *Bereel v. Lavton*, 90 N. Y. 298; *Keating v. Springer*, 146 Ill. 481, 22 L. R. A. 544." In *Keating v. Springer*, 146 Ill. 481, 22 L. R. A. 544, we said: "If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon and he cannot sustain a plea of eviction by showing that there were circumstances which would have justified him in leaving the premises. Hence, it has been held that there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession, and then escape the payment of rent by pleading a state of facts, which, though conferring a right to abandon, had been unaccompanied by the exercise of that right." See also *Burnham v. Martin*, 90 Ill. 488; *Patterson v. Graham*, 140 Ill. 531. But, conceding that the act of the landlord amounted to a constructive eviction, still appellant must be deemed to have waived any benefit which might have accrued to him therefrom by retaining possession of his rooms, and, there being no conflict as to the possession, nor as to the amount of rent due under the lease, nor as to the demand notice to quit and default, there was no question of fact for the jury to try, and the direction by the court to find for the plaintiff was right.

The judgment of the Appellate Court is affirmed.

William C. NIBLACK, *Appt.*,

v.

PARK NATIONAL BANK of Chicago.

(189 Ill. 517.)

1. A check is properly presented to a bank for payment where a notary public takes it to the bank during banking hours for the purpose, and upon finding the doors closed makes a demand upon the bank president, although the controller of the currency has taken charge of the bank.
2. A bank to which a check is presented by a third person receiving it in the usual course of business cannot, where such check constitutes an equitable assignment of the fund, appropriate such fund after such presentation to the payment of a note held by it against the depositor and refuse to pay the check, if, at the time of presentation, it has taken no steps to appropriate the deposit to the payment of the note.
3. That the controller of the currency has taken charge of a bank at the time of the presentation of a check by a third person holding it in the regular course of business does not authorize the subsequent application of the fund to the payment of a note held by the bank against the depositor, as neither the controller nor the receiver appointed by him has any more right to transfer such fund than the bank itself.
4. Interest is properly allowed upon a check, payment of which has been wrongfully refused by a bank, from the date of its presentation for payment.

(November 8, 1897.)

A PPEAL by plaintiff from a judgment of the Appellate Court, First District, reversing a judgment of the Circuit Court for Cook County in his favor in a suit brought to enforce payment of a check. *Reversed.*

Statement by **Wilkin, J.**:

On June 17, 1890, Cook and Leake, doing business as the Bank of Hartford, and having sufficient funds on deposit to their credit with the appellee, the Park National Bank of Chicago, drew a check for \$1,056 upon the latter bank, payable to appellant William C. Niblack, and delivered it to him. On the morning of the 20th following, the controller of the currency seized the property and assets of the Park National Bank, and caused it to suspend business. At this time there was on deposit in the latter bank to the credit of the Bank of Hartford the sum of \$3,574.44 and it held a note of the Bank of Hartford, payable on demand, for the sum of \$13,600. At the time of the closing of its doors, it had taken no steps to transfer the deposit to part payment of the note which it held. On this day, Niblack, by a notary public, presented his check to the appellee bank for payment, and, finding the doors closed, and being unable to make a demand, presented it to the president of the bank

at another place and protested it, in due form, upon payment being refused. Afterwards, on July 14, Gilbert G. Shaw was appointed receiver of appellee bank, and in August following a claim for the amount of the check was presented to him, but he refused to acknowledge it as an obligation of the bank, and this suit was brought to recover that sum. Upon the hearing judgment was rendered against the receiver for the face of the check, with interest from June 20, 1890, amounting in all to \$1,346. Appeal was taken to the appellate court of the first district, where the judgment of the trial court was reversed, without being remanded. From that judgment William C. Niblack, appellant here, prosecutes this appeal.

Messrs. James S. Harlan and S. S. Gregory, for appellant:

In order to defeat the right of a checkholder the bank, prior to the time of presentment of the check, must have done some act indicative of its intention to appropriate its depositor's credit balance to the payment of its claims against him. This is not a mere question of bookkeeping.

First Nat. Bank v. Kelsay, 54 Ill. App. 660; *American Exch. Nat. Bank v. Gregg*, 138 Ill. 596.

The check of a depositor transfers to the payee so much of the deposit as the check calls for.

Bank of Antigo v. Union Trust Co. 149 Ill. 343, 23 L. R. A. 611; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398.

A checkholder, though treated as an assignee of the depositor, yet has rights superior to him or to his assignee in insolvency.

National Bank v. Indiana Bkg. Co. 114 Ill. 483.

The drawer of a check cannot stop payment after the check has come to the hands of a bona fide owner.

Union Nat. Bank v. Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185.

A bank holding the note of a depositor which is overdue is not bound to apply his deposit to its payment, even as against a surety on that note.

People's Bank v. Legrand, 103 Pa. 309, 49 Am. Rep. 126; *Voss v. German-American Bank*, 83 Ill. 599, 25 Am. Rep. 415.

The controller must decide when and to what extent the personal liability of stockholders can be enforced, and the courts cannot review his decision in this matter.

Kennedy v. Gibson, 75 U. S. 8 Wall. 498, 19 L. ed. 476; *Cass v. Terrell*, 78 U. S. 11 Wall. 199, 20 L. ed. 184.

A bank check drawn on a sufficient fund is an assignment *pro tanto*, and on presentment and refusal may be made the basis of suit against the bank on which it is drawn by the holder thereof.

Munn v. Burch, 25 Ill. 85.

NOTE.—For set-off against assignee of commercial paper of claim against assignor, see *note to Vann v. Marbury* (Ala.) 23 L. R. A. 325.

As to setting off insolvent's obligation against claim in the hands of his receiver or assignee for creditors, see *note to Merrill v. Cape Ann Granite Co.* (Mass.) 23 L. R. A. 313.

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For set-off by bank of unmatured claim against check of insolvent, see *note to Nashville Trust Co. v. Fourth Nat. Bank* (Tenn.) 15 L. R. A. 710; also *Merchants' Nat. Bank v. Robinson* (Ky.) 28 L. R. A. 760.

A bank cannot set off against such check a claim it may have against the holder.

Brown v. Leckie, 43 Ill. 497.

The bank may, when it sees fit, insist on payment of its demand note, and for that purpose apply so much of the deposit as may be necessary.

Myers v. Union Nat. Bank, 27 Ill. App. 254.

Failure of a bank excuses presentment of commercial paper there payable.

Berg v. Abbott, 83 Pa. 177, 24 Am. Rep. 168, and note, p. 160; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436.

A check is at least an equitable assignment to the amount of the check, and this is its character in advance of presentment.

Fourth Nat. Bank v. City Nat. Bank, 68 Ill. 398; *Abt v. American Trust & Sav. Bank*, 159 Ill. 467; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *National Bank v. Indiana Bkg. Co.* 114 Ill. 483.

Messrs. William Brace and John T. Richards, for appellee:

As between the parties, a check operates as an equitable assignment of the funds of the drawer from the time of delivery.

Munn v. Burch, 25 Ill. 35; *Buehler v. Galt*, 35 Ill. App. 225.

But as between the payee of the check and the bank, the rights of the former are fixed and determined by conditions existing at the time of presentment.

Myers v. Union Nat. Bank, 27 Ill. App. 254; *Bank of Antigo v. Union Trust Co.* 50 Ill. App. 434, 149 Ill. 348, 23 L. R. A. 611.

Where a depositor is indebted to the bank by an independent matured indebtedness, the bank may apply money on deposit in payment.

Home Nat. Bank v. Newton, 8 Ill. App. 563; *Hayden v. Alton Nat. Bank*, 29 Ill. App. 458; *Schuler v. Laclede Bank*, 27 Fed. Rep. 424.

The theory upon which the holder of a check may sue the bank, if at the time of presentment it had money of the depositor which it ought to have applied to the payment of the check, but did not, is, that the check operated as an assignment *pro tanto* of the funds of the drawer on deposit with the bank.

Munn v. Burch, 25 Ill. 35; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212; *National Bank v. Indiana Bkg. Co.* 114 Ill. 483.

A bank holding an overdue note of a depositor, of greater amount than his deposit, may properly refuse to pay his check without any formal appropriation of the deposit upon the note.

Mt. Sterling Nat. Bank v. Green, 99 Ky. 262, 32 L. R. A. 568.

No demand is necessary before bringing suit on a note payable on demand.

Hall v. Jones, 32 Ill. 38.

Wilkin, J., delivered the opinion of the court:

It is contended by appellant that, inasmuch as at the time of the making and presentment of the check the Park National Bank held sufficient funds belonging to the maker of the check to pay it, and at that time had taken no steps to appropriate the deposit to the payment of the note in its favor, the bank could not afterwards appropriate this fund to the payment of its note, and refuse to pay the check. 89 L. R. A.

On the other hand, it is contended by appellee, first, that the check was not properly presented for payment; and, next, if it was presented, even after presentment, the bank had the right to appropriate the maker's funds then on deposit to the payment of its own note, rather than to the payment of the check. We think the check must be treated as properly presented to the bank for payment. It appears from the evidence that a notary public, with the check, went to the bank during banking hours, for the purpose of demanding payment for appellant, but found the doors closed. He then made a demand of payment of the bank president. Everything was done to present the check for payment which could be done by the holder. If a check is presented to the bank for payment during business hours, and the doors be closed, this is due diligence on the part of the holder of the check, and it may be protested for nonpayment. *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436. It is a well-settled rule in this state that the drawing and delivery of a check upon a fund in the bank is, in effect, an assignment to the holder of the check of so much of the fund as the check calls for. But the contention of appellee seems to be that, although the making and delivery is an equitable assignment of so much of the deposit, the banker has the right to refuse payment of the check even when presented by a third person, and appropriate the money to the payment of a debt due from the maker to himself, on the theory that he has a lien upon the deposit in favor of himself to the extent of the maker's indebtedness; or, in other words, it is insisted that the bank has the right of set-off, to the extent of the note, against the maker of the check, and may exercise the right to set-off when the check, which is held even by the third person, is presented.

The question in the case of *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 402, is very similar to this. The banker, holding a note which was not due against the maker of the check, refused to pay the check which was presented by a third party, although, at the time of making and presentment, there were sufficient funds on deposit to the maker's credit to pay it. There, as here, the attempt was to maintain that the banker had a lien upon the funds in his possession to pay an indebtedness to himself. The court said: "In the very nature of such transactions, a banker's lien cannot extend to the money left on deposit with him, according to the customs and usages of banks. It has never been so extended, but is confined to securities and valuables which may be in the banker's custody as collaterals. The credit must be given on the credit of the securities or valuables, either in possession or expectancy. *Russell v. Haddock*, 8 Ill. 233, 44 Am. Dec. 693. This is the extent of a banker's lien." The right of set-off was urged in favor of the bank as against the maker of the check, and the court further said: "The other proposition, that of a right to an equitable set-off, might be conceded if no third party was in the way. The third party here is the appellees, whose right to this money was fixed on the 17th of October, the day the check was presented and payment demanded. This right of set-off, as claimed, is but another phase of the bank.

ers' lien, and has no foundation in law or justice as against a check holder for value." Had the maker himself presented this check, the bank would have had the right to refuse payment, and could have appropriated this deposit to the payment of the indebtedness. It is also the law, where a bank holds a demand note, or a note past due, it has the right to charge such obligation up against the maker's deposit account; and, if it does so before a check drawn by the depositor is presented for payment, it will be entitled to hold the deposit against any check afterwards presented. But here Niblack, a third party, presented the check, which amounted to the transfer of so much of the fund to him as the check called for, and no right of set-off existed in favor of the bank thereafter. He had received it for value. It had been drawn against a fund sufficient to pay it belonging to the drawer. Taken in the usual course of business, it was clothed with all the rights which the customs of business gave it for commercial convenience. When presented, the fund still stood to the credit of the maker, and, according to the decisions of this court, the bank had no legal right then to refuse payment.

Counsel for appellee contend that, the note being due, and the bank having passed into

the hands of the controller when the check was presented, that state of facts itself transferred the deposit to the payment of the note. The fact that the controller took charge of the bank did not make any change in the relation of the parties. The controller, and the receiver afterwards appointed by him, acted for the bank. Having seen that the banker's lien does not extend to money on deposit when checks are presented by third persons who are holders in the regular course of business, neither the controller nor the receiver had any more right to make the transfer than the bank itself.

It is also urged that, even if the appellate court was in error, and its judgment must be reversed, the trial court erred in instructing the jury to allow interest upon the face of the check from the 20th day of June, the day of protest, and for this reason the judgment of the latter court should be reversed. We are satisfied that the check was duly presented for payment on the 20th day of June, and hence interest was properly allowable from that time. We find no merit in this contention.

The judgment of the Appellate Court reversing the judgment of the Circuit Court is reversed, and the judgment of the Circuit Court is affirmed.

MARYLAND COURT OF APPEALS.

BALTIMORE CITY PASSENGER RAILWAY COMPANY, *Appt.*,

v.

T. Harry NUGENT.

(.....Md.....)

1. **An injury to a passenger on a trolley car by contract with a trolley wire charged with electricity which breaks and falls over the rear end of the car does not render the carrier liable if the accident was caused solely by a hidden or latent defect in the wire which could not have been discovered or detected by any reasonable examination, unless the carrier has been in some way negligent in respect to the danger of such an accident.**
2. **The utmost care and diligence which human foresight can use is the measure of duty which a carrier owes to a passenger.**
3. **An hypothesis unsupported by evidence should not be submitted to the jury.**
4. **Negligence is relative, and cannot exist independently** of some imposed or implied correlative duty essentially related to the particular circumstances.
5. **Testimony that a person "looked very bad; he was lame and he could scarcely get up stairs," is not inadmissible on an issue as to his condition at a certain time.**
6. **An election for a trial by jury, required by the rules of court authorized by the amendment of 1892 to the Maryland Constitution, must be made by a separate and distinct act, and cannot be made by a demand in the declaration.**

(November 17, 1897.)

NOTE.—As to injuries to a passenger on an electric car by a shock, see also *Burt v. Douglas County Street R. Co.* (Wis.) 18 L. R. A. 479.

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APPEAL by defendant from a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Arthur W. Machen and William S. Bryan, Jr., for appellant:

When an accident occurs from a failure of one of the appliances of a car, a prima facie presumption of negligence arises which it is incumbent on the defendant to meet by evidence. But when it appears from the evidence produced that the measure of care which the law exacts from the carrier had been in fact exercised in respect to such appliance, and that the defect which caused such failure was latent and not discoverable, and that all reasonable precautions by way of inspection and otherwise had been made use of, then the principle is well established that the carrier is not liable.

Daniel v. Metropolitan R. Co. L. R. 8 C. P. 222; *Hearn v. West Jersey Ferry Co.* 143 Pa. 122, 18 L. R. A. 866; *Pershing v. Chicago, B. & Q. R. Co.* 71 Iowa, 585; *Norfolk & W. R. Co. v. Marshall*, 90 Va. 836; *Booth, Street Railways*, § 332; *Baltimore & Y. Turnp. Road v. Cason*, 72 Md. 380; *Potts v. Chicago City R. Co.* 33 Fed. Rep. 610; *Fleming v. Pittsburgh, C. C. & St. L. R. Co.* 158 Pa. 180, 22 L. R. A. 851; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 543, 75 Am. Dec. 258; *Mexican C. R. Co. v. Lauricella*, 87 Tex. 279.

The law makes no unreasonable demand. It does not require from any man superhuman wisdom or foresight. Therefore no one is guilty of culpable negligence by reason of failing to take precautions which no other man

would be likely to take under the circumstances.

1 Shearm. & Redf. Neg. § 11.

If the accident complained of was caused solely by a hidden or latent defect, nor apparent to the eye, the defendant is not liable even though the plaintiff, without fault on his part, did receive injuries by reason of the breaking and falling of said trolley wire.

Carter v. Kansas City Cable R. Co. 42 Fed. Rep. 89; *Union R. Co. v. State, Steever*, 72 Md. 159; *Johnson v. Harvey*, 80 Md. 259.

Messrs. Thomas C. Ruddell, Sidney Hall, and Joseph W. Bristor, for appellee:

If plaintiff while a passenger on one of the defendant's cars, and while exercising ordinary care, was shocked and knocked off said car, and injured by coming in contact with the end of a broken trolley wire used by defendant in the operation of the railway, he can recover.

Baltimore & O. R. Co. v. State, Mahone, 68 Md. 144; *Baltimore & O. R. Co. v. State, Hauer*, 60 Md. 449; *Baltimore & O. R. Co. v. State, Coughlan*, 24 Md. 84; *Baltimore & Y. Turnp. Road v. Leonhardt*, 66 Md. 70; *Stokes v. Saltonstall*, 88 U. S. 18 Pet. 181, 10 L. ed. 115.

There is imposed on the defendant as a carrier of passengers the duty not only to use the highest degree of diligence practicable under the circumstances in regard to the erection and maintenance of its trolley wire and car, but also to use the same degree of diligence in the operation of its line.

Hurt v. Woodland, 24 Md. 393; *Maltby v. Northwestern Virginia R. Co.* 16 Md. 445; *Washington F. Ins. Co. v. Davison*, 80 Md. 92.

The dangerous nature of the motive power used by the modern electric railway has brought with it an additional obligation, and the carriers of passengers, by electricity, are required to use the very highest degree of care in the construction, maintenance, and operation of their plant.

Uggle v. West End Street R. Co. 160 Mass. 351; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810; *Western U. Teleg. Co. v. State, Nelson*, 82 Md. 293; *Croswell, Electricity*, §§ 234, 252.

McSherry, Ch. J., delivered the opinion of the court:

This is an action to recover damages for a personal injury. The facts, so far as they need be recited to present the questions of law which are brought up by the second and third bills of exception, are few and simple, and will be stated in a moment. The ruling complained of in the first bill of exceptions has reference to a question of practice, and, though arising earliest on the record, will be considered and disposed of last, because it does not pertain to the merits of the controversy.

The appellant is a corporation owning and operating a street railway in the city of Baltimore. The motive power used to propel its cars is electricity, which is applied by the overhead trolley system. On the day that the injury complained of happened, the appellee boarded one of the company's cars, taking a seat on the inside, but afterwards, owing probably to the crowded condition of the car, going to and standing on the rear platform.

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Shortly thereafter the trolley wire broke some few inches from a brass sleeve which spliced together the ends of the separate wires that, when united, formed the continuous trolley wire. That part of the broken wire which was above the car, and which stretched in the direction that the car was going, was carried on the trolley pole as the car proceeded; and, as the car moved forward, the wire, charged with the electric current, was paid out over the trolley wheel, and the severed end fell upon the roof of the car, and thence over its rear edge, and came in contact with the appellee, who was thrown by the shock, or who, receiving a shock therefrom, jumped to the ground, and was injured. The period of time intervening between the breaking of the wire and the injury to the appellee was only a few seconds. The record fails to show that the car could have been stopped in a shorter space of time than it was, or that the employees in charge of it could have done anything which they omitted to do to avoid the injury. There was evidence adduced by the appellant tending to prove that the wire broke from a latent defect that no test or inspection could have discovered, and that no human foresight could have guarded against; that the wire had been subjected to all the tests known to science, if not before it was sent from the factory where it was made, at least before it was put in place; and that, since it had been in use, it had been regularly and carefully inspected. It was further shown that the most skilled contractors had constructed the line, and that the best materials which could be procured had been used. There was also sufficient evidence before the jury from which they well might have found, if they believed that evidence to be true, that the wire broke from no fault or negligence of the company or its employees; and they might likewise have concluded—for the testimony, if credited, warranted the conclusion—that the highest degree of care and caution known to science had been used by the company in providing the best materials, appliances, and workmanship in the building of its trolley system. The declaration contains a single count. It avers that a certain wire, the property of the defendant, and which it was its duty to keep in repair, was, through the carelessness and negligence of the company and its servants, out of repair, and, in consequence, broke, and fell upon the plaintiff, who at that time was using due care and caution. Under this declaration, and upon this proof, each of the parties presented two prayers for instructions to the jury. The court of common pleas granted the plaintiff's second prayer, modified his first, and, as modified, granted it; rejected the defendant's second, modified its first, and, as modified, granted it. To this action of the court the third bill of exceptions was taken.

The plaintiff's first prayer needs no discussion. The objection made to it in the court below was that it left to the jury a question of law, in not defining the degree of care required of the defendant. No point is suggested in the brief against this prayer, and we think the one raised below is not tenable. It defined the degree of care and diligence exacted of the defendant as the "highest degree of care and diligence practicable under the circumstances."

This, as we shall see later on, correctly described the extent of the duty owed by the carrier to the plaintiff.

The plaintiff's second prayer should not have been granted. There was a special exception interposed to it in the trial court, upon the ground that there was no evidence to support one of its hypotheses. This objection ought to have been sustained. The prayer instructed the jury that if they should find from the evidence that the plaintiff, while a passenger on the defendant's car, and while using due care, was injured by contact with a broken trolley wire, and that the broken wire was dragged up on the back platform, and against the plaintiff, by the momentum of the car, then their verdict would have to be for the plaintiff, *"unless they shall further find that the defendant's employees could not, by the exercise of reasonable care, have prevented the trolley wire from being dragged up on the platform."* Now, there is not a particle of evidence in the record to support the hypothesis we have put in italics, and it was consequently error to have submitted such an hypothesis to the jury. We may remark, in passing, that the theory of the prayer is directly at variance with the declaration. It does not, it is true, refer to the pleadings, and would not therefore, on the ground of variance, be open to criticism; but it shifts the right to recover from the one alleged in the narr. to a totally different ground. If the cause of the injury was, as charged in the declaration, the bad condition or disrepair of the wire, and this bad condition or disrepair was really due to the negligence of the defendant, and injury ensued as a consequence, then the cause of action declared on was proved; and it made and could make no possible difference whether the employees in charge of the car could or could not have prevented the wire from being dragged up on the platform after it had, in consequence of prior negligence, broken and fallen on the car. Even if the employees could not by the utmost care have prevented the wire from being so dragged up on the platform, the right of action would still have been perfect if the efficient cause of the injury was in reality the antecedent imputed negligence of the defendant in permitting the wire to be out of repair.

The substantial error of law into which the learned judge below inadvertently fell was in refusing to grant the defendant's second prayer. By that prayer the defendant sought an instruction to the effect that if the jury should find that the accident to the plaintiff was caused "solely by a hidden or latent defect, not apparent to the eye, in the trolley wire," and which "the defendant could not have discovered or detected by any reasonable examination," and that if the company employed proper and suitable contractors to erect the wire and overhead construction at the place of the accident, and if the contractors used suitable and proper material and a proper and skillful method of overhead construction, "then the defendant has performed its duty to the passenger in this regard, and the verdict must be for the defendant, even though the jury further find that the plaintiff, without fault on his part, did receive injuries by reason of the breaking and falling of said trolley wire. A carrier of passengers is not an insurer of their

safety. This is the settled law. Such a carrier is only bound to employ the utmost care and diligence which human foresight can use. *Washington, C. & A. Turnp. Co. v. Case*, 80 Md. 45; *State, Coughlan, v. Baltimore & O. R. Co.* 24 Md. 102, 87 Am. Dec. 600. This is the limit and the measure of the duty which he owes to the passenger. His failure or omission to discharge that duty is an act of negligence, and, if injury results from that negligence, an action will lie. It is apparent, then, that all actions of the kind we are now dealing with, to be maintained, must be founded on negligence of the defendant, both asserted and proved. If there be no negligence, though there be an injury, no action will lie. Negligence is essentially relative. In the abstract it is a nullity. It does not, and it cannot, in the nature of things, exist. It is metaphysically impossible to evolve a concept of negligence apart from the facts which give rise to it, and independently of some imposed or implied correlative duty. The duty must be essentially related to the particular circumstances; and a variance in the circumstances necessarily begets either a modification of the duty or else extinguishes it altogether. Thus, the duty which a railroad company owes to a passenger whom it is carrying on its train is widely different from the duty it owes to a trespasser on its tracks; not only because the rights of the two are different, but because the attendant circumstances and facts creating the reciprocal rights, in each instance, are dissimilar. This difference in rights and in duties springs from a divergence in the circumstances out of which they respectively grow. Consequently, a condition which would in one case give rise to an inference of negligence would be wholly insufficient to justify its deduction in the other. Because this is so, it follows that the conditions under which an injury to a trespasser and to a passenger happens produce different evidentiary results,—in the one case, the injury, if flowing from defective appliances, being in itself, on grounds of policy and convenience, prima facie evidence of negligence in respect to the appliances which produced the injury; while in the other instance it (the injury) is simply neutral and indifferent as respects the proof of negligence. Negligence and injury are cause and effect, but negligence is not the only cause of injury. As, in all cases where the injury itself is treated as prima facie evidence of negligence, this prima facie evidence is rebuttable, it results that the burden of proof to show that the injury arose from some other cause than negligence is cast upon the party against whom the prima facie evidence has raised the inference of negligence. Prima facie proof of negligence is not conclusive proof that negligence in fact existed. It furnishes sufficient evidence, if nothing to the contrary be shown. Every injury does not necessarily result from negligence. There are acts of God, involving a *vis major*, and there are accidents, including no elements of negligence, because occasioned by no breach of any imposed or implied duty at all. An act of God injures no one. When an act complained of and alleged to be negligent could not by the exercise of proper diligence have been foreseen, and is concurrent in its origin with the resulting injury, and as sim-

ultaneous therewith as physical cause and effect can be, and there is no antecedent dereliction or breach of duty, actual or constructive, constituting an ulterior or primary cause, the act belongs, not to the class of negligent acts, but to that described as accidents. *Washington, C. & A. Turnp. Co. v. Case*, 80 Md. 45. For a mere accident, unmixed with negligence or fault, no action will lie, even though an injury has been done; and no action will lie because there has been no breach of a duty that was owed, and therefore no negligence. *Gault v. Humes*, 20 Md. 297; 1 Am. & Eng. Enc. Law, 2d ed. pp. 272, 273, note 2. If, in a given case, where an injury has happened, and where, by reason of the duty that is owed and the circumstances existing, the presumption of negligence arises from the mere fact of an injury having been sustained, it be shown that the duty which was owed to the party receiving the injury had been performed to the full measure that the law exacts, then there is no breach of duty, and, there being no breach of duty, there is and there can be no negligence. This conclusion must be legally and logically applicable to a case like the one before us, if the carrier is not an insurer of the passenger's safety; and, if the conclusion be applicable, it can only be so because the carrier is an insurer of the safety of the passenger.

The measure of duty which a carrier owes to a passenger is, as we have said, the utmost care and diligence which human foresight can use. If human foresight, with the aid of the most advanced scientific methods yet discovered, is powerless to detect latent defects that are searched for in the appliances used by the carrier, and if proper skill be employed in the construction of those appliances, and if the appliances themselves are appropriate, and still an injury happens, not from negligence in their use, but solely and exclusively from some hidden defects in their structural materials, that adequate and careful inspection, seasonably and faithfully employed, failed to reveal, then such an injury is referable to a nonactionable accident, and not to negligence. There may be negligence predicated of an improper or careless operation or use of a perfectly sound appliance, but that is negligence in the manipulation or employment, and not in the construction, of the thing causing the injury. With that species of negligence the prayer does not deal, and it is consequently not involved in this discussion. The prayer we are considering left it to the jury to find whether the injury sued for resulted solely from a hidden defect in the wire, which defect could not have been discovered by any reasonable examination; and it also left it to them to find whether proper and competent contractors had been employed to erect the structure, and whether suitable materials had been used and a skillful method had been pursued in the work; and it then instructed them, as the legal conclusion from an affirmative finding of these hypotheses, that the appellant had performed its duty to the passenger in so far as that duty related to the providing of proper appliances that were alleged to have caused the injury; and, of course, it necessarily followed that, if its

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whole duty in this regard had been done, there was no breach of a duty owed to the passenger, and consequently no negligence of the character charged in the declaration; and, if there was no negligence, there was no cause of action. Under these conditions, the injury was the result of accident. This prayer contained a correct exposition of the law, and the jury ought to have been instructed to that effect. The refusal to do so was error. In addition to the adjudged cases hereinbefore cited, we may, in support of the legal principle announced in the prayer, refer to the following: *Crutchfield v. Richmond & D. R. Co.* 76 N. C. 320; *Handelum v. Burlington C. R. & N. R. Co.* 73 Iowa, 709; *Wabash, St. L. & P. R. Co. v. Locke*, 113 Ind. 404; *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L. R. A. 50; *Libby v. Maine C. R. Co.* 85 Me. 34, 20 L. R. A. 812; *Spellman v. Lincoln Rapid Transit Co.* 36 Neb. 590, 20 L. R. A. 816; *Simmons v. New Bedford, V. & N. S. B. Co.* 97 Mass. 361-367, 93 Am. Dec. 99.

There was error, also, in refusing to grant the first prayer of the defendant, as offered. The declaration did not count on negligence in the operation of the trolley wire and car; nor did it allege that an injury had resulted from the negligence of the servants in charge of the car, as negligence in the operation of the car involves; but it proceeded exclusively on the ground that the wire was, through carelessness and negligence, out of repair, and, in consequence, broke, and, breaking, inflicted the injury complained of. The defendant clearly had the right to have the jury confined to the issue made by the pleadings, and its first prayer as presented did this; but the modification of that prayer amplified and enlarged the issue. In this there was obvious error.

The second exception brings up a ruling as to the admissibility of evidence. A witness, not an expert, was asked what was the condition of the plaintiff on September 12,—one month and eight days after the date of the accident. And the witness replied that he "looked very bad; he was lame, and he could scarcely go up stairs," etc. The question and answer were excepted to. The witness was not asked an opinion. She was simply required to describe the plaintiff's physical condition, and this she was competent to do, because it was merely the description of a fact which she had seen. Its weight and value were for the jury. We see no error in the ruling.

The first exception brings up a new question of practice. By § 6 of article 15 of the Constitution, a trial by jury of all issues of fact is guaranteed to every litigant when the sum in controversy exceeds \$5, though it is competent, under § 8 of article 4, for the parties to a proceeding to waive that right, and to submit the cause to the court for determination without the aid of a jury. It was found in actual practice that these provisions resulted in congesting the dockets of the common-law courts in the city of Baltimore, and accordingly an amendment of the organic law was proposed by the general assembly during the session of 1892. This amendment was subsequently adopted by the people.

Among other things, it declares that "the general assembly may provide by laws, or the supreme bench [of Baltimore city] by its rules, for requiring causes in any of the courts of Baltimore city to be tried before the court without a jury, unless the litigants or some one of them shall, within such reasonable time or times as may be prescribed, elect to have their causes tried before a jury." This amendment, it will be seen, requires the causes therein referred to to be tried by the court, unless an election to have a jury trial is made, and produces precisely the converse of the condition which prevailed prior to its adoption. Acting under the authority thus conferred upon it, the supreme bench adopted a series of rules to put the amendment into effect. Those rules provide that all causes standing for trial in the common law courts of the city shall be tried before the court without a jury unless an election in writing be filed for a trial before a jury. They further declare that such election must be made by the plaintiff not later than fifteen days after the filing of the declaration, and that defendants must make such election at or before the time of first filing a plea, but in no event after the time allowed by law to plead. It is also prescribed that "such election shall not be withdrawn except by written consent of all the parties filed in the case." The original declaration filed in this case concluded with these words: "Wherefore he brings this suit, and claims \$5,000 damages, and prays a jury trial." Subsequently an amended declaration was filed, and immediately following the claim for damages these words appear: "The plaintiff prays a jury trial. This is the only election made by either of the parties to have the case tried by a jury. When the case was called for trial in the court of common pleas, the appellant filed a motion asking that a trial be had before the court without the aid of a jury, assigning, as a reason in support of the motion, the omission of the plaintiff to file, in the manner and within the time fixed by the rules, an election for a trial before a jury. This motion was overruled, and to that adjudication the first bill of exceptions was taken.

We think there was error in this ruling. There was no election by the plaintiff other than the concluding words which we have quoted from the declaration. These words were in fact a part of the declaration. A

withdrawal of the declaration under leave of court would have withdrawn the election for a trial by jury, notwithstanding the rule forbids a withdrawal of an election without the consent of both parties. It was the obvious intent of the rule that an election for a trial by a jury should be a separate and distinct act, evidenced by a writing different from the pleadings, so that no change in the latter could affect or interfere with the former. Clearly, the correct practice under the rule is the one just indicated. There is an additional reason: By the same rule it is made the duty of the several clerks, as soon as it is ascertained that a cause will not be tried by a jury, to transfer the same to a separate trial docket, entitled "Non Jury Cases," and the trial shall take place before the judge at large. Now, it was manifestly not the design of the rule that the clerks of the several courts should examine all the pleadings to ascertain whether somewhere among them there might be found a claim for a trial by jury; and, to obviate the necessity for such an examination, the rule plainly provides that the election shall be filed in writing, not later (if filed by the plaintiff) than fifteen days after the filing of the declaration. The two things, *viz.*, the election in writing and the declaration, are treated by the rule as distinct and independent; and it is clearly error to combine them in one paper. A declaration is simply the statement of the plaintiff's cause of action, and it has nothing to do with the mode of trial. The election is a mere designation of the mode of trial, and has nothing to do with the thing to be tried. Strictly, the declaration should contain no averments or statements beyond those that are necessary to set forth the cause of action; and hence a distinct step in the case relating only to the mode of trial ought not to be made a part of the declaration, with which it has no concern. What is true of the declaration is true also of the pleas, and the election should form no part of them. For the errors we have pointed out, the judgment must be reversed; and, as the truth of the evidence adduced by the defendant is a matter wholly for the jury, or the court sitting as a jury, to pass upon, a new trial will be awarded.

Judgment reversed, and new trial awarded, with costs above and below.

MISSOURI SUPREME COURT (Division No. 1).

Henry HOLKER, *Appt.*,

v.

Ed. HENNESSEY *et al.*, *Defts.*,

and

Benjamin F. PIXLER, *Garnishee, Resp't.*

(.....Mo.....)

1. The amount in dispute on an appeal is the difference between the amount claimed and the amount recovered.

2. Money and property lawfully taken

NOTE.—For the general rule as to garnishment of property in custody of law, see *Dunsmoor v. Furstenfeldt* (Cal.) 12 L. R. A. 508.

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from a prisoner under arrest is not subject to garnishment in the hands of the sheriff because it is in custody of law.

3. Money or property unlawfully taken

from a prisoner under arrest is not subject to garnishment because a wrongful use of criminal process was made in getting possession of it.

4. The lien on the estate of a criminal, given by Rev. Stat. 1889, § 4317, to the party injured, does not authorize the garnishment of his property while in the hands of a sheriff who took it from the prisoner while under arrest.

(November 23, 1897.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Nodaway County in fa-

vor of the garnishee in a proceeding brought to reach property alleged to be in his possession belonging to the defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Frank Griffin and W. W. Ramsay for appellant.

Mr. E. A. Vinsonhaler, for respondent, garnishee:

Is not this property in *custodia legis*, and therefore not subject to garnishment?

Richardson v. Anderson (Tex. App.) 18 S. W. 195; *McKnight v. Spain*, 18 Mo. 534.

It is the approved practice, upon arrest, to always search the prisoner. No order is necessary, nor is it subject to garnishment.

Commercial Exch. Bank v. McLeod, 65 Iowa, 665, 54 Am. Rep. 36; *Bishop*, Crim. Proc. § 212.

At least the property was not subject to garnishment on the 18th of October, 1894, for at that date the defendants had not violated the terms of their bond, and where service is obtained by publication the jurisdiction of the court is determined by condition of garnishee's liability at time of service.

McCord & M. Mercantile Co. v. Bettles, 58 Mo. App. 384.

Macfarlane, J., delivered the opinion of the court:

The suit is against Hennessey and Green, to recover \$5,000, of which amount plaintiff charges that defendants robbed him. In aid of the suit an attachment issued, and was placed in the hands of the coroner; and defendant Pixler, sheriff of Nodaway county, was summoned as garnishee. Garnishee made answer to the usual interrogatories as follows: "That at the date of service of process of garnishment he did not have, nor has he since received, any property, effects, or credits belonging to any of defendants, unless the following statement of facts should be held to show property in his hands belonging to defendants: That on the — day of —, 1894, two persons who gave their names as David C. Wilson and E. M. Hall, were apprehended by the police officers of Nebraska City, Otoe county, Nebraska, upon a charge that they had committed grand larceny in Nodaway county, Missouri. Garnishee was informed by the officers that upon such arrest said officers took from the person of David C. Wilson \$180, and from the person of E. M. Hall, \$66. That, pending issuance by the governor of the state of Nebraska of a warrant upon the requisition of the governor of the state of Missouri, said Wilson and Hall sued out a writ of habeas corpus to secure their release. That garnishee, to secure the detention of said parties, employed counsel and guards, and, the said parties having been denied their release by the court, garnishee paid the costs. That the following expenses were incurred." (Here follows an itemized statement of the expenses of the habeas corpus proceedings in Nebraska, amounting to \$411.75.) Garnishee continues: "That afterwards these parties, under warrant from governor of the state of Nebraska, were returned to, and confined in, the jail of Nodaway county: D. C. Wilson, fifty-four days, at a cost of \$27; E. M. Hall, sixty-one days, at a cost of \$30.50,—when they gave bond for their appearance on the first day of November term, 1894, to answer

an indictment now on file in this court. That said parties failed to appear as required, and their bonds were forfeited, and *alias* warrants issued for their arrest. That they are now fugitives from justice. That the sums of money said to be taken from the persons of said Wilson and Hall by the police officers aforesaid were turned over to this garnishee, and he is entitled to same, to reimburse him and the state for the expense so incurred. That said Wilson and Hall are not entitled thereto. Garnishee further states that he is not indebted in any manner to said Wilson and Hall. Having fully answered, garnishee asks to be discharged, with costs." To this answer, plaintiff replied: "That these defendants were on or about the 13th day of June, 1894, justly indebted to him in the sum of \$5,233½, for and on account of having, at the county of Nodaway and state of Missouri, on the 18th day of June, 1894, feloniously stolen said sum of money from him, and having received the same from him by means of false pretenses. That on account of said felony the said Ed. Hennessey, *alias* E. M. Hall, and the said John Green, *alias* David C. Wilson, were at the June term, 1894, of the Nodaway county circuit court, indicted. That afterwards, to wit, on the — day, —, 1894, the garnishee, Benjamin F. Pixler, arrested said Green, *alias* Wilson, and said Hennessey, *alias* Hall, and placed them under arrest, for the commission of said felony, and after said arrest he received from said parties the sum of \$246 in money; one diamond pin, of the value of \$100; one gold watch, of the value of \$150; one revolver, of the value of \$10; one valise, of the value of \$5; a roll of money, of the value of \$4,200,—of the goods, chattels, and property of the said Ed. Hennessey, *alias* E. M. Hall, John Green, *alias* D. C. Wilson, Mary Green, Mathew Reynolds, and William Gardner, *alias* John L. Gardner, *alias* Denver. That all of said property was in the possession of the garnishee at the time of the service of this summons on the said Benjamin F. Pixler. Plaintiff further states that though the said Hennessey, *alias* Hall, and the said Green, *alias* Wilson, were indicted for said offense aforesaid, and were arrested as aforesaid, they were afterwards, during the month of September, 1894, released from the Nodaway county jail by the garnishee herein, Benjamin F. Pixler, and they have since escaped from this state, and have not been brought to trial, or convicted of said offense. Plaintiff further says that from the date of the arrest of said parties as aforesaid this plaintiff had a just and lawful lien on the property aforesaid, so received by this garnishee, for the reparation and payment of his debt against these defendants. That all of said property was and is subject to the garnishment proceedings in this case, and is in no wise liable to the payment of the claims set forth in the answer of garnishee. Wherefore plaintiff asks judgment against the garnishee for the full value of said property, aforesaid."

There seems to be no denial of this reply, although the case was tried without objection on the part of plaintiff. No objection is now made to this omission, and we treat the case—as treated by the parties—as though a general denial had been filed. The issues were tried

to the court without a jury. On the trial it was shown that plaintiff had recovered judgment against defendants for over \$5,000; that garnishee was sheriff of Nodaway county; that, under a charge of grand larceny from plaintiff, defendants were arrested in Nebraska by garnishee and the local officers of that state, and two revolvers, two valises, and a sum of money were taken from them; that defendants attempted, but failed, to secure their release under writs of habeas corpus; that garnishee paid the expenses incident to the arrest, and securing the habeas corpus proceedings, and securing the extradition of the prisoners, which amounted to the sum named in the answer of garnishee; that the prisoners were brought to this state and indicted; that they afterwards gave bail, and never appeared to answer to the indictment, and their recognizance was forfeited by judgment of court, and the accused were still fugitives from justice. There was evidence of one witness who testified that garnishee told him, while in Nebraska, that he had taken \$4,000 from defendants. Garnishee admitted that the officers making the arrest took from the prisoners \$246 in money, two revolvers, and two valises. He claimed that one of the revolvers was given to him by the prisoners. He admitted that he had the other and the \$246 in money still in his possession, but claimed that it was subject to the state's lien for payment of costs. The evidence showed that plaintiff furnished garnishee money to pay the costs incurred in making the arrest, and in all other proceedings in securing the return of the prisoners to this state. There was evidence tending to prove that Judge Dawson received a gold watch and a diamond pin as security for his fee of \$300 for legal services in defending the prisoners; that \$200 was afterwards paid, and the diamond pin, valued at \$150, was delivered to garnishee, to be held as security for the balance; that, after forfeiture, garnishee paid Judge Dawson the balance of his fee, and retained the pin. Judge Dawson testified that he received the watch and pin from a woman claiming to be the wife of defendant Green.

The finding and judgment of the court are as follows: "The court finds that the defendant has in his possession a revolver worth \$15. Ordered, that the garnishee deliver the same into court, and, upon said delivery, is entitled to his discharge; and the court finds for garnishee as to other matters claimed. And now the sheriff, Pixler, delivers to the clerk of this court the revolver claimed, and is discharged." From the judgment, plaintiff appealed to the Kansas City court of appeals, from which the case was transferred to this court, on account of the amount involved being in excess of the jurisdiction of that court.

1. Issues in garnishment proceedings are made up by the denial of the answer of the garnishee, and the reply thereto. The denial should state the grounds upon which a recovery is claimed, and the reply to the denial makes the issue. The reply of plaintiff in this case charged that the garnishee received from the defendants, when arrested, the sum of \$246 in money; one diamond pin, of the value of \$100; one gold watch, of the value of \$150; one revolver, of the value of \$10; one valise, of the value of \$5; and a roll of money, of the

value of \$4,200,—the property of said defendants. The evidence tended to prove these allegations. The amount in dispute therefore exceeded \$2,500. The court found that the garnishee had in his possession one revolver, the property of the defendants, of the value of \$15, which was ordered to be deposited in court. The amount in dispute, on the appeal of plaintiff, is the difference between the amount claimed and the amount recovered. In this case the supreme court clearly has jurisdiction of the appeal. *Doud v. Westinghouse Air Brake Co.*, 57 Mo. App. 219, 132 Mo. 581.

2. As to whether or not the diamond pin and watch in question were the property of defendants, the evidence is conflicting. No instructions as to them were asked or given, so we are unable to determine the theory upon which that issue was tried and determined. Indulging the presumption that the court found and decided correctly, we assume that it found that these articles belonged to the woman from whom Judge Dawson received them. The evidence is also conflicting as to the amount of money the garnishee took from defendants. No instructions were asked or given on this question, either. No question of law, therefore, was raised on that fact, and there is nothing before us to decide. Garnishee admitted, however, on the trial, that he took from the persons of defendants, when he arrested them, \$246, which he still had. This fact, then, must be taken as confessed. The exception taken in the trial court, and insisted on here, is that error was committed in holding that "the \$246 in the possession of the garnishee was not subject to garnishment."

3. The only question raised by this record is whether or not this money taken from the person of these prisoners when arrested and still held by garnishee officially, as sheriff, is subject to garnishment in an attachment suit in favor of plaintiff and against defendants; the subject of the suit being damages on account of the alleged crime. It has been held in this state, and is generally recognized as the law, that, in a civil action, service of process upon a defendant who is brought into the territorial jurisdiction of the court by fraudulent means or criminal process will be set aside, if timely objection is made thereto. *Byler v. Jones*, 79 Mo. 261; *Christian v. Williams*, 111 Mo. 485, and cases cited. So it is held that "where an officer unlawfully gets possession of a debtor's property, as by breaking into his dwelling house without proper authority, and then attaches it on mesne process, or levies upon it on execution, the attachment or levy will be void." *Closson v. Morrison*, 47 N. H. 485, 93 Am. Dec. 459, citing *Isley v. Nichols*, 12 Pick. 270, 23 Am. Dec. 425; *People v. Hubbard*, 24 Wend. 369, 35 Am. Dec. 628; *Curtis v. Hubbard*, 4 Hill, 437, 40 Am. Dec. 292, and other cases. This seems to be the modern doctrine, founded upon the principle that courts will not lend their assistance to effectuate fraudulent or unlawful practices of suitors, though the old doctrine was that the seizure under process, in such case, would be valid, while the officer making it would be liable for the trespass. See *People v. Hubbard*, 24 Wend. 369, 35 Am. Dec. 628.

In the case of *Closson v. Morrison*, 47 N. H. 485, 93 Am. Dec. 459, the sheriff arrested a person upon the charge of grand larceny, and, before trial or examination, proceeded, on his own motion, to search the prisoner, and took from his person some money, a watch, a watch chain, and a wallet. On the next day writs of attachment were issued against the prisoner, and placed in the hands of the sheriff, and he thereupon attached the money and other property. The court, in giving its judgment, says: "The money and other articles were proper articles to attach, if the officer could rightfully obtain possession of them, without arresting the debtor, which his writ did not warrant him in doing. Now, if the officer took advantage of his warrant, and the arrest under it, to take from his prisoner this property, not for any legitimate purpose, but simply for the purpose of attaching it on these writs, that would be obtaining possession of the property under false pretenses and fraudulently, which would make the possession to stand like the unlawful possession in case of breaking into the house in the other case, and would not justify the attachment." The court held that, if this property was lawfully taken from the person of the debtor, it was subject to attachment while in the hands of the sheriff. The same ruling was made by the supreme court of Iowa in the case of *Reifmyer v. Lee*, 44 Iowa, 102, 24 Am. Rep. 733. Beck, J., in delivering the opinion, says: "A party to a suit can gain nothing by fraud or violence under the pretense of process, nor will the fraudulent or unlawful use of process be sanctioned by the courts. In such cases parties will be restored to the rights and position they possessed and occupied before they were deprived thereof by the fraud, violence, or abuse of legal process." Money and a watch had also been taken from the person of the prisoner in that case, and the court held that the officer was authorized to make the search and take into his possession such property, and the levy of the attachment upon it while so held was valid. In a subsequent case, however, the same court held that where the sheriff took from the person of a prisoner two watches and some money, which were in no way connected with the crime with which he was charged, and which could not be used as evidence in the prosecution, it was his duty to return them, and while he retained them his possession was that of the prisoner, and they were "no more subject to attachment in an action against the prisoner than if they had been in his pocket." The court says: "To hold otherwise would lead to unlawful and forcible searches of the person under cover of criminal process, as an aid to civil actions for the collection of debts." *Commercial Exch. Bank v. McLeod*, 65 Iowa, 666. We find the same ruling by the supreme judicial court of Massachusetts in the cases of *Robinson v. Howard*, 7 Cush. 258, and *Morris v. Penniman*, 14 Gray, 220, 74 Am. Dec. 675. In the former case the headnote reads: "An officer is not liable, by the trustee process, to a creditor of a person arrested by him on a criminal warrant, for money or other property, taken by the officer, under color of his official duty, from the person of his prisoner, and for which he gives the latter a receipt." Shaw,

Ch. J., says: "Such process might be used to search the person, or otherwise, under color of lawful authority, to get possession of the property of a debtor, in order to place it in the hands of the officer, and thus make it attachable by trustee process." In the latter case one Bassett was arrested on a charge of larceny. On being asked what property he had about him, he delivered up, with objection, a watch and key. While they were in possession of the officer they were attached on process against Bassett. On this state of facts the court held that "the attachment of the watch and key was not valid." A sheriff took from the person of a prisoner \$950 in money, and other property. While in his possession, the officer was served with process by garnishment. Knox, the prisoner, intervened, and claimed that the property in the hands of the sheriff was in the custody of the law, and was not subject to garnishment at the suit of a creditor. On appeal this plea was sustained, on the ground that the property was not subject to process by garnishment. *Richardson v. Anderson* (Tex. App.) 18 S. W. 195. The supreme court of Alabama reaches a different conclusion, under a provision of the Code of that state. The court, however, in discussing the question, says: "At common law, and perhaps without statute, the money or property [taken from the person of the prisoner] would be *in gremio legis*, not subject to attachment, and entirely under the control of the court." *Ex parte Hurn*, 92 Ala. 109, 13 L. R. A. 120.

Generally speaking, in the absence of a statute an officer has no right to take any property from the person of the prisoner, except such as may afford evidence of the crime charged, or means of identifying the criminal, or may be helpful in making an escape. The officer has the undoubted right to make the search, and, considering the nature of the accusation, he may, when acting in good faith, take into his possession any articles he may suppose will aid in securing the conviction of the prisoner, or will prevent escape. "He holds all such property, whether money or goods, subject to the order of the court; and, in proper circumstances, he will be directed to restore it, in whole or in part, to the prisoner." Bishop, *Crim. Proc.* §§ 211, 212; Whart. *Crim. Pl.* §§ 60, 61. We find no statute of this state giving the arresting officer authority to search a prisoner, but no statute is necessary. The power exists from the nature and objects of the public duty the officer is required to perform. Such authority is directly given to a committing magistrate by statute (§ 4308, Rev. Stat. 1889); but, unless the arresting officer has the authority immediately on making the arrest, all evidences of crime and of identification of the criminal might be destroyed before the prisoner could be taken before the magistrate. We have no doubt the search of the prisoners in this case was entirely justifiable, considering the nature of the crime charged, and other circumstances. In the circumstances, also, he was justified in taking from their persons and keeping in his possession the money found upon them, though it may have been in no manner connected with the charge or proof against them. Money is the most effective kind of property a prisoner could have in his

possession, to be used as a means of escape; and the safe-keeping of the prisoner justified the retention of the money, at least until he was brought before the magistrate. Neither the officer nor the state acquires any title to the property, or lien upon it, until after conviction. A mere accusation does not justify the confiscation of the property of the accused. The property, therefore, whatever its character, belongs to the prisoner, until judicially sequestered. "The officer," says Bishop, "holds all such property, whether money or goods, subject to the order of court; and, in proper circumstances, he will be directed to restore it, in whole or in part, to the prisoner. This power . . . will be exercised both in cases where original taking was wrongful, and where for the any other reason there ought to be a partial or complete returning of the thing." Bishop, *Crim. Proc.* § 212. If the taking was wrongful, then the custody of the officer can only be regarded as the custody of the prisoner; and the property in his hands would, before conviction, no more be subject to levy under attachment or execution than if upon the person of the owner. To hold otherwise, as said by Shaw, Ch. J., *supra*, "such process might be used to search the person, or otherwise, under color of lawful authority, to get possession of the property of a debtor in order to place it in the hands of the officer, and thus make it attachable." No such abuse of criminal process should be allowed. "The people shall be secure in their persons, papers, homes, and effects from unreasonable searches and seizures." Mo. Const. art. 2, § 11. If the property was lawfully taken from the person of the prisoner, the act of the officer will be in the performance of an official duty. The sheriff being an officer of the court in which the indictment is pending, the money is in custody of the court, subject to its order. The rule of general application is that money or property which has come into the hands of an officer of a court by virtue of legal process is regarded as in the custody of the law, and cannot be taken from him under other process, either of execution, attachment, or garnishment. Shinn, *Attachm.* § 505; 2 Wade, *Attachm.* §§ 380, 421; Kneeland, *Attachm.* § 410; Waples, *Attachm.* § 390; 8 Am. & Eng. Enc. Law, p. 1187. This rule was approved at an early day by this court in *Murvin v. Hawley*, 9 Mo. 382, 43 Am. Dec. 547, in which the court says: "It is not the policy of the law thus to embarrass the regular proceedings in the courts, deprive parties of their rights, and impose such onerous and difficult duties on the sheriff. We are then of opinion that money in the hands of the sheriff, collected on execution, cannot be attached by a creditor of the execution plaintiff before the return day of the writ." The officer, in such case, is the mere agent of the court, and custodian of the property; and to permit an interference with his possession would be to interfere with the jurisdiction of the court, and divert the property from the purposes for which it is held. No one could reasonably claim that money or other property taken from the person of a prisoner, and held to be used as evidence of the criminal charge, could be taken out of his possession by other legal process, whether of the same court or another.

other,—at least, until final judgment of conviction. "For these reasons, and because it is deemed contrary to public policy to permit such officers to be subjected to the embarrassment, delay, and expense incident to such process, the authorities are almost uniform in holding that general words in garnishment statutes are not to be construed as including them." 8 Am. & Eng. Enc. Law, p. 1188, and note 2. The statute of Missouri provides that "no sheriff, constable, or other officer charged with the collection of money shall, prior to the return day of an execution or other process upon which the same may be made, be liable to be summoned as garnishee." Rev. Stat. 1889, § 5220. It may be agreed that this statute does not in terms apply to a case like this one, in which the property is taken from the owner under criminal process. But we do not think the statute, by stating one case of exemption, excludes all others. The sheriff does not require an order of court to pay over money collected on execution. The law imposes that duty upon him. The statute was designed to protect the sheriff from embarrassment in executing the process of the court, and the onerous and difficult duties garnishment proceedings would impose upon him. The principle that money in the hands of a custodian of the court is subject to its order rests upon wholly different grounds, as has been seen, and applies as well to receivers, clerks, and other custodians. Shinn, *Attachm.* § 505; 8 Am. & Eng. Enc. Law, p. 1188. It is therefore our opinion that, if the money and property were taken from the person of the prisoners by authority of law, which the sheriff would be estopped to deny, it was in the custody of the law, and subject to the orders of the court in which the criminal proceedings were pending, and was not—at least until after conviction—subject to attachment at the suit of a creditor of a prisoner. If, on the other hand, it was taken without authority of law, then it is not subject to attachment because a wrongful use was made of criminal process in getting possession. Such an abuse of criminal process is against the policy of the law, and would be violative of one of the rights guaranteed by the Constitution.

The only case in this state that we have been able to find, having any bearing on the issues in this one, is *McKnight v. Spain*, 18 Mo. 536. In that case money and a watch were taken from a prisoner on his arrest, which were held by the officer of the court until after trial and conviction of the prisoner, and a judgment for costs had been rendered against him. An execution was issued on the judgment, and the property so held by the officer was sold, and the proceeds were applied to the payment of costs. The only questions determined in that case were whether the execution was sufficient in form, and whether or not the lien of the state, which, under the statute then in force, dated from the arrest, would have priority over a transfer of the property after arrest, and before judgment. The court held the execution good, and that the lien of the state prevailed over the assignment. It does appear, however, that the property was sold under execution, though held by an officer of the court, and the validity of the sale was tacitly approved.

This circumstance gives some support to the position of plaintiff that the property, while in the hands of the officer, was subject to seizure and sale under civil process. The statute makes it the duty of the clerks of criminal courts, at the end of each term, to issue executions for all fines imposed and all costs of conviction, in criminal cases, remaining unpaid, "which will be executed in the same manner as executions in civil cases." Rev. Stat. 1889, § 4265. We take the issuance of execution in such cases, and the duty under it of the officer into whose hands it is placed, done and required by authority of law, as equivalent to an order of the court; and, unless otherwise directed by the court, it authorizes the money or property in the custody of the court to be applied to the satisfaction of the judgment. When the purpose of the legal custody has been accomplished, and the only duty the custodian has to perform is to deliver the property or pay the money to the owner, the legal custody ceases, the officer holds it for the owner, and it becomes subject to process at the suit of his creditors. 2 Shinn, Attachm. § 546. This rule is recognized by our statute which exempts a sheriff from garnishment until the return day of an execution, and an administrator until an order of distribution be made. After a final conviction in a criminal case, the purpose of the legal custody of the money or property taken from the person of the prisoner has presumably been accomplished, and it becomes subject to process, unless the court may otherwise direct. What has been said has no application to property stolen, or otherwise feloniously obtained. The statute provides for the restoration of such property to the owner. Rev. Stat. 1889, §§ 4808 *et seq.*

4. Plaintiff places his chief reliance for reversal upon the last clause of § 4317, which provides that "the party injured shall have a lien on the estate of the criminal from the time of his arrest, subject to any lien granted by law to this state." We are unable to see that this provision authorizes the enforcement of the lien by garnishment. In-

deed, the lien of the injured party is expressly made subject to the lien of the state; and the equities between the two lienors, in case they are conflicting, must be determined and settled by the court having custody of the property under such appropriate proceedings as will give each a chance to be heard. The statute gives the state a lien on all property, real and personal, of any person charged with a criminal offense, from the time of his final conviction of such offense, for the payment of all fines and costs which he may be adjudged to pay. Rev. Stat. 1889, § 4264. The statute further provides, "Whenever any person shall be convicted of any crime or misdemeanor, he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county." Id. § 4395. The lien the statute gives to the injured party only becomes consummate and enforceable on final conviction, but then relates back to the date of arrest. The preceding part of § 4317, which provides the proceedings by which the person injured may secure restitution, or reparation in damages, shows clearly that the lien can only be enforced after final conviction. The lien is given on the estate of the criminal, and no one can justly be called a criminal until he be convicted of crime. While, therefore, the lien of the state dates only from conviction, and the lien of the injured person dates from the arrest, both become enforceable on the date of the conviction, and the lien of the state has precedence, though of a later date. In this case neither party had an enforceable lien on the property in question by virtue of the foregoing provisions of the statute, for there had been no conviction, and the statute gave no aid to the proceedings by attachment.

We are of the opinion that the circuit court ruled correctly in holding that the sheriff was not subject to garnishment on account of the money of the prisoner in his custody, and its judgment is affirmed.

All concur.

MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* W. H. GELSTHORPE, County Treasurer, *Appt.*,

v.

Della M. FURNELL *et al.*, *Respts.*

(.....Mont.....)

1. The right to receive property, and not the property itself, is taxed by act March 4, 1897, imposing a tax on "all property" which shall pass by will or intestate laws, unless the estate is less than \$7,500.
2. A reasonable classification of property for taxation does not violate the rule of uniformity.
3. A succession tax does not take property without due process of law when it is im-

posed on all property which passes by will or intestate laws except when the estate is less than \$7,500.

4. The rule of uniformity is not violated by a succession tax which exempts every estate less than \$7,500.

5. An inheritance tax does not deny to anyone the equal protection of the laws because it exempts estates less than \$7,500 each.

6. A statute taxing the right already vested to take shares of an estate of a person who died before the act was passed, but which is yet subject to the control of the probate court and not yet distributed, is not an unconstitutional impairment of vested rights.

(November 15, 1897.)

NOTE.—For legislative power to impose inheritance taxes, see *Re Romaine* (N. Y.) 12 L. R. A. 401, and *note*; also *State v. Hamlin* (Me.) 25 L. R. A. 632; 89 L. R. A.

Minot v. Winthrop (Mass.) 26 L. R. A. 259; *State v. Alston* (Tenn.) 23 L. R. A. 178; *State, Schwartz, v. Ferris* (Ohio) 30 L. R. A. 218.

APPEAL by relator from a judgment of the District Court for Cascade County in favor of defendants in a proceeding brought to enforce payment of an inheritance tax. *Reversed.*

The facts are stated in the opinion.

Messrs. M. M. Lyter and C. B. Nolan, Attorney General, for appellant:

Such taxes are nothing more than a burden, bonus, excise, or assessment, as they have been variously defined, imposed by government upon the passing devolution, transmission, or privilege of taking or receiving property under wills and intestate laws, whether such property passes to collateral or lineal heirs. The right to impose these taxes is based upon the broad constitutional power of the state, as a sovereign, to modify, amend, extend, or wholly to repeal the laws governing the transmission of property by will and intestate laws.

Dos Passos, Inheritance Tax Law, p. 31; Minot v. Winthrop, 162 Mass. 113, 26 L. R. A. 259; State v. Hamlin, 86 Me. 503, 25 L. R. A. 632; United States v. Perkins, 163 U. S. 625, 41 L. ed. 237; Eyre v. Jacob, 14 Gratt. 422, 73 Am. Dec. 387; Re Swift, 137 N. Y. 77, 18 L. R. A. 709; State, Schwartz, v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218.

The evident intention of an act will prevail over the literal sense of its terms.

Sutherland, Stat. Constr. § 219.

While the power to dispose of property is an incident to the property itself, the right to take by will or from intestate is a mere privilege of the municipal law, which may be changed, modified, or repealed, in the discretion of the legislature.

State v. Hamlin, 86 Me. 505, 25 L. R. A. 632; Eyre v. Jacob, 14 Gratt. 437, 73 Am. Dec. 367; Stride v. Com. 52 Pa. 181; Redf. Wills, § 1; 2 Bl. Com. pp. 10-13; Mager v. Grima, 49 U. S. 8 How. 490, 12 L. ed. 1168.

The right to inherit being a mere privilege conferred by statute, and not a natural right, the power of the legislature to tax that privilege is unlimited and unrestricted, and may be exercised in any manner or mode in its discretion.

Jenkins v. Erin, 8 Heisk. 456; Kelly v. Dwyer, 7 Lea. 180; State v. Burgoyne, 7 Lea. 173, 40 Am. Rep. 60.

The tax is levied upon the privilege and not upon the property.

State, Schwartz, v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218; Re Hoffman, 143 N. Y. 330; Re Swift, 137 N. Y. 77, 18 L. R. A. 709.

The legislature might, after the death of a testator or intestate, increase the fees to be paid to the clerk of the court by executors and administrators. Could it be claimed that such increase disturbed rights which had become vested in the heirs or successors?

The privilege thus granted, and which did not otherwise exist, was not a contract on the part of the state.

Baltimore & S. R. Co. v. Nesbit, 51 U. S. 10 How. 396, 13 L. ed. 470; Butler v. Pennsylvania, 51 U. S. 10 How. 414, 13 L. ed. 477; Watson v. Mercer, 33 U. S. 8 Pet. 110, 8 L. ed. 884; Childer v. Bull, 3 U. S. 3 Dall. 386, 1 L. ed. 648; Brick Presby. Church v. New York, 5 Cow. 538; Vanderbilt v. Adams, 7 Cow. 349.

The better authority upon the question as to
39 L. R. A.

the constitutionality of the retroactive provision in acts like the one in question here is in favor of the constitutionality of such provision.

Dos Passos, Inheritance Tax Law, p. 417; Re Short, 16 Pa. 66; Carpenter v. Pennsylvania, 58 U. S. 17 How. 456, 15 L. ed. 127; Ennis v. Smith, 55 U. S. 14 How. 400, 14 L. ed. 472; Tucker v. Ferguson, 89 U. S. 22 Wall. 563, 23 L. ed. 805.

Privileges which are granted by the state without any agreement as to their continuance, and without the passing of any consideration from the grantees, may be withdrawn at any time.

Cooley, Const. Lim. p. 338; Talmadge v. Seaman, 85 Hun. 242; Re Seaman, 147 N. Y. 69.

While the vested rights to the legal estate undoubtedly accrue upon the death of the testator, no rights vest in the beneficial interest, nor do the heirs become "beneficially entitled" to anything until distribution is made.

Todd v. Wickett, 18 B. Mon. 871.

Mr. William T. Pigott, for respondent:

The act is repugnant to the 14th Amendment to the Federal Constitution, in that it denies to persons within the jurisdiction of Montana the equal protection of the laws.

(a) It exempts from tax estates under \$7,500 in value, while it levies the tax upon all estates of that or greater value. An estate valued at \$7,499.99 is exempt, but one of greater value is taxed, not only upon the excess, but also upon the \$7,499.99.

Government is instituted for the equal protection and benefit of the people. Laws must likewise be for their equal protection and benefit.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. Rep. 385; Railroad Tax Case, 8 Sawy. 238, 13 Fed. Rep. 722; State, Schwartz, v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218.

(b) It exempts from taxation estates distributed prior to its passage, while imposing the tax upon all other estates.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666.

(c) In imposing a tax upon estates not distributed at the time the act took effect, it impaired the vested rights of those entitled to the property of such estates, whereas like vested rights in other estates were not disturbed. The persons having these rights are not equally protected by the law.

The act is in violation of the Constitution of Montana.

The tax is expressly declared upon property.

The Pennsylvania rule declared in *Re Short*, 16 Pa. 63, and *Bittinger's Estate*, 129 Pa. 338, that the tax is upon the property itself, is in harmony with the plain terms of the act.

Carpenter v. Pennsylvania, 58 U. S. 17 How. 456, 15 L. ed. 127.

If the tax be declared upon property as distinguished from the privilege of succession, the act violates section 1 of article 12, providing that the legislature shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for the taxation of all property except that especially provided for in this article.

The act violates also § 9, in that the rate exceeds 2½ mills on each dollar of valuation.

Exemption from taxation of an estate valued at less than \$7,500 renders the act void.

State, Schwartz, v. Ferris, 53 Ohio St. 814, 30 L. R. A. 218; *State, Davidson, v. Gorman*, 40 Minn. 232, 2 L. R. A. 701; *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337. And see *State, Sanderson, v. Mann*, 76 Wis. 469.

As applied to estates remaining undistributed when the act took effect, it disturbs and lessens vested rights, and also impairs the obligations of contracts.

At the moment of the testator's death, the rights of the devisees and legatees vested.

Brenham v. Story, 329 Cal. 188; *Black, Constitutional Law*, 429; *Cooley, Const. Lim.* p. 359; *Beach, Mod. Eq. Jur.* § 1045; *Croswell, Exrs. & Admsrs.* § 171; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *Ervin's Appeal*, 16 Pa. 266, 55 Am. Dec. 499; *Clarke v. McCreary*, 12 Smedes & M. 347; *Rock Hill College v. Jones*, 47 Md. 1; *Civil Code*, §§ 1794, 1851.

The declaration contained in § 3 of article 8 of the Constitution, that all persons have the natural, essential, and inalienable right of acquiring, possessing, and protecting property, coupled with the declaration of § 27, that no person shall be deprived of life, liberty, or property without due process of law, would seem to imply a prohibition against the power of the assembly to enact a law whose effect would be the impairment of vested rights.

Westervelt v. Gregg, 12 N. Y. 209, 62 Am. Dec. 160; *Jones v. Robbins*, 8 Gray, 329; *Bank of Columbia v. Okely*, 17 U. S. 4 Wheat. 235, 4 L. ed. 559; *Cooley, Const. Lim.* 354.

Although the Constitution may not, in terms, prohibit laws impairing vested rights, nevertheless they are forbidden by the nature of republican government.

Wilder v. Lumpkin, 4 Ga. 208; *Andrews v. Russell*, 7 Blackf. 474; *Darville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663; *Dunbarton v. Franklin*, 19 N. H. 257; *Commercial Bank v. Chambers*, 8 Smedes & M. 9; *Osborn v. Nicholson*, 80 U. S. 13 Wall. 654, 20 L. ed. 689; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Dash v. Van Kleeck*, 7 Johns. 499, 5 Am. Dec. 291.

Taxes on inheritance are laid in diminution of a new capital which now comes to the hands of persons on the death of the former owners.

Cooley, Taxn. p. 22.

If the legislature has the power to impose a tax of 5 per cent or 1 per cent on a vested right, it has authority likewise to destroy the right by imposing a tax equal to the value of the property acquired. Authority which permits a person to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional limitation as where it attempts to do the same thing directly.

Merrill v. Sherburne, 1 N. H. 199, 8 Am. Dec. 52; *Re Handley*, 15 Utah, 212.

Whether or not the state received a consideration for granting the privilege of succeeding to property is immaterial when the privilege has been exercised and has become a right.

39 L. R. A.

The amount of the impairment of the obligation is immaterial.

Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558.

Hunt, J., delivered the opinion of the court:

The legislature of Montana, by an act approved March 4, 1897, enacted a law establishing a tax on direct and collateral inheritances. The law substantially provides that "all property" which shall pass by will, or by the intestate laws of the state, from any person who may die seised or possessed of the same, shall be, and is, subject to a tax at a fixed rate on every \$100 of the clear market value of such property: provided, that an estate valued at a less sum than \$7,500 shall not be subject to any such "tax or duty." It is also provided that the tax shall be levied "upon all estates which have been probated before, and shall be distributed after the passage and taking effect of this act;" and again, that the act should apply to all estates remaining undistributed at the time the law took effect, and that in such estates the tax should be determined and collected as in other cases. The act went into effect March 4, 1897. Sess. Laws 1897, p. 83. Matthew Furnell, a citizen of Cascade county, Montana, died testate May 6, 1896, nearly one year before the passage of this law, leaving his property to the respondent, his wife, in her own right, and as trustee for his minor children. The value of the estate greatly exceeded \$7,500. The will was duly proved in 1896, and administration was had. On July 19, 1897, after the inheritance-tax law was in force, the district court ordered a distribution of the estate and the discharge of the executors. Before this order was made, however, the county authorities took steps to collect the inheritance taxes, and thereupon it was agreed between the respective counsel for the interested parties that the order of distribution and discharge should in no way prejudice or delay the state in the collection of the inheritance taxes, if found to be justly due. This proceeding was then instituted to enforce the payment of the taxes. The district court held that, as applied to the estates of persons who might die after the law took effect, the statute was constitutional, but that where, as in this case, the decedent died before March 4, 1897, the tax or assessment could not be collected, for as to such case the law was invalid. The learned judge said that the legatees under the will took immediately at the death of the decedent a vested estate, and that, although the beneficiaries under the will were postponed in the matter of present possession and enjoyment, their interest was none the less a vested one, charged only with the burdens imposed by laws existing and in force at the time such interests vested. As the validity of the act affecting successions opening since its enactment, as well as its application to successions already in the course of settlement when the law was passed, is contested, it devolves upon this court to review each of the respondent's principal contentions.

It is urged that the law attempts to impose a tax upon property, as distinguished from the

right or privilege of succession; that, if it be held to lay a tax on the right of succession, still it is invalid, because the legislature is limited in its right to tax only such property as is defined by § 17 of article 12 of the State Constitution; that, as applied to estates remaining undistributed at the time the act took effect, it disturbs and lessens vested rights, and impairs the obligations of contracts; and that the act is repugnant to the 14th Amendment to the Constitution of the United States, in that it denies to persons within Montana the equal protection of the laws.

The better view, as laid down by the authorities, is that a collateral inheritance or succession tax is a duty or bonus exacted in certain instances by the state upon the right and privilege of taking legacies, inheritances, gifts, and successions passing by will, by intestate laws, or by any deed or instrument, made *inter vivos*, intended to take effect at or after the death of the grantor. The burden or the tax is not imposed upon the property itself, but upon the privilege of acquiring property by inheritance. In nearly all inheritance tax laws the statutes provide for appraising the property to be inherited, but the object of such valuation is not to tax the property itself. It is to arrive at a measure of price by which the privilege of inheriting can be valued. *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 682. In speaking of the inheritance tax law of New York state, Judge Wallace, of the United States circuit court, said: "Such a tax is no more one upon the bonds than an income tax is one upon the property out of which the income is derived, or an excise tax is one upon the articles manufactured or sold. The bonds are the subject of the appraisal, but the privilege is the subject of the tax. Inasmuch as it is lawful for the state to withhold altogether the privilege of acquiring property within its dominion by will or inheritance, whether the property consists of government bonds or anything else, it is lawful for the legislature to annex any conditions to the privilege which may seem expedient and do not conflict with the organic law of the state, or the Constitution or laws of the United States." *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171. The courts generally approve of this doctrine. In the early case of *Eyre v. Jacob*, 14 Gratt. 422, 73 Am. Dec. 367, the court said that such a tax could not be regarded, in a proper, legal sense, as a tax upon property, but as one "upon the transmission of property by devise or descent to collateral kindred." *Strode v. Com.* 52 Pa. 181. The intention of the legislature was to exact a certain premium for the enjoyment of a civil right secured under the laws of succession. The reasoning of the many cases upholding such laws proceeds upon the indisputable proposition that the state has the power—unless denied it by constitutional prohibition—to regulate the devolution and distribution of an intestate's property, and equal authority to limit the power of a testator to bequeath his property to whom he pleases. *State v. Dalrymple*, 70 Md. 294, 8 L. R. A. 372. Beneficiaries under wills, and heirs generally, must know that statutes may constitutionally limit the power of disposition and acquiring of property. The power to dis-

pose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away, or limited and regulated in whole or in part, by the legislature." *Minot v. Winthrop*, 162 Mass. 113, 24 L. R. A. 259. And under the power of regulation, clearly, the state may impose reasonable burdens or conditions pertaining to the taking of property by will or inheritance. *Strode v. Com.* 52 Pa. 181. It therefore has a right to levy an excise tax or duty as a price upon the right or privilege of succession under a will, or by devolution in intestacy, for the purpose of increasing its revenues. *Re Hoffman*, 148 N. Y. 327. The United States Supreme Court has sustained such a tax,—not as upon property but as upon a right to take property. *Mager v. Grima*, 49 U. S. 8 How. 490, 12 L. ed. 1169; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287. In the last case, Justice Brown, for the court, said: "In this view, the so called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon a right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

The most exact rule is that which regards the tax as upon the right to receive property, rather than the right to dispose of it. Such is the explanation of the nature of the tax as given by Dos Passos in his valuable book on Inheritance Tax Law (p. 81), and as stated in the following clear language by Judge Burket, of the Ohio supreme court, in *State, Schwartz, v. Ferrie*, 58 Ohio St. 314, 30 L. R. A. 218: "In view of the authorities cited, it must be conceded that the general assembly has the power to pass an inheritance tax for purposes of general revenue; unless prohibited by the Constitution of our state. Properly understood, it is not the right to transmit, but the right and privilege to receive, that is taxed. The right to dispose of property during the lifetime of the owner cannot be separated from the property itself, and therefore to tax the right of disposal by contract in the lifetime of the owner, even though to take effect at his death, is to tax the property itself. But the right to dispose of the property by will or descent, taking effect after the death of the owner, is not so closely connected with the right of property, and it is not so clear that such right may not be taxed. But when the right to receive the property is considered, it is clear that the right is distinct and separate from the property itself, and the state may tax this right to receive property; and this is so whether the property is disposed of by the owner during his lifetime, or at his death. This right to receive property is under the control

of the legislature, and it has the power to regulate and lay such burdens thereon as it may see fit, within the provisions of the Constitution. To regulate by taxation or otherwise the privilege or right to receive property is not in conflict with the 1st section of the Bill of Rights, which recognizes the inalienable right of acquiring, possessing, and protecting property. Were it otherwise, all our laws as to wills, descent, distribution, and conveyances would be unconstitutional." The rule is also enunciated in the recent case of *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178.

The language of the Montana statute, that "all property" shall be subject to a tax, etc., requires no construction not in harmony with the usual interpretation given to inheritance tax laws generally using identical language. In *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 682, this point was made; but the court said the act should be construed "according to its essential principle, object, and effect. Substance, and not form of phrase, is the important thing. All exactions of money by the government are taxes; but they are not all levied by assessment upon values. The latter class refers to the burdens recurring periodically, which are assessed upon valuations of property, made at stated intervals." A majority of the Ohio court so held, too, in *State, Schwartz, v. Ferris*, 53 Ohio St. 314, 30 L. R. A. 218, where the language of the statute, upon its face, imposed the tax as upon "property;" and we are of the opinion that, under the recent decisions upon similar statutes, ours must be construed, upon this point, as a constitutional tax upon the right to receive property, and not upon the property itself. The case of *Carpenter v. Pennsylvania*, 58 U. S. 17 How. 456, 15 L. ed. 127, is cited by the respondent's counsel as upholding the view that the tax is upon property alone. The court there spoke of the Pennsylvania statute as one imposing a tax upon the property of the decedent, but we do not understand the decision to be that such a tax is a property tax, strictly speaking. Certainly no such interpretation was put upon the inheritance-tax laws by the same court in *Scholey v. Rew*, 90 U. S. 23 Wall. 381, 23 L. ed. 99, or in their recent decision in *United States v. Perkins*, heretofore cited, where Justice Brown quotes liberally from various cases to distinguish the tax as not being one upon property, in the ordinary sense of the word.

The tax, therefore, being upon a civil right and privilege, we briefly inquire whether the statute imposing it violates the principles of equality and uniformity prescribed by §§ 1 and 11 of article 13 of the State Constitution. We do not think it does. Judge Cooley, in *Cooley on Taxation* (p. 570), lays it down that the sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction, or it may select any particular species of property and tax it, and that "what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed." Of course, this power may be restricted by the Constitution; but that author expressly says on page 584 that succession to an inheritance may be

taxed as a privilege, notwithstanding the property of the estate is taxed, and taxes on property are required by the Constitution of the state to be uniform. Cooley supports his text by citing *Eyre v. Jacobs*, 14 Gratt. 422, 73 Am. Dec. 307, where the court regarded the equality and uniformity clauses of state Constitution as applying only to direct taxes upon property, intended to prevent arbitrary taxation of property according to kind or quality, without regard to value, and not as limitations upon the power of the legislature as to the objects of taxation. But it is unnecessary to go at length into those questions now; for, conceding that succession taxes are within the rule contended for, the application of the principle of uniformity and equality must always be a reasonable one. The legislature is not prevented by the Constitution from the exercise of discretion as to what classes of rights or privileges it may enumerate as subject to taxation, provided always the tax imposed is uniform in its application to all rights and privileges within the class defined, and provided, further, we take it, that any classification made is based upon a reasonable, and not a mere arbitrary, ground. *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178. Nothing laid down in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, conflicts with these expressions. In *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259, the tax was urged as an unequal one, because it was not imposed upon all estates, and upon all heirs, devisees, legatees, and distributees. But the court said that distinctions between collateral kindred or strangers, in reference to the assessment of such taxes, had the sanction of nearly all states which levied taxes of this kind. Continuing, the court said: "It has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater. The tax imposed by this statute is uniformly imposed upon all estates and all persons within the description contained in it, and the tax is not plainly and grossly oppressive in amount. *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178. The court also answered the argument that the tax was unreasonable on account of certain exemptions, by declaring that the cost of administering smaller estates is proportionately greater than that in administering large ones, and this operated to diminish amounts received, and furthermore, that the laws of the different states and nations which levied taxes on devises, legacies, and inheritances have usually made exemptions, but that it was peculiarly within the discretion of the legislature to determine what exemptions should be made, and apportioning the burdens of taxation among those who can best bear them. In *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 682, the court said that it was within the province of the legislature to say who shall and who shall not take an estate, and the proportion in which they may take, and that the state was not prevented from exacting an excise or duty from the person for taking the privilege allowed by the state. "It is necessary," said the court, "to make such excise uniform as to the entire class of collaterals. It must not tax one and exempt another in the same

class. But it is not a violation of this principle to require an excise from all collaterals and strangers, and exempt from the excise classes nearer in blood to the decedent."

Provision is made in the statute for notice, to the person whose right is liable for the payment of the tax, of the proceeding affecting his interests; and opportunity is given him to be heard in relation to the value of his property, and in the amount of the tax to be imposed. Considering all these matters, we find nothing in the statute violative of the uniformity and equality clauses of the Constitution; and we are unable to see how, in this respect, it denies to persons within Montana the equal protection of the laws, or takes property without due process of law. *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502.

Thus far, we find ourselves in accord with the opinion of the district judge. But, after painstaking investigation and careful deliberation, we have concluded that he was in error in ruling that, as applied to an estate remaining undistributed when the act took effect, it disturbed and lessened vested rights. It is argued that at the moment of the testator's death the rights of the legatees and devisees vested. By our statutes, testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death (Civ. Code, § 1794); and real and personal property of one who dies without disposing of it by will, pass to the heirs of the intestate, subject to the control of the district court, and to the possession of the administrator for the purposes of administration. We believe that the privileges and rights of heirs and legatees to take and receive shares of the property of a decedent are vested immediately upon the death of the testator or intestate. That the right to a distributive share in an estate vests in those entitled, directly upon the death of the intestate, is well established. *Croswell, Exrs. & Admsrs.* p. 396; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160; *Davis v. Newton*, 6 Met. 537. Chief Justice Shaw said in this last case: "The decree does not found the right, but judicially ascertains the heir, the whole amount to be distributed, and the amount of the distributive share of each. This distributive share, therefore, though its amount was uncertain and the time of payment contingent, was a vested property in the insolvent, at the time of the decease of his brother Henry." Such a right is a valuable one. It may be sold or mortgaged by the person to whom it belongs, and no law can be so changed as to justly deprive him of it, and bestow it upon another, without the owner's consent. It is also true that, after a testator's death, rights of legatees are entitled to every safeguard usually afforded by the state for the protection of individual rights. *Cooley, Const. Lim.* p. 439. But, notwithstanding these truths, a person may not apply, as "a shield of protection," the term "vested rights," against all considerations designed by the legislature to promote the general welfare, or establish an advanced public policy for the state. Judge Cooley (p. 437, *Const. Lim.*), says: "In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid

and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights, in any legal sense." A vested right is held subject to the laws for the enforcement of public duties. Why, on a similar principle, is a right to take a legacy not subject to the laws for the assessment and collection of a tax, as a premium upon the right and privilege to receive the inheritance, as much as it is subject to laws which authorize the taxation of the very property bequeathed? It cannot be denied that the tax is imposed for public uses and purposes. The whole state, including these legatees, have an interest in the collection of taxes for state purposes. Protection is guaranteed by the state, not alone to the property of the decedent and to those who are justly entitled thereto, but also to the right to receive the property by affording to those enjoying that right means to determine its extent, and enforce the same when determined, to the end that it shall accrue absolutely to them, freed from the control of an administrator or executor. As a correlative proposition, the state has power to demand of those upon whom it confers the right, and to whom it affords this measure of protection, a tax to help sustain its protection. In *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, the general proposition was laid down that whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary course of justice, with notice to the person, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. Now, clearly, it is not obnoxious to the Constitution to lay a tax on the right to take, even where such right is vested while the estate is subject to the control of the district court to ascertain the exact value of the right, and the possession of an executor for purposes of administration. It is this important restriction to the vested right which respondent seems to have overlooked in the case. The acts of administration are conservatory means directed by the state to ascertain those vested rights. But, although vested, the rights of the legatees "are subordinate to the conditions, formalities, and administrative control prescribed by the state in the interests of its public order and are irrevocably established upon its abdication of this control, at the period of distribution." *Carpenter v. Pennsylvania*, 58 U. S. 17 How. 456, 15 L. ed. 127; *Oyon's Succession*, 6 Rob. (La.) 504, 41 Am. Dec. 274; *Deyraud's*

Succession, 9 Rob. (La.) 357. Nor is there anything in the Federal or state Constitutions which prevents the state, during this period of administration and control, from imposing and collecting the tax upon the vested right to receive, before the legatee has actually received under a decree of distribution. The interests vested only in the manner and upon the conditions authorized by the laws of the state (*Prevost v. Greenauz*, 60 U. S. 19 How. 1, 15 L. ed. 572); and the imposition of an inheritance tax, though made as a condition for the taking of the inheritance after the right to take was vested, yet before the taking, does not impair the value of the right in any greater manner than the imposition of a rate of taxation greater after an interest vested than before would impair the value of the property itself. The inherent power of the statute gives it the right to lay the tax. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616. The statute is but an exercise and declaration of that power; and, when the rights of legatee vested (that is, at the death of the testator), the right of the state to tax in any reasonable manner it saw fit simultaneously arose. *Arnaud v. His Executor*, 3 La. 336. In *Re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, the court of appeals aided in its conclusions by exceptionally able briefs and arguments, published in the report cited, trace the origin of inheritance taxes, and expressly decide that the imposition and collection of such taxes are simply incidents in the final settlement and adjustment of the estates. It follows that, as final settlements are made by an administrator, they are acts in the course of administration, and the imposition of the tax but an item or incident therein. In announcing the doctrine of the constitutionality of such a tax, and the power of the legislature over the subject of taxation, Judge Earl, speaking for the court in the case just cited, said: "We entertain no doubt that such a tax can be constitutionally imposed. The power of the legislature over the subject of taxation, except as limited by constitutional restrictions, is unbounded. It is for that body, in the exercise of its discretion, to select the objects of taxation. It may impose all the taxes upon lands, or all upon personal property, or all upon houses or upon incomes. It may raise revenue by capitation taxes, by special taxes upon carriages, horses, servants, dogs, franchises, and upon every species of property, and upon all kinds of business and trades. *People, Griffin, v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *People v. Equitable Trust Co.* 96 N. 89 L. R. A.

Y. 387; *Portland Bank v. Apthorp*, 12 Mass. 252; *Cooley, Taxn.* § 7. Taxes upon legacies and inheritances have been approved generally by writers upon political economy and systems of taxation, and no tax can be less burdensome and interfere less with the productive and industrial agencies of society. Such taxes were imposed in Rome two thousand years ago, and are now imposed in England and several of the continental countries of Europe, and in the states of Pennsylvania, Maryland, and Virginia, and perhaps other states of this country." To this list of states may now be added Tennessee, Massachusetts, Maine, New Jersey, West Virginia, and others. And upon the powers of taxation we quote the following language of Justice Miller in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616: "It is said that plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids this, or which forbids unequal taxation by the states. If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the supreme court of Louisiana in being unable to discover such a contract."

Possible consequences and difficulties in executing the act in certain cases, where death occurred prior to the enactment of the law, and where the estates of such persons have not been ordered to be distributed, are advanced by way of argument. While we doubt whether many embarrassments will ensue, yet, if they do, it cannot affect the constitutionality of the act upon all estates brought within its provisions. Our consideration has been addressed to the question of the power of the legislature to provide for such a tax, and to impose it upon the right to take estates not distributed. Whether or not the power has been expediently exercised is not for the court to decide. In conclusion, our judgment is that the act is constitutional and valid, as affecting the estate involved in this case, and that the lower court erred in holding otherwise.

The judgment is reversed, and the case is remanded with instructions to overrule the demurrer and motion of the respondent, and grant respondent leave to answer.

Pemberton, Ch. J., and Buck, J., concur.

Rehearing denied December, 13, 1897.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Fred L. CLAYTON, *Appt.*,

v.

John S. HEBB.

(42 U. S. App. 477, 80 Fed. Rep. 568.)

Placing 85 tons of coal as ballast in the hold of a vessel of 700 or 800 tons' burden which is loaded with lumber does not bring her within the provisions of the Maryland law, ex-

empting from pilot fees vessels laden in whole or in part with coal or coke mined in the United States.

(May 5, 1897.)

A PPEAL by defendant from a decree of the District Court of the United States for the District of Maryland in favor of libellant in a libel to enforce payment of pilot fees. *Affirmed.*

NOTE.—*Liability of vessel or owner for compulsory pilotage fees.*

- I. What constitutes compulsory pilotage.
- II. Consideration and construction of provisions for.
 - a. Generally.
 - b. Exemptions.
- III. Effect of constitutional restrictions.
- IV. Effect of national prohibition against discrimination.
- V. Effect of national provision for waters between states.
- VI. Effect of Federal licenses and license laws.
- VII. Conditions of liability.
 - a. Necessary qualifications of pilot.
 - b. Tender of services.
 - c. Refusal of services tendered.
 - d. First pilot offering.
 - e. Proper destination.
- VIII. Outward bound pilotage.
- IX. To whom and what the liability attaches.
- X. The amount or rate.

I. What constitutes compulsory pilotage.

Compulsory pilotage may be said to be a system of pilotage in which it is made by law the duty of a vessel approaching or about to leave a harbor to employ or pay a pilot.

Thus, 3 N. Y. Rev. Stat. 7th ed. pp. 2017, 2019, 2020, providing that vessels from foreign ports shall take a licensed pilot, or, in case of refusal, pay full pilotage, and making it a misdemeanor to pilot vessels without a license, and providing that the pilot who brought in a ship has the right, unless complaint has been made, to take her out, and in case of complaint that the commissioners shall assign another pilot,—creates a system of compulsory pilotage. *Homer Rameadell Transp. Co. v. Compagnie Générale Transatlantique*, 68 Fed. Rep. 845.

The question as to when and under what circumstances pilotage is compulsory has frequently arisen and been extensively discussed in connection with collisions and other causes of damage happening while the vessel causing them was in charge of a pilot, under the doctrine that if the employment of the pilot is compulsory he is not the agent of the master or owner, and they are not responsible for his acts; but as these cases do not involve the liability of the vessel or owner for the fees, they have been omitted from this note.

The term "compulsory pilotage," as used with reference to fees, is usually applied to fees required by law to be paid when services are tendered but refused and no services are rendered.

In *Smith v. The Creole*, 2 Wall. Jr. 485, however, it was held that Pennsylvania pilot act of March 23, 1803, requiring vessels going out or coming in to the port of Philadelphia to receive a pilot or forfeit half pilotage, making it a lien upon the vessel and recoverable in admiralty, is not compulsory, and a ship need not take a pilot if it prefers to pay the penalty or forfeiture.

The master of a vessel may usually pilot his own vessel into harbor, subject only to liability for the 39 L. R. A.

payment of pilotage fees when a pilot seasonably offers his services; and if no such offer is made, he may employ any other person to pilot his vessel in without incurring any penalty therefor. *Com. v. Ricketson*, 5 Met. 412.

It will be seen, however, by examination of the cases herein set forth, that many of the English statutes, and some of those of the American states, impose a penalty upon anyone not a duly licensed pilot who pilots a vessel into or out of a harbor, some of them including the master of the vessel within the prohibition.

II. Consideration and construction of provisions for.

a. Generally.

A right to compulsory pilotage is not founded on the principles of the common law, and can be established only by statute. *Winslow v. Prince*, 6 Cush. 368.

And the right to pilotage fees for services tendered but not accepted cannot be exercised in the absence of express statutory authority. *Winslow v. Prince*, 6 Cush. 368.

Provisions for half pilotage in case of the refusal of the services of a pilot, however, are an essential and necessary part of every system of pilotage. *Ex parte McNiel*, 80 U. S. 13 Wall. 236, 20 L. ed. 624.

And an act providing that the pilot who shall first offer himself to any vessel (shall be entitled to take charge thereof imposes on the vessel a corresponding obligation to allow the exercise of such right by the pilot. *The Lord Clive*, 110 Fed. Rep. 185.

A right to half pilotage fees in case a vessel declines the offered services of a pilot, given by statute, is a right to compensation for the exertion and labor of the pilot and the expense and risk incurred by him in placing himself in a position to render the services offered, and is in the nature of a quasi contract; and where such right is so far perfected that nothing remains to be done by the party asserting it the repeal of the statute upon which it depends, does not affect it, nor an action for its enforcement. *Pacific Mail S. S. Co. v. Joliffe*, 69 U. S. 2 Wall. 450, 17 L. ed. 805.

The consideration for half pilotage authorized by such a pilotage law is the exertion of the pilot to reach the vessel for the purpose of placing his knowledge and skill at her disposal, and the liability of the vessel attaches according to the general rule of the maritime law by which the vessel herself is held responsible, and the presence or absence of a provision for a lien in the statutes of a state does not affect the question. *The Kalmar*, 10 Ben. 242.

Thus, the services provided for by La. act of 1857, § 18, providing for half pilotage in case of refusal of tendered services, are performed indirectly, and the master and warden are as much entitled to be paid for them as if they were done directly. *New Orleans Port Wardens v. The Martha J. Ward*, 14 La. Ann. 289.

And the Pennsylvania statute of March 2, 1803, providing that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master

Before *Goff* and *Simonton*, Circuit Judges, and *Brawley*, District Judge.

The facts are stated in the opinion.

Mr. Robert H. Smith, for appellant:

The bark "Edmund Phinney" was an American vessel. When she sailed from Baltimore on the voyage in question she had on board as part of her cargo 25 tons of coal mined in the

state of Maryland. This coal was in fact a part of her cargo.

The legislature of Maryland had two objects in view in passing that law. *viz.*: first to remove a burden from American vessels, and, second, to encourage the coal industry of the port of Baltimore.

The first of these objects was accomplished by

warden of the pilots, for the use of the Society for the Relief of Distressed and Decayed Pilots and Their Widows and Children, one half the regular amount of pilotage, is an appropriate part of a general system of regulations on this subject, and cannot be considered as a covert attempt to legislate upon another subject under cover of the subject of pilotage. *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 314, 13 L. ed. 1002.

So, the payment of pilotage fees by a master of a vessel who has declined an authorized pilot's seasonable offer of services and employed an unauthorized person to pilot his vessel in is not the payment of a penalty. *Com. v. Ricketson*, 5 Met. 412.

The laws respecting pilotage are to be classed under the head of maritime law, pilotage being a subordinate, but highly useful, branch thereof; and statutory provisions with relation thereto are entitled to a liberal construction in order to give full efficiency to laws especially designed to promote the interest of commerce, and to protect the lives and property of the citizens engaged in it. *Smith v. Swift*, 8 Met. 329.

And the pilotage act of New York of 1853, chap. 467, and the act of 1857, amendatory thereof, are in the nature of a public regulation for the protection of life and property which might be endangered for want of proper precaution in navigating vessels entering the harbor of New York, and is to be liberally and beneficially construed. *Gillespie v. Winberg*, 4 Daly, 318.

And the fact that it was in the summer, and that the weather was fair, that the ship's master was competent to and did bring his vessel over the bar in safety, does not affect his liability to pay the usual rates of pilotage upon refusal to receive a pilot on board under the act of assembly of North Carolina providing for such payment. *Gerrish v. Johnson*, 1 Jones, L. 336.

So, whether or not a port is a good and safe harbor does not affect the question of the liability of a vessel for half pilotage for refusal to accept the services of a pilot tendered, where the vessel was bound to such port and discharged her cargo therein. *Weldt v. The Howden*, 30 Fed. Rep. 877.

And the necessity imposed upon a vessel by statute to take a pilot for the security of life and property brings the case within the exception to the Lord's Day act, and it is no defense to an action for compulsory pilotage that the services of a pilot were offered on Sunday. *Perkins v. O'Mahoney*, 181 Mass. 548.

And the fact that certain pilots pooled their earnings and divided them after paying out certain agreed items of expense does not affect the right of a pilot to recover pilotage fees where the statute provides that a fee shall be paid to the pilot first speaking the vessel, and there is no proof that as among themselves they agreed to become partners. *The Pirate*, 32 Fed. Rep. 496.

So, Pennsylvania act March 23, 1803, providing a system of pilotage, and that if a vessel refuses or neglects to receive a pilot duly qualified, the master, owner, or consignee shall forfeit to the master warden a sum equal to the half pilotage of the ship or vessel, to the use of the Society for the Relief of Distressed and Decayed Pilots, is not repealed by act March 24, 1851, providing that upon refusal of a licensed coasting vessel to take a pilot the master or owner or consignee shall forfeit half pilotage, 39 L. R. A.

and if the vessel be not licensed he shall forfeit full pilotage, the latter act being of no effect except to increase the penalty for refusal. *The Lord Clive*, 10 Fed. Rep. 135.

And the master of a schooner is subject to the penalty of \$50 for refusing to take a pilot under Mass. act 1829, chap. 2, subjecting a person to such penalty who shall undertake to pilot any vessel into the harbor of Boston without having first obtained a commission or a branch pilot, notwithstanding the fact that his vessel drew less than 9 feet of water, and the fact that by a former act vessels drawing less than 9 feet of water were not obliged to take pilots, as the act of 1829 extends to all vessels except such as are therein particularly excepted, without regard to their draft of water. *Hunt v. Card*, 14 Pick. 185.

And South Carolina act 1878, § 16, imposing penalties for entering port without a pilot or a signal for a pilot, and upon any person not a duly licensed pilot who shall bring in any such vessel, applies to masters of vessels bringing in their own vessels without a pilot, as well as to persons acting as pilots without a regular license. *State v. Penny*, 19 S. C. 218.

So, in *Kemler v. Blanchard*, 2 W. Bl. 690, 5 Burr. 2602, it was held that the master of a vessel is liable for navigating her within water covered by 3 Geo. I. chap. 18, imposing a penalty upon any person navigating a vessel not being a duly licensed pilot.

But the master of a vessel navigating her himself as pilot after a duly licensed pilot has offered his services is not liable to the penalty imposed by 6 Geo. IV. chap. 125, § 70, upon every person assuming or continuing in charge or conduct of any vessel without being a duly licensed pilot, as navigation of a vessel by the master is specially provided for by § 58 of that act. *Beilby v. Shepherd*, 3 Exch. 40, 18 L. J. Exch. N. S. 73.

In that case *Kemler v. Blanchard*, 2 W. Bl. 690, 5 Burr. 2602, *supra*, was distinguished upon the ground that the action there was founded on 3 Geo. I. chap. 18, in which there was no special provision for a case of pilotage by the master.

So, 6 Geo. IV. chap. 125, § 62, providing that the provisions thereof with relation to compulsory pilotage are not to be construed so as to subject to any penalty for nonemployment of pilots the master or mate of any vessel being the owner or part owner thereof and residing at Dover, Deal, or the Isle of Thanet, for conducting or piloting his own ship or vessel from any of the places located up or down the rivers Thames or Medway, extend only to protect such masters as navigate ships from the places so mentioned in the act. *Peake v. Screech*, 14 L. J. Q. B. N. S. 317, 7 Q. B. 608; *Williams v. Newton*, 14 Mees. & W. 747, 15 L. J. Exch. N. S. 11.

And in *King v. Lambe*, 5 T. R. 76, it was held that 5 Geo. II. chap. 20, inflicting the penalty of £20 on persons piloting ships down the Thames, etc., only extends to vessels sailing on foreign voyages, and not to those which, having performed their voyages, were steered from one wharf to another on the river for the purpose of unloading their cargo.

And the same was held in *King v. Neale*, 8 T. R. 241.

To justify a recovery of a claim for pilotage offered and refused, however, the court must be

exempting vessels which had previously been burdened with pilotage charges from such charges when they were laden not only "in whole" but also "in part" with coke or coal. The second object was accomplished by encouraging vessels to carry coal (the mining and shipping of which are important industries in the state of Maryland) from the port of Balti-

fully satisfied that the vessel refused or neglected to take a pilot as provided by the statute. *The Talisman*, 28 Fed. Rep. 111.

And the fact that a pilot left the vessel he was piloting without written permission from the master, as required by the rules and regulations of the master and wardens of the port of New York, does not destroy his right to compensation provided he left a competent substitute on board who was able to perform his duties; but the substitute must be a person who is himself a branch or deputy pilot. *Shepherd v. Mitchell*, 10 Johns. 112.

And that a pilot did not immediately upon going on board a vessel ascertain the situation of the ship and cause an entry thereof to be made in the log book, according to the rules and regulations of the master and wardens of the port of New York, cannot take away the right of the pilot against the ship owner to compensation, and the situation of the ship, being a matter of fact, may be proved in an action for such compensation by parol. *Shepherd v. Mitchell*, 10 Johns. 112.

b. Exemptions.

The exemption of American vessels engaged in the Pennsylvania coal trade from the necessity of paying half pilotage for refusal to accept the services of a pilot, provided for by Pa. laws March 3, 1868, is a fair exercise of legislative discretion acting upon the subject of the regulation of the pilotage of the port of Philadelphia. *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 314, 13 L. ed. 1002.

So, a registered vessel bound from the port of Boston to Alexandria, from whence she was destined to and actually went upon a foreign voyage, should be considered as a coasting vessel within the meaning of the Massachusetts statute exempting coasting vessels from compulsory pilotage. *Tilley v. Farrow*, 14 Mass. 17.

And a vessel properly documented, sailing from Philadelphia to Boston with a cargo of coal duly cleared with bills of lading signed and delivered, is regularly employed in the coasting trade within the meaning of Mass. Stat. 1873, chap. 281, § 1, authorizing vessels engaged in such trade to decline the services of a pilot, and exempting them from compulsory pilotage, though she sailed under a register and not under a coasting license, and though she had not been continuously or generally so employed. *Wilson v. Gray*, 127 Mass. 98.

And a vessel regularly and properly documented, which had been continuously employed for about seven years in carrying coal for various persons from Philadelphia to New York and other ports along the coast of the United States, and chiefly employed by the charterer in carrying its coal from its depot in Philadelphia to various depots of that company at other ports, transporting a cargo of coal from such depot to the charterer in Newburyport for sale there in the regular course of its business, is engaged in the coasting trade within the meaning of Mass. Pub. Stat. chap. 70, § 22, exempting vessels regularly employed in the coasting trade from compulsory pilotage. *Chase v. Philadelphia & R. R. Co.* 126 Mass. 347.

So, a British vessel engaged in the plaster trade between Nova Scotia and Boston is not obliged to take a pilot into the harbor of Boston, and is not liable for refusal to do so, as the statutes of Massa-

chusetts exempt American vessels engaged in the plaster trade, and British and American vessels are by treaty and commercial arrangement between Great Britain and the United States placed upon the same footing with each other. *Hunt v. Card*, 14 Pick. 135.

If it had been the intention of the legislature to require the vessel which was to have the benefit of this exemption to carry any definite quantity of coal or any fixed proportionate part of her cargo of coal, it would have so provided by its legislation.

But an Irish vessel with a general cargo, trading between Belfast and London and not laden with corn or grain as specified in 46 Geo. III. chap. 97, § 2, cannot be considered as a coasting vessel or an Irish trader using the navigation of the river Thames, as a coaster, within the meaning of 52 Geo. III. chap. 39, § 2, and is not exempted from the duty of taking a pilot on board. *Devson v. McKibben*, 6 J. B. Moore, 387, 3 Brod. & B. 112.

For construction of exemption of vessels laden with lumber, see *CLAYTON v. HEBB*. Coasting vessels, however, are not bound to take pilots on board on entering rivers within the limits of a jurisdiction having authority to appoint and license pilots, and the exemption in 52 Geo. III. chap. 39, is not confined to coasters navigating the Thames alone. *Usher v. Lyon*, 2 Price, 118.

And the merchant's shipping act of 1854, § 379, exempting ships not carrying passengers employed in the coasting trade from compulsory pilotage in Trinity House export districts, which by § 370 thereof includes any pilotage district for the appointment of pilots within which no particular provision is made by law, is not repealed or overridden by the Ipswich dock act of 1852 (15 Vict. chap. 116, § 91), requiring the corporation of Trinity House to appoint commissioners resident within the port of Ipswich to examine and certify pilots; and the master of a ship not carrying passengers employed in the coasting trade within the district is not liable for compulsory pilotage upon refusing to take a pilot. *Hadgraft v. Hewith*, L. R. 10 Q. B. 360, 44 L. J. M. C. N. S. 140, 32 L. T. N. S. 720, 23 Week. Rep. 911.

But a steam tug carrying passengers between two places, both of which are within the provisions of the Dublin port and dock act of 1869, is within the merchant's shipping act (17 & 18 Vict. chap. 104), providing that certain vessels in such case must take a pilot, imposing a penalty upon the master for failure to do so. *Dublin Port & Docks Board v. Shannon*, Ir. Rep. 7 C. L. 116.

All exemptions from compulsory pilotage existing immediately before the time that act went into operation are continued by the merchant's shipping act of 1854 (17 & 18 Vict. chap. 104, § 368), and a vessel carrying passengers proceeding on her outward voyage to the Baltic is not liable for compulsory pilotage for refusal to allow a duly qualified pilot to take charge at Gravesend. *Stanton v. Banks*, 4 Jur. N. S. 10, 382, 8 El. & Bl. 445, 27 L. J. M. C. N. S. 105.

As to constitutionality of exemption of certain vessels, see *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 314, 13 L. ed. 1002, *infra*, III.

As to exemptions within the Federal prohibition against discrimination, see *supra*, IV.

III. Effect of constitutional restrictions.

A law requiring ships to pay half pilotage in case of refusal of offered services of a pilot is not unconstitutional. *Collins v. Society for Relief of Distressed & Decayed Pilots*, 73 Pa. 194.

A state statute regulating the modes and times

Alexander v. Worthington, 5 Md. 485; *Sutherland*, Stat. Constr. § 286.

If the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation.

Sutherland, Stat. Constr. § 287; *Wilson v.*

of offering and rendering their services by pilots and the compensation they may demand constitutes a regulation of commerce within the grant to Congress of the commercial power contained in the 8d clause of the 8th section of the 1st article of the Constitution of the United States, but such power is not in its nature national, admitting only of one uniform system or plan of regulation, and such state regulation is not therefore repugnant to such constitutional provision where Congress has not found it necessary to exert its power upon the subject. *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 300, 13 L. ed. 996.

Power to regulate pilots and pilotage is concurrent in the state and national governments until exercised by the latter, and is not therefore granted by Congress to the states, but may be exercised by the later until appropriated by the former. *The Panama*, Deady, 27.

And state pilotage laws regulating pilots and providing for their compensation, and entitling them to half fees when their services are refused, though subject to the power of Congress over the matter, are valid, and not in conflict with the provisions of the United States Constitution conferring upon Congress the power to regulate commerce. *Ex parte McNiel*, 80 U. S. 13 Wall. 236, 20 L. ed. 624.

So, a state statute regulating the modes and times of offering and rendering their services by pilots and the compensation they may demand, passed previous to the act of Congress of August 7, 1790, providing that all pilots, in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the state respectively, wherein such pilots may be, might be held to have been adopted by Congress and thus made a law of the United States. *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 312, 13 L. ed. 1001, *dictum*.

See similar doctrine in *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 207, 6 L. ed. 72.

And the fact that Congress has legislated on the subject of pilotage by act of March 2, 1837, with relation to waters which are the boundaries between two states, considered in connection with the act of Congress of August 7, 1790, providing that all pilots in the bays, inlets, rivers, and harbors of the United States shall continue to be regulated in conformity with the existing laws of the states respectively, wherein such pilots may be, manifests an intent upon the part of Congress, with the single exception named, not to regulate this subject, but to leave its regulation to the states, so that a state statute providing for the modes and times of offering and rendering their services by pilots and the compensation they may demand would not be thereby rendered invalid. *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 300, 13 L. ed. 996.

Thus, the pilot laws of the state of New York are valid, and not in conflict with the provisions of the Constitution of the United States conferring power upon Congress to regulate commerce. *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234.

And the New York act of April 15, 1847, and amendments thereto, providing that a pilot who shall first tender his services may demand from the master of any vessel of designated capacity navigating Hell Gate, to whom the tender was made and by whom it was refused, half pilotage though a 39 L. R. A.

Gray, 127 Mass. 98; *Tilley v. Farrow*, 14 Mass. 18; *Chase v. Philadelphia & R. R. Co.* 135 Mass. 847.

Messrs. Stewart Brown, Arthur George Brown, F. W. Brune, and George Stewart Brown, for appellee:

In all known systems of pilotage, provisions for what is called "compulsory pilotage" are

regulation of commerce, is not in conflict with the provision of the United States Constitution conferring power to regulate commerce upon Congress, as the power to regulate pilotage is one which may be exercised concurrently and independently by both state and nation, and may be exercised by the states until Congress shall see fit to act upon the subject. *Ex parte McNiel*, 80 U. S. 13 Wall. 236, 20 L. ed. 624.

So, the act of California of May 20, 1861, providing that when the services of a pilot are refused he shall be entitled to one half pilotage fees, is not in conflict with the provision of the United States Constitution conferring upon Congress the power to regulate commerce, as such power does not exclude the exercise of authority by the states to regulate pilots. *Pacific Mail S. S. Co. v. Joliffe*, 69 U. S. 2 Wall. 450, 17 L. ed. 805.

And Louisiana act of 1865, with relation to the board of master and port wardens, providing for the payment for services actually rendered or the tender of such services by pilots, is not a violation of the commercial clause of the United States Constitution. *New Orleans Port Wardens v. The Martha J. Ward*, 14 La. Ann. 289.

And in *New Orleans Port Wardens v. Prats*, 10 Rob. (La.) 480, it was said that the constitutionality of the Louisiana act of 1806, which first allowed fees to the master and warden, has never been questioned, although they have been claimed for forty years.

So, the fees allowed to the master and warden of a port for piloting vessels, or for offer of services which is refused, are not impost or duties on imports or exports within the meaning of the prohibition against the levying thereof by the states contained in the Constitution of the United States. *New Orleans Port Wardens v. The Martha J. Ward*, 14 La. Ann. 289; *State v. Penny*, 19 S. C. 218.

And the Pennsylvania law of March 2, 1803, providing that a vessel which neglects or refuses to take a pilot shall forfeit one half the regular amount of pilotage, exempting American vessels engaged in the Pennsylvania coal trade, is not repugnant to the 5th clause of the 9th section of the 1st article of the Constitution of the United States, providing that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, and that vessels to or from one state shall not be obliged to enter, clear, or pay duties to another, as pilotage fees are not duties, and the requirement of the payment of pilotage fees does not constitute a preference. *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 314, 13 L. ed. 1002.

And half pilotage under the California act of 1863, providing that all vessels arriving at or leaving a designated port shall receive only half of the rates provided for by full pilotage when a vessel is spoken and the services of the pilot are refused, which shall go to the pilot first offering his services, is not a toll in the sense of the Constitution, but merely a compensation dependent upon the rendering of certain services and the discharge of certain duties incident to the office of pilot. *Harrison v. Green*, 18 Cal. 94.

And the Pennsylvania act of March 2, 1803, providing that a vessel which neglects or refuses to take a pilot shall forfeit one half of the regular amount of pilotage, is not in conflict with the 2d

to be found, and as such requirements are upheld by the courts as "necessary and usual parts of every such system."

Ex parte McNiel, 80 U. S. 13 Wall. 236, 20 L. ed. 624.

They do not constitute "a burden on commerce, but are for its benefit and safety."

Smith v. The Creole, 2 Wall. Jr. 485.

and 3d clauses of the 10th section of the 1st article of the Constitution of the United States, which prohibits the state without the assent of Congress from laying any imposts or duties on exports or imports or tonage, as this provision of the Constitution was intended to operate upon subjects actually existing. *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 314, 13 L. ed. 1002.

So, Pa. act March 2, 1873, providing that a vessel which neglects or refuses to take a pilot shall forfeit one half the regular amount of pilotage, exempting American vessels engaged in the Pennsylvania coal trade, is not repugnant to the 1st clause of the 8th section of the 1st article of the Constitution of the United States declaring that all duties and imposts and excises shall be uniform throughout the United States, as pilotage is not a duty, impost, or excise requiring uniformity. *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 300, 13 L. ed. 996.

And Ga. Code, § 1512, providing for compulsory pilotage, but exempting from its operation coasters of that state, and between the ports thereof, and those of South Carolina and Florida, is not repugnant to the 14th Amendment of the Constitution, providing that all citizens of the several states shall be citizens of the United States, and that no state shall make or enforce any law which shall infringe the privileges and immunities of citizens of the United States, and no state shall deny to any person within its jurisdiction the equal protection of the laws. *Thompson v. Sprague*, 59 Ga. 409, 47 Am. Rep. 760.

And Ga. Code, § 1512, providing for compulsory pilotage, but exempting from the operation thereof coasters in that state, and between the ports thereof and those of South Carolina and Florida, is not repugnant to the Constitution of the United States, art. 4, § 2, ¶ 1, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, as it cannot be said by this exception citizens of any state are excluded from owning and employing coasters within the exemption. *Thompson v. Sprague*, 59 Ga. 409, 47 Am. Rep. 760. But see *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, *infra*, IV.

So, La. act 1855, organizing a board of port wardens for the port of New Orleans, which permits them to demand from each vessel arriving from sea the sum of \$5 whether they are called upon to perform any services or not, is not unconstitutional as a charge or duty imposed without regard to a corresponding and equivalent benefit. *New Orleans Port Wardens v. The Charles Morgan*, 14 La. Ann. 602.

And Fla. act March 7, 1879, authorizing the pilot commissioners to determine rates of pilotage which shall be paid by any vessel at their ports, such rate not to be greater than those provided, is not a local law within the meaning of Fla. Const. art. 4, § 18, providing that in designated cases, and in others where a general law can be made applicable, the law shall be general and uniform throughout the state. *The Chase*, 14 Fed. Rep. 854.

So, the right of a pilot who offered his services to a vessel of 100-tons burden passing through Hurlgate near the city of New York, which were refused, under N. Y. act Feb. 19, 1819, providing therefor, will not be defeated by the claim that the

They are not a "tax, impost, or duty."

Cooley v. Philadelphia Port Wardens, 53 U. S. 12 How. 314, 13 L. ed. 1002.

Nor a penalty.

Pacific Mail S. S. Co. v. Joliffe, 69 U. S. 3 Wall. 450, 17 L. ed. 805.

And such laws with respect to such provisions are not in derogation of the common law,

vessel was owned in Boston, and that consequently the law of New York on that subject was unconstitutional, where it does not appear where the vessel was owned. *Nickerson v. Mason*, 13 Wend. 64.

IV. Effect of national prohibition against discrimination.

It is provided by act of Congress (U. S. Rev. Stat. § 4237), that no regulations or provisions shall be adopted by any state which shall make any discrimination in the rates of pilotage or half pilotage between vessels sailing between the ports of one state and vessels sailing between ports of different states, or against national vessels of the United States.

This statute is constitutional and valid under the clause of the National Constitution authorizing Congress to regulate commerce between the states. *Freeman v. The Undaunted*, 37 Fed. Rep. 662.

And Cal. Pol. Code, § 2468, exempting from all charges for pilotage unless a pilot be actually employed all vessels coasting between San Francisco and any port in Oregon or Washington or Alaska territories, and by vessels coasting between ports of the state, is invalid for discrimination within the meaning of that statute. *Freeman v. The Undaunted*, 37 Fed. Rep. 662.

And a vessel sailing from San Francisco to New York around Cape Horn is a coasting vessel sailing between the ports of different states within the meaning thereof. *Freeman v. The Undaunted*, 37 Fed. Rep. 662.

And Cal. Pol. Code, tit. 6, chap. 1, art. 6, §§ 2466, 2468, providing a system of pilotage and half pilotage, but exempting vessels engaged in the whaling or fishing trade and all vessels coasting between San Francisco and any port in Oregon or Washington or Alaska territories, and all vessels coasting between the ports of the state, conflicts with the provisions of that statute, and are invalid so far as they relate to coasting vessels, but may be enforced so far as they relate to vessels engaged in foreign trade. *The Alameda*, 31 Fed. Rep. 366.

But the exemption under Cal. Pol. Code, § 2468, of certain coasting vessels from the charge of half pilotage does not have the effect of bringing the whole system of regulations for half pilotage prescribed by Cal. Pol. Code, § 2466, providing for a system of pilotage and half pilotage, and exempting vessels engaged in the whaling or fishing trade, within the inhibition of that statute; § 2466 being left intact, while § 2468 is invalid so far as it conflicts with the Federal prohibition. *The Alameda v. Neal*, 32 Fed. Rep. 331.

In that case *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, was distinguished upon the ground that in that case it was sought to charge a coasting vessel which was exempted from pilot charges by the Code of Georgia, while here it is sought to exempt from such charges a vessel engaged in foreign commerce, because of an exemption in favor of certain coasting vessels contained in an independent section.

So, Georgia Code, § 1512, providing that any person, master, or commander of a ship or vessel bearing toward any of the harbors of that state who refuses to receive a pilot on board shall be liable to the first pilot offering his services outside of the bar for the full rate of pilotage, excepting from

but "are entitled to a liberal construction, in order to give full efficiency to laws especially designed to promote the interest of commerce, and to protect the lives and property of the citizens engaged in it."

Smith v. Swift, 8 Met. 832.

Looking to the general purpose and policy of the pilot act, it should receive every reason-

able intendment in its favor, and provisions for exemption from its operation, and not the general law itself should be strictly construed.

Ross v. Duval, 88 U. S. 13 Pet. 61, 10 L. ed. 59.

All statutes must be construed by reference to their effect upon the particular subject-matter to which they relate.

its operation coasters in that state and between the ports of that state and other designated states, is invalid because of such discrimination, as in conflict with the Federal prohibition. *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, reversing *Thompson v. Sprague*, 69 Ga. 409, 47 Am. Rep. 760.

But South Carolina act 1878, prescribing a system of pilotage for the ports of that state, requiring the employment of licensed pilots and establishing the fees to be paid them by incoming and outgoing vessels, is not invalid as conflicting with U. S. Rev. Stat. § 4237, prohibiting discrimination. *State v. Penny*, 19 S. C. 218.

V. Effect of national provision for waters between states.

By act March 2, 1837, Congress provided that it shall be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states to employ any pilot duly licensed or authorized by the laws of either.

Within this provision a state may license pilots and provide regulations for their government and employment, but she cannot exclude others duly licensed elsewhere from employment on the public waters of the nation because these waters happen to be within her territorial limits, and a law designed for that purpose, or which contemplates an exclusive jurisdiction over the subject of water within the limits of the state by requiring any person exercising the profession of a pilot thereon to apply to a board of commissioners of that state for a license to entitle him to do so, is inoperative and void. *The Clymene*, 9 Fed. Rep. 164.

And a pilot duly licensed under a statute of the state of Delaware, who pilots a vessel from the entrance of Delaware bay into the port of Philadelphia, is not deprived of his right to compensation for his services by the fact that a statute exists in Pennsylvania prohibiting anyone from acting as pilot in Delaware river or bay without a license from a Pennsylvania board. *The Clymene*, 9 Fed. Rep. 164, 12 Fed. Rep. 346.

And a claim for half pilotage by a duly licensed pilot, against a vessel to which he tenders his services to bring her into the port of Philadelphia, under the Delaware statute providing therefor, is not affected by the fact that the laws of Pennsylvania exempt all vessels from the obligation to take a pilot after they have crossed a designated line. *The Alzona*, 14 Fed. Rep. 174.

So, a vessel at Astoria bound up the Columbia river is on pilotage ground subject to the laws of both Oregon and Washington, and may under the act of Congress of March 2, 1837, take a pilot from either state after declining the services of one from the other without being liable for half pilotage under a state law of the latter. *The Glencarne*, 7 Sawy. 200, 7 Fed. Rep. 604.

The state of Oregon and the territory of Washington have equal powers over the subject of pilots and pilotage on Columbia river, and either may appoint pilots for the river and prescribe their duties and compensation without reference to whether the business or commerce in which they are engaged pertains to Oregon or Washington, and neither can require that the legislation of the other shall conform to its own. *The Alcalde*, 30 Fed. Rep. 133.

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The Columbia river is the boundary between two states, Oregon and Washington, within the purpose and spirit of U. S. Rev. Stat. § 4236, prohibiting discrimination by state laws with relation to pilotage on such waters, and the state of Oregon cannot require a vessel bound in or out of said river to take an Oregon pilot or pay half or any pilotage if the master thereof prefers and does take a Washington pilot. *The Abercorn*, 28 Fed. Rep. 384; *Neil v. Wilson*, 14 Or. 410.

And a duly licensed Oregon pilot who piloted a vessel over the bar of the Columbia river into Astoria, and tendered his services to pilot her out again to the open sea, which were refused and another pilot licensed for Washington territory engaged, is not entitled to half pilotage because of such refusal under Oregon act of 1882, providing that a pilot who brings a vessel in is entitled to pilot her out when she leaves, and if his offer of services is refused by the master he shall pay half pilotage. *Neil v. Wilson*, 14 Or. 410.

So, Fla. act 1859, § 8, providing that no person shall be authorized or permitted to conduct any vessel into or out of the harbor of Fernandina, unless such person shall have a license from the commissioner of pilotage for that port imposing a penalty for violation thereof, is unconstitutional as contravening that act. *Cribb v. State*, 9 Fla. 409.

And though the waters of Delaware bay and river are not the boundary between Delaware and Pennsylvania, as both states border on them, they come within the purview of the act. *The South Cambria*, 27 Fed. Rep. 525.

So, a vessel refusing to take a New York pilot upon entering New York harbor by way of Sandy Hook is not liable for pilotage as if one had been employed under N. Y. Laws 1853, chap. 469, as amended by N. Y. Laws 1857, chap. 243, where there was a New Jersey pilot on board, as the water constituted the boundary between two states within the meaning of the act of Congress of March 2, 1837, authorizing the employment of pilots licensed by the laws of either state. *Brown v. Elwell*, 60 N. Y. 249.

And a New Jersey pilot piloting in New York waters is authorized to maintain an action for compensation allowed by the statutes of New York by U. S. Rev. Stat. § 4235, authorizing his employment in such waters, and declaring that pilotage shall be regulated by the law of the state where the pilot may be, as such statute adopts the local law and makes it applicable to the New Jersey pilot so employed. *Heardon v. Arkell*, 59 Fed. Rep. 624.

In *Hopkins v. Wyckoff*, 1 Daly, 176, however, it was held that a pilot licensed under the statutes of the state of New Jersey and authorized by Congress to pilot vessels coming in or going out of the port of New York cannot sue for the pilotage fees under the New York pilot act of 1853, as amended by Laws 1854, chap. 196, and 1857, chap. 243, for refusal of the master of a vessel to accept the service of the pilot first offering, the right to recover thereunder being confined to pilots who have been duly licensed under that act.

And the words "licensed pilots" in N. Y. Laws 1853, chap. 469, as amended by Laws 1857, chap. 243, regulating the pilotage of the port of New York, providing that certain designated vessels bound to or from the port of New York shall take a licensed

Maxwell, Interpretation of Statutes, 2d ed. chap. 2, p. 75; *The Cybele*, L. R. 2 Prob. Div. 224, L. R. 3 Prob. Div. 8; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226; *United States v. Kirby*, 74 U. S. 7 Wall. 482, 19 L. ed. 278; *The Winestead* [1895] P. 170.

It is an unreasonable construction to hold

pilot, or, in case of refusal pay pilotage as if one had been employed, to the pilot first offering his services, has been held to refer to pilots who derive their authority from the appointment of the commissioners established by that act, and not to include a New Jersey pilot whose services were offered and refused. *Brown v. Elwell*, 60 N. Y. 249.

But while a state cannot pass laws excluding the duly qualified pilot of adjacent states on the same waters, she may impose such regulation as she deems conducive to the public welfare upon pilots licensed under her own laws. *The William Law*, 14 Fed. Rep. 792.

And a state being sovereign and independent possesses inherent power over every resident citizen to declare what shall be considered a public grievance, provided such declaration does not conflict with the Constitution or any act of Congress passed within the scope of the constitutional power of Congress; and it may legally prohibit one of its citizens residing within its jurisdiction from holding and exercising a license as pilot granted by a sister state or any foreign power, so that fees for pilotage under such a license could not be recovered. *Cribb v. State*, 9 Fla. 409.

And a vessel refusing to take a pilot on waters which constitute a boundary between Delaware and Pennsylvania is liable under the Delaware statute for pilotage where he did not take a Pennsylvania pilot as authorized by the act of Congress of March 2, 1837, but went without a pilot. *The Belle Hooper*, 28 Fed. Rep. 828.

So, the provision of the act of Congress of March 2, 1837, that a vessel upon waters that are the boundary between two states may take a pilot from either, do not apply to a vessel bound on a voyage to Portland after passing the mouth of the Walamet river involving the navigation of that river for a distance of 12 miles within the exclusive jurisdiction of Oregon; and an Oregon pilot offering his services to the vessel to conduct her from Astoria to Portland is entitled to half pilotage under the laws of Oregon, in case of a refusal of his services. *The Glenearne*, 7 Sawy. 200, 7 Fed. Rep. 604.

And the rule that under the act of Congress of 1837 a state has no right to compel vessels passing up Delaware bay and bound to the port of Philadelphia to accept any other pilot than those they see fit to elect does not apply so as to relieve a vessel from payment of compulsory pilotage to a pilot offering his services, where she was not bound to Philadelphia but to a breakwater for orders, so that the whole scope of her action was confined to Delaware waters. *The William Law*, 14 Fed. Rep. 792.

The act of Congress of August 7, 1790, granting the power to states to pass pilot laws, includes territories, so as to authorize services on such waters by a pilot licensed by territorial legislation, and prevent a recovery for services tendered and refused by a pilot authorized under state legislation. *The Panama*, *Deady*, 27.

And the territory of Washington is a state, and the Columbia river is the boundary between two states, within the meaning of the act of Congress of March 2, 1837. *The Abercorn*, 26 Fed. Rep. 877.

And pilots and pilotage are rightful subjects of legislation not inconsistent with the Constitution 89 L. R. A.

that the legislature intended to exempt a vessel carrying a quantity of little value and small compared with her full tonnage.

Goff, Circuit Judge, delivered the opinion of the court:

John S. Hebb, the appellee, filed a libel in the district court of the United States for the

and the laws of the United States, within the meaning of the organization act conferring legislative power upon the territory of Washington. *The Alcalde*, 30 Fed. Rep. 133; *The Panama*, *Deady*, 27.

A vessel going out of a port situated on water constituting the boundary between Washington territory and Oregon, which refuses the services of the pilot which had brought her in, is not liable for half pilotage for such refusal under Oregon act of 1882, on the ground that the act of Congress of March 2, 1837, authorizing the employment of any pilot duly licensed by either state by a vessel coming in or going out of any port situated upon waters which are the boundary between two states does not apply as between a state and territory. *Nell v. Wilson*, 14 Or. 410.

In that case, *supra*, *The William Law*, 14 Fed. Rep. 793, was distinguished upon the ground that in that case the vessel passed over no other territory than that within the jurisdiction of the state of Delaware; and *The Glenearne*, 7 Fed. Rep. 606, was distinguished upon the ground that the vessel in that case was on a voyage which involved the navigation of a river for a distance of 12 miles, which was within the exclusive jurisdiction of the state of Oregon.

VII. Effect of Federal licenses and license laws.

The act of Congress of 1852, with reference to pilots licensed by the United States, is applicable only to the class of pilots attached to particular vessels and charged with the duty of navigating them on the voyage, and does not supersede the authority of the states to regulate pilotage at their own ports for the protection of general commerce, and to require a vessel to take the first pilot offering his services. *Cleco v. Roberts*, 36 N. Y. 232.

And the act of Congress of July 25, 1866, providing that every seagoing vessel subject to the navigation laws of the United States shall when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspector of steam vessels, and the act of February 25, 1867, amendatory thereof, providing that nothing in such acts shall be construed to annul or affect any regulations established by existing state laws, does not annul or abrogate state laws concerning pilots and pilotage in ports and harbors except so far as the latter may conflict or be inconsistent with the former, or prohibit a mere state pilot from piloting a seagoing steamer in the port or elsewhere upon the navigable waters of the United States; if the pilot be licensed by the United States inspectors the act of Congress is satisfied and does not exclude the operation of state laws providing additional regulations upon the subject, and the master of such a vessel may, if he chooses, pilot her in or out, but he is bound notwithstanding to pay a pilot who first offers his services outside of the bar full pilotage, and, if bound out, half pilotage, under a state statute providing therefor. *The George S. Wright*, *Deady*, 561.

And a duly licensed pilot who offered his services to a seagoing vessel, which were refused, cannot be deprived of his right to fees for pilotage on the ground that N. Y. act of 1853, chap. 467, p. 921, with the subsequent act amendatory thereof, was repealed by the act of Congress of July 25, 1866. *Henderson v. Spofford*, 10 Abb. Pr. N. S. 140.

So, a pilot licensed by the United States inspectors under act of Congress July 25, 1866, is not a

district of Maryland against Frederick L. Clayton, agent and consignee of the American bark Edmund Phinney, in a cause of pilotage civil and maritime. He alleged that he was a duly licensed pilot, authorized and competent to pilot vessels of any tonnage and class over the waters of the Chesapeake, to and from the Atlantic Ocean; that the Edmund Phinney was

an American vessel of between 700 and 800 tons burden, registered in the port of Portland, Maine, in the name of J. S. Winslow & Co., as owners, of which Frederick L. Clayton was the agent and consignee in the port of Baltimore; that said vessel, laden with a full cargo of lumber, had cleared and was ready to sail from the port of Baltimore to a foreign port, to wit,

full pilot on pilot grounds within the state of Oregon, and before he is authorized to offer his services to a vessel, and in case of refusal to demand whole or half pilotage as the case may be, he must be qualified under state law. *The George S. Wright, Deady, 591.*

And a license granted at Philadelphia to the master of a steamer as pilot for the Atlantic coast, under the United States Revised Statutes providing for such licenses, expires with the coast voyage of the vessel, and the provision therefor does not annul the Georgia act with relation to pilotage except so far as the coastwise voyage of the steamer is concerned, and does not authorize the navigation from Tybee bar and up the river with all its local difficulties of navigation to a port not on the coast without the aid of a pilot licensed by the United States local inspector for Savannah. *Thompson v. Sprague, 69 Ga. 409, 47 Am. Rep. 760.*

But, a vessel propelled by steam and engaged in carrying passengers is within the class of vessels provided for by acts of Congress of 1852, 1858, and 1848, providing that it shall be unlawful for any person to employ or any person to serve as engineer or pilot on any vessel propelled in whole or in part by steam who is not licensed by the inspector, such act applying to the employment of pilots on steam vessels engaged in carrying passengers throughout the whole voyage and every part of it, so that a person licensed as pilot under a state law, offering his services to pilot the vessel in and out of port, but who was not licensed under the act of 1852, cannot recover compensation where there was on board a pilot licensed under that act. *The Panama, Deady, 27.*

And where a pilot has a license from the United States authorities to pilot within the bar and up the rivers of a state under the provisions of the United States Revised Statutes, no state law can require an additional license and enforce the collection of the fees of a pilot so licensed by the state. *Thompson v. Sprague, 69 Ga. 409, 47 Am. Rep. 760.*

The proviso contained in U. S. Rev. Stat. § 4444, that nothing in this title shall be construed to annul or affect any regulations established by the laws of any state, requiring vessels entering or leaving a port in any such state other than the coastwise steam vessels to take a pilot duly licensed or authorized by the laws of such state or of a state situate upon water of such state, however, does not apply to coastwise steamers whose masters or captains have no license to pilot within the bar and up the rivers of the state on the United States authorities. *Thompson v. Sprague, 69 Ga. 409, 47 Am. Rep. 760.*

A vessel enrolled and licensed in the coasting trade in the manner prescribed by law, and whose license is renewable annually, and which sails from one port of the coast of the United States to another, or which is employed in the whale or coast fisheries, is a coastwise vessel within the meaning of the act of Congress of February 28, 1871, § 51, which is subject only to the navigation laws of the United States, and when in charge of a United States pilot a Sandy Hook pilot licensed under a state law is not entitled to compensation for an offer of services which was refused. *Murray v. Clark, 4 Daly, 468.*

And an exemption of vessels licensed to engage
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in the coasting trade from liability to a fine imposed upon any master or person on board who shall bring a vessel into port without a licensed pilot on board, provided for by N. Y. Laws June 28, 1853, as amended by Laws 1857, chap. 243, applies to vessels which have taken out a coasting license as provided for by the act of Congress, by which their business would be confined exclusively to the coasting trade and it would then be known at sailing that such was their character. *Sturges v. Spofford, 52 Barb. 436.*

And a coastwise sea-sailing vessel, not sailing under register, having a pilot licensed by the United States inspector of steamboats under pay from the commencement of the voyage to be taken on board when necessary, is under the direction and control of such pilot as required by U. S. Rev. Stat. § 4401, and is exempt, under U. S. Rev. Stat. § 4444, from any pilot charges levied by any state, and is not liable upon entering a port of Georgia to pilotage fees under Ga. Code, § 1512, for refusal to take a state pilot. *Sprague v. Thompson, 118 U. S. 90, 30 L. ed. 115.*

So, a vessel owned by a citizen of the United States who was a resident of Maine sailing under a fishing license is not a foreign vessel or vessel under register, which is required to pay half pilotage in case of tender of services by a pilot and refusal under the New York pilotage law. *Weaver v. McLellan, 5 Ben. 79.*

VII. Conditions of Liability.

a. Necessary qualifications of pilot.

To render a vessel liable for compulsory pilotage it would seem, as a general rule, that the pilot must have been duly qualified by law to act as such, and must have possessed and been prepared to produce the evidences of such qualification regular upon their face.

Thus, a vessel is not liable to a pilot for services offered and refused where his license was only signed by two of the three commissioners provided for by law, unless it further appears from the minutes of the board that the matter was acted upon and the license granted at a meeting of the commissioners when all of them were present, or unless such license contains a direct recital or averment of such meeting and action. *The California, 1 Sawy. 596.*

And a pilot who has given a bond with two sureties who are only bound in the sum of \$500 each, when the statute requires a bond for \$1,000 with two sureties each bound for the whole sum, is a pilot *de facto*, and cannot recover fees for pilotage when he sues in his own right and claims that they are due to him personally by virtue of his office, and no rights of the public or of third persons are concerned. *Dolliver v. Parks, 186 Mass. 499.*

So, the master of a vessel is not liable to the penalty imposed by 6 Geo. IV. chap. 125, § 58, for refusal to employ a pilot offering his services unless the pilot produces his license as required by § 66 of that act though its production is not demanded. *Hammond v. Blake, 10 Barn. & C. 424, 5 Moody & R. 361.* See also *The Eldridge, Deady, 176, infra, VII. b.*

But a warrant or commission of a pilot, regular upon its face, entitles him to be treated and authorizes a ship to receive him as a pilot upon the production thereof, under a statute authorizing a pilot

to Rosario, on the river Platte, in South America; and that, as so laden, she drew rather more than 16½ feet of water. It is also set forth in the libel that under the provisions of the Code of the state of Maryland, as amended and reenacted by the act of the general assembly of that state of March 11, 1896 (chap. 40, Acts 1896), it is, among other things, provided that

to conduct a vessel into a harbor, so as to prevent another pilot from recovering compensation as for an offer and refusal, though the warrant of the former was without legal effect because he had not given bond and did not keep a suitable boat on the bar as required by the act. *The Panama, Deady, 27.*

And a license certifying that the licensee is a skillful master of steam vessels, and can be intrusted to perform such duties and to act as pilot, and licensing him to act as such master on steam vessels for a designated term, licenses him to act in a double capacity of master and pilot within the meaning of U. S. Rev. Stat. § 4443, permitting licenses to be granted to a master or mate to act as pilot, and requiring that it should state on its face that he is authorized to act in such double capacity, so as to exempt a vessel employing such master from compulsory pilotage within the meaning of Mass. Stat. 1882, chap. 176, § 15, and relieve the vessel from liability for pilotage to a pilot offering his services to such vessel, which were refused. *Joslyn v. Nickerson, 1 Fed. Rep. 133.*

And a warrant issued to a pilot is not objectionable because headed temporary, and his employment will prevent another pilot from being the first to offer his services where it appears that the warrant had never been revoked. *The Panama, Deady, 27.*

So, the warrant of a Washington pilot, granted him by the commissioners of pilots, is sufficient authority for his tender of services to any vessel bound in or out of the Columbia river, and it cannot be shown as a defense to a suit for half pilotage on a refusal of such offer that he did not keep a sufficient boat on the bar, such matter being a proper subject for inquiry before the board of pilot commissioners only. *The Aloaide, 30 Fed. Rep. 133.*

A statute requiring pilots to keep such boats as the commissioners might approve is not repealed by a subsequent statute requiring each pilot to keep a boat on the bar of not less than fifty tons' burden, so as to invalidate a warrant issued to a pilot under the former act who pilots a boat into harbor, and authorize recovery by another pilot for an offer and refusal of services. *The Panama, Deady, 27.*

b. Tender of services.

It is not necessary that a pilot should make an actual offer of services to the master of a vessel in the night-time bound into a harbor, or that the master should have knowledge of such offer; it is sufficient if the pilot approaches the vessel and hails her and makes all the tender of services the time and circumstances permit, and his hail is heard on board, though it is not answered. *Com. v. Ricketson, 5 Met. 412.*

The approach by a pilot boat within the customary cruising ground for incoming vessels, and the display of her blue flag as a signal, which was or ought to have been recognized by the master of an incoming vessel when the pilot boat was within a reasonable distance, is in legal effect a tender and offer of her services with the usual waiver of extra pilotage charge. *The Yumuri, 68 Fed. Rep. 380.*

To entitle a pilot to half pilotage it is his duty in speaking a vessel to use such signals as are ordinarily in use to denote the presence of a pilot and

"all vessels sailing under register bound to and from Baltimore city (except vessels employed in and licensed for the coasting trade and American vessels laden either in whole or in part with coke or coal mined in the United States), shall take a licensed pilot or in case of refusal to take such pilot shall themselves, their owners or consignees, pay the said pilot-

the offer of services, in order to inform the master of his character and give him an opportunity to accept or reject them; and such signals should be made reasonably so that the officers of the vessel may see them. *The Mascotte, 39 Fed. Rep. 371.*

And a pilot who leaves his pilot boat anchored 2 or 3 miles from the channel, and comes with a small boat showing no light until within from 100 to 300 feet of a steamer, and no flash light until the steamer had passed and left him abaft the beam so that such flash was not seen by any of the officers of the steamer, and the pilot's hail was not heard by them, does not speak the steamer so as to entitle him to half pilotage, as for a refusal of services. *The Mascotte, 39 Fed. Rep. 371.*

In the absence of proper signals the burden of proof rests with the pilot to show that his hail was heard and understood. *The Mascotte, 39 Fed. Rep. 371; The Ullock, 19 Fed. Rep. 207.*

And he cannot recover pilotage unless he makes it appear from the evidence that his offer was made within the legal distance, where the pilot commissioners have prescribed a distance within which a tender of services must be made. *The Ullock, 19 Fed. Rep. 207.*

Thus, a pilot must offer his services and be ready to take charge of a vessel before she has arrived within the harbor lines, under Mass. Gen. Stat. chap. 52, Stat. 1882, chap. 176, § 24, and a vessel which signals for a pilot outside the harbor lines is not liable for compulsory pilotage where the pilot does not reach her till after the signal is hauled down and she is within the harbor lines. *Perkins v. Buckley, 120 Mass. 8.*

And a tender of pilot's services under Oregon Sess. Laws 1865, chap. 33, providing that any river pilot, who shall first speak any seagoing vessel ascending or descending the river above Astoria shall be entitled to half pilotage therefor, made by a river pilot to a vessel bound to Portland, is not valid if made below Astoria and before the vessel has reached the pilot's plot ground. *The Glaramara, 8 Sawy. 22, 10 Fed. Rep. 678.*

So, under Mass. Rev. Stat. chap. 32, every Boston pilot who offers his services to the master of an inward-bound vessel before she has passed the line designated by § 24 thereof as the harbor line is entitled to full fees of pilotage whether his services are accepted or not. *Com. v. Ricketson, 5 Met. 412.*

But the requirement of Mass. Rev. Stat. chap. 32, § 24, that the tender of the pilot's services shall be made before the vessel has passed the harbor line to entitle the pilot to fees, refers to a final passing of the line by the vessel in her inward-bound course, and not to a mere temporary and incidental passing followed by a retrogression outside of the line, and the vessel is liable for fees when it was outside the line when the pilot hailed it, though in tacking it, it had been inside. *Hunt v. Carlisle, 1 Gray, 257.*

And a vessel approaching the port of Philadelphia from a foreign port, which refuses the services of a Delaware pilot, is not exempt from liability for his fees under the Delaware statute by the fact that she had crossed the line within which by the laws of Pennsylvania a vessel was exempt from the obligation of taking a pilot. *The Charles A. Sparks, 16 Fed. Rep. 480.*

So, the provision of the New York Hell Gate pilot act indicates an intention to offer an induce-

age, as if one had been employed, and such pilotage shall be paid to the pilot first speaking to such vessel (before Cape Henry bears south, if inward bound)." Also, it is alleged that the said Edmund Phinney, being so laden and ready to proceed on her voyage, the appellee, as a duly licensed pilot, made application to both the captain and to said Frederick L. Clay-

ton, the consignee, and offered himself ready and willing to pilot her to sea, but that both of them declined the offer and refused to take the pilot; that thereupon, he having so offered, and they having so refused, he presented to said captain and consignee a bill for pilotage, which, under the law, amounted to \$32.50, but that payment of the same was refused; that he

ment to pilots to go farther east than Sands Point, and a tender of services off Norwalk island, 17 miles to eastward of Sands Point, is within the letter and spirit of the statute, and entitles the pilot to half pilotage in case of refusal of his services. *The Georgia D. Loud*, 8 Ben. 392.

And the words "navigating the channel of Hell Gate" in *N. Y. Laws 1865*, p. 197, providing for pilotage services by Hell Gate pilots and for half pilotage in case of an offer and refusal of services, refer to the actual present navigation of the Gate, and are to be taken as intended to cover any vessel which, approaching the Gate on the voyage which carries her through it, has reached a point as far to westward as Execution Rock on Sand's Point. *Horton v. Smith*, 6 Ben. 264.

The above cases, *The Georgia D. Loud*, 8 Ben. 392, and *Horton v. Smith*, 6 Ben. 264, together with *The Traveller*, 6 Ben. 280, *infra*, VII. e, were distinguished in *The Glamara*, 8 *Sawy*, 22, *supra*, on the ground that they all relate to vessels bound through the passage in the East river called Hell Gate.

But while a pilot under the New York Hell Gate pilot act may well be taken when the channels of Hell Gate are shortly to be navigated and it would not be unreasonable to take a pilot in time to enable him to ascertain the capacity of the vessel and her ability to work before reaching those channels, a tender of services by a pilot under that act to pilot a vessel through Hell Gate, made off Block island, when the vessel was not yet in Long Island sound, is not good, and will not charge the vessel with half pilotage though she was destined for New York by way of Hell Gate. *The S. & B. Small*, 8 Ben. 523.

All vessels lying within the protection of the headlands of a bay constituting pilot grounds are, in the absence of any legally defined limits to the bay, within it so as to entitle a pilot offering his services to half pilotage upon a refusal thereof. *Weidt v. The Howden*, 30 Fed. Rep. 877.

So, a licensed pilot may recover pilotage from a schooner which refuses to accept his services under the pilot laws of the state of New York providing for such liability in case of refusal, though the vessel was from a foreign port, and the tender of services was made outside of the jurisdiction of the state. *Wilson v. McNamee*, 102 U. S. 572, 23 L. ed. 234; *Wilson v. Mills*, 10 Abb. Pr. N. S. 143, overruling *Peterson v. Walsh*, 1 *Daly*, 182.

Pilotage laws have sufficient effect beyond the boundary of the state to fix the rate of compensation for services tendered. *The Nevada*, 7 Ben. 386.

And while a state cannot extend the pilot ground at the mouth of a river indefinitely into the sea, and probably not farther than 3 miles beyond the headland, she may permit and require her pilots to cruise for vessels at a much greater distance from shore; and an offer of pilot services to be performed on pilot grounds, made to an inward-bound vessel outside the 3-mile limit, is valid and effectual, and a refusal would entitle the pilot offering to compensation. *The Whistler*, 8 *Sawy*, 232, 13 Fed. Rep. 295.

But the question whether the laws of the state of Delaware affect the rights of a foreign steamer to accept or refuse pilots at a place upon the high sea, does not arise where it appears from proofs that the offer of services as pilot was made within 89 L. R. A.

the 3-mile limit from the shore. *The Earnwell*, 28 U. S. App. 398, 70 Fed. Rep. 331, 17 C. C. A. 136.

A pilot is not entitled to half pilotage for a tender of services which was refused under Or. act Oct. 25, 1870, p. 51, where the vessel to which his services were offered was being towed by a tug or steamer. *The Glamara*, 8 *Sawy*, 22, 10 Fed. Rep. 678.

But a person who selects the course of a ship, and takes her management for the purpose of directing her in that course, is in the charge or conduct of the vessel within the meaning of 6 Geo. IV. chap. 125, § 70, providing that the master of a coasting vessel may, if he chooses, perform that duty himself, but if he chooses to employ another he must employ a licensed pilot, imposing penalties for the employment of another, but he is not precluded from employing any moving power, as, for instance, steam; and the fact that applying such power necessarily involves the selection of the ship's course and her charge and conduct in that course upon another is immaterial. *Beilby v. Scott*, 7 Mees. & W. 93.

The provision of Mass. Stat. 1862, chap. 176, requiring that in case any vessel liable to pilotage shall refuse to take a pilot it shall be the duty of the pilot to inform the vessel that she will be held to pay the regular fees for pilotage whether his services are accepted or not, are absolute, and in case of failure to give such notice the pilot cannot recover fees, though the ship master knew of the provisions of the statute by information from other sources. *Chandler v. Doody*, 101 Mass. 267.

And the exhibition by a pilot of his warrant to the master of a vessel is a necessary part of his tender of services, under the pilot act of the territory of Washington of January 26, 1863, authorizing certain pilots to take charge of vessels bound in and out of the Columbia river provided such pilots shall first show the masters his warrant, and unless such exhibition is expressly waived or intentionally prevented or avoided by the master the pilot cannot, in its absence, recover for such tender of services. *The Eldridge*, *Deady*, 178.

c. Refusal of services tendered.

The failure of a vessel to slow down or turn toward a pilot by whom she is properly signaled is a refusal to accept his offer of services which will render her liable for pilotage. *The Yumuri*, 68 Fed. Rep. 920.

And a reply of a master of a vessel on being hailed, that he would want a pilot when he got to pilotage ground, but keeping his course though the pilot boat followed a short time, and entering a port without a pilot, is a sufficient refusal of the services of the pilot to sustain an action for pilotage under N. Y. Laws 1857, chaps. 243, 329, authorizing a recovery in case of such refusal. *Wilson v. Mills*, 10 Abb. Pr. N. S. 143.

And a tender of services by a pilot who overtook a vessel as she was about to anchor, and a reply by the master that he intended to wait until daylight and see if there were any tug boats about, after which the pilot went away and did not return, manifests an intent to avoid taking a pilot if he could find a tug, and amounts to a refusal of the

was informed by them that their excuse for not accepting a pilot was that, in addition to the cargo of lumber aboard said vessel, they had shipped a quantity of coal mined in the United States, amounting to from twenty to twenty-five tons in all, and that by reason of such alleged shipment of coal they claimed that the vessel was "laden in part with coal mined in

the United States," and that it was therefore exempt from the demand of pilotage. The libel then claimed that such shipment of coal, if made, was not in the usual and regular course of trade to the port of destination, but that the same was colorable merely, and made for the express purpose of evading the requirements of said pilot laws, and that, as it was

services which will justify a claim for pilotage. *The Tallman*, 23 Fed. Rep. 111.

So, the services of a pilot offered to a British vessel on the high seas bound for the port of New York, at such a distance from Sandy Hook lighthouse that it could not be seen on deck, upon which the master offered to take him on board but said he would not pay offshore pilotage, whereupon the pilot left the vessel, are refused so as to entitle the pilot to recover offshore pilotage under the New York pilotage act of April, 1857, though the master subsequently took another pilot to whom he duly paid inshore pilotage. *The Nevada*, 7 Ben. 386.

And refusal by an ocean steamer to receive a duly qualified pilot on the ground that he had never before taken charge of an ocean steamer renders the vessel liable for full pilotage as if such services had been rendered, under Pa. act March 23, 1803, and March 24, 1851, providing therefor in case of refusal of services of the first duly licensed pilot who offers them to an inward-bound vessel, though the ship afterwards receives a pilot from the same pilot boat. *The Lord Clive*, 10 Fed. Rep. 135.

A vessel must take, and is liable for pilotage for refusal to take the first pilot offering his services, under Del. act April 6, 1851, with relation to pilotage of vessels passing in or out of Delaware bay by way of Cape Henlopen, where such pilot's boat and another boat from which a pilot was taken were similarly situated, and she could have taken a pilot from one as well as from the other. *The Earnwell*, 28 U. S. App. 333, 70 Fed. Rep. 331, 17 C. C. A. 136.

And a vessel cannot defend in an action for pilotage on the ground of a refusal of tendered services on the ground that other pilots offered their services at the same time, where the defense pleaded was that the pilot boat, after signaling the vessel, hauled down her signal and sailed away, thus preventing her from accepting the services, as such defense should have been averred in the answer. *The Earnwell*, 68 Fed. Rep. 223.

A vessel is not required to go materially out of her way to meet the pilot first signaling, or stop and wait for him, however, if others were more convenient, but simply to accept the services of the pilot first offering if she could do so without disadvantage; and if several offer simultaneously she can accept the services of either. *The Earnwell*, 68 Fed. Rep. 223.

But the master of a vessel which is piloted into Stand Gate creek by a Cinque pilot, and discharges him and goes a mile down the bank toward London and signals for a Trinity House pilot, who comes on board, is liable for the penalty under 52 Geo. III. chap. 39, § 34, for continuing in charge of the vessel after a duly licensed and qualified pilot shall have offered to take charge of her. *Thornton v. Bolland*, 9 J. B. Moore, 403, 2 Bing. 219.

d. First pilot offering.

The master of a foreign vessel bound to the port of New York from a foreign port by way of Sandy Hook is not bound to take the first pilot offering his services, or, in case of refusal, to pay him pilotage, under Laws 1853, chap. 467, § 29, as amended by N. Y. Laws 1857, chap. 243, providing that such vessels shall take a licensed pilot, or, in case of refusal to take such pilot, pilotage shall be paid as if one had been employed, to the first pilot speaking

or offering his services; the penalty is imposed for not taking any pilot, and it is only when no pilot is taken that such pilotage is due. *Gillespie v. Zittlosen*, 60 N. Y. 449.

In that case, *Cisco v. Robert*, 36 N. Y. 292, *supra*, VI. was distinguished upon the ground that the statute had been changed, and that the regulation there in question does not now exist.

But slight circumstances are sufficient to warrant the inference that no other pilot was taken, in an action for the recovery of pilotage based on a tender and refusal of services; and proof that after the vessel arrived the pilot made out his bill and presented it to the master, who said it was all right, admits by implication that no pilot was taken. *The Nellie Husted*, 9 Ben. 42.

And the fact that a pilot offered his services as such to a vessel approaching the port of New York, 10 miles from Sandy Hook, and that there was no pilot on board the vessel at the time, is sufficient to show that he was the first pilot speaking or offering his services to the vessel. *Murray v. Clark*, 4 Daly, 463.

A pilot offering his services to pilot a vessel through Hell Gate, at a proper distance therefrom, whose services were refused, is the first pilot to tender his services within the meaning of the law, and is consequently entitled to half pilotage though another pilot had tendered his services to pilot the vessel through at a point off Block Island outside of Long Island sound. *The S. & B. Small*, 8 Ben. 523.

The liability for a penalty for refusal or neglect to take a pilot under the Pennsylvania act providing that the pilot who shall first offer himself to any inward-bound vessel shall be entitled to take charge thereof, however, is incurred upon refusal to receive such pilot, though another is subsequently taken, the provision inflicting the penalty for refusal to accept a pilot having reference to such pilot first offering himself. *The Lord Clive*, 10 Fed. Rep. 135.

And a pilot hired by the month to serve as such between the ports of San Francisco and Portland, who piloted the ship over the bar, may be considered a bar pilot who tendered his service as such to the ship so as to prevent another pilot who remains on the bar from first offering his services and becoming entitled to compensation on refusal thereof, where there is nothing in the statute to limit the locality within which services may be offered. *The Panama*, *Deady*, 27.

But a contract between the master or commander of a vessel and a pilot to receive the pilot on board at a certain point outside a harbor, pursuant to which he is so received, will not give such master or commander the right to reject a pilot offering his services before the former was received on board without becoming responsible for his fees, under Georgia Code, § 1512, providing for such payment in case of refusal to receive the first pilot offering his services. *Thompson v. Sprague*, 69 Ga. 408, 47 Am. Rep. 760.

And a duly licensed and qualified full branch pilot for the bars and harbors of St. Helena and Port Royal, who was the first pilot offering to board a ship about to enter such harbor from a regular numbered pilot boat then being within the cruising ground of St. Helena bar, whose offer was refused, is entitled to recover full pilotage under

made for the purpose of evading the law, it was not within the fair and reasonable intent of the same, nor of its proper construction, and that, therefore, the vessel was not "laden in part" with coal so mined, and not exempt from paying the pilotage fees so demanded. Hence he prayed a decree against the consignee for the sum of \$82.50. The answer of Clayton

admitted that the Edmund Phinney was an American vessel of about 650 tons burden, hailing from the port of Portland, Maine; that he was the agent of the vessel in the port of Baltimore for procuring a cargo for her, and that he was her consignee for such purpose; that she was laden in the port of Baltimore, but not that she was fully laden with lumber;

duly authorized rules of the board of commissioners of pilotage having jurisdiction over that port, providing that all vessels will be held for full amount of pilotage whether the services of the pilot were accepted or not, and that no pilot shall be allowed to take charge of any vessel unless attached to a duly numbered pilot boat belonging to the bars as prescribed by law, or board any vessel except from a regularly numbered pilot boat, or be entitled to collect pilotage fees from any vessel so boarded, though there was a licensed pilot on board of the ship who had gone on at another port at the time the offer of pilotage was made. *O'Brien v. DeLarrinaga* (S. C.) 27 S. E. 481.

Refusal of a vessel to employ the first pilot who reaches her, however, does not render her liable to him for pilotage where she was not fit to be navigated by the power of her sails alone, and her master had gone on shore for a pilot and a tug. *Flanders v. Tripp*, 2 Low. Dec. 15.

e. Proper destination.

To establish a claim for half pilotage under the Hell Gate pilot act, on the ground of a tender of services and refusal thereof, it must be shown that at the time of the tender the vessel was engaged in the prosecution of a voyage which would carry her through Hell Gate. *The Kalmor*, 16 Ben. 242.

And a breakwater constitutes a port within the meaning of the act of Congress providing that the pilots in ports, etc., shall continue to be regulated in conformity with state laws and the usages of navigation in the proper sense of the term, so that an offer of a Delaware pilot to take a vessel into a breakwater where she was bound for orders is an exercise of legitimate authority on his part, and the refusal to take the pilot is a violation of the Delaware statute providing for half pilotage in such case, for which the pilot is entitled to his remedy. *The William Law*, 14 Fed. Rep. 792.

And an offer by a pilot to a vessel bound in the Columbia river, to pilot her in, which was refused, is not rendered invalid so as to deprive the pilot of his right to compensation by the fact that the course of the vessel was subject to a contingency which never happened. *The Whistler*, 8 Sawy. 232. 18 Fed. Rep. 296.

And the words "navigating the said channel of Hell Gate," used in the Hell Gate pilotage act of 1847, p. 85, 1865, p. 197, must be deemed to cover any vessel navigating to or from the port of New York and from any part of the port when on a voyage through the Gate, and it is no objection to a recovery of half pilotage for a tender and refusal of services that the libel avers that the vessel was at the time of the tender in the North River off Hoboken; and a subsequent change of voyage or failure for any reason to attempt to pass the Gate has no effect upon the right of the pilot to compensation. *The Traveller*, 6 Ben. 280.

So, the duty of pilots for the harbor of Boston is to take charge of a vessel subject to the pilot laws about to enter that harbor, as well as where they are bound to other ports that must be reached by using the channels leading directly to the port of Boston as when bound to Boston; and they are entitled to their fees under Mass. Rev. Stat. chap. 32, when they seasonably offer their services to such vessel and their offer is refused. *Martin v. Hilton*, 9 Met. 371.

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And refusal of a pilot to pilot a vessel up one of the branches leading from Boston across the mouth of Charles river, on account of which the master of the vessel refuses to receive the pilot, does not affect his right to fees, where there had been an unbroken usage of the pilots in Boston harbor ever since the erection of such branches to pilot vessels destined to places or wharves of the branches either to the lower pier of the draw of the bridge or to a place of anchorage in the stream near the draw, and there leave them in charge of their master. *Hunt v. Carlisle*, 1 Gray, 257.

And parol evidence that the harbor of Boston extends only to the mouths of the rivers emptying into that harbor, and that the usage of pilots for the last forty years to pilot vessels bound to towns upon such rivers was to take them as far as such mouths and leave them, is admissible in an action by a pilot for fees against the master of a vessel who had declined to receive him because he had declined to take the vessel up as far as the master wished, but offered to carry her to a place where she might take a river pilot. *Martin v. Hilton*, 9 Met. 371.

So, the right of a duly licensed pilot for the port of Wilmington and bay of San Pedro to half pilotage for services tendered and declined will not be denied on the ground that the vessel was not bound for and did not enter the port of Wilmington or the bay of San Pedro, where the limits of the bay of San Pedro had never been defined by any competent authority, and the port of Wilmington had always been locally known and regarded as one and the same, and Congress had given unmistakable evidence that it regarded them as identical, though the port had originally been known as the port of San Pedro, and its name and the name of the bay had been changed to Wilmington. *Weidt v. The Howden*, 39 Fed. Rep. 877.

And a claim for pilotage of a ship into Wood's Hole by one whose warrant constituted him a branch pilot for the coast of Martha's Vineyard and over Nantucket Shoals, and authorized him to receive fees for piloting vessels to the ports, among others, of Holmes' Hole and Falmouth, is valid under a statute authorizing the appointment of pilots for the several harbors and coasts of the state, the port of Holmes' Hole being in the town of Falmouth, as the ports in Falmouth not specially designated as attached to a particular district may by force of the statute be assigned to such pilots as are best situated to serve most promptly vessels belonging or bound to such ports, and the fact that there was another ship harbor in that town does not affect the case, as the language used is broad enough to include all its ports. *Smith v. Swift*, 8 Met. 329.

The above case was distinguished in *Winslow v. Prince*, 6 Cush. 369, holding that a warrant appointing a branch pilot for the coasts of Nantucket and Martha's Vineyard and over Nantucket Shoals does not since the enactment of Mass. Stat. 1788, chap. 56, confer exclusive right to such pilotage or the right to fees for services tendered to vessels bound through Vineyard sound and over the shoals, and refused, on the ground that the port of Falmouth in question in that case was not specially provided for in the statute, and that it was therefore perfectly competent for the governor to appoint the pilot and fix his fees.

that she cleared and sailed from Rosario, in South America, and that when laden she drew about 164½ feet of water. He alleged that the vessel was partly laden with coal mined in the United States. He denied that the libellant made application, either to him or to the master, after the vessel was loaded, or at any other time, to pilot her to sea, and he denied that

any bill for pilotage had been presented to him. He admitted that the vessel did not take a pilot on the voyage from Baltimore, mentioned in the libel, and claimed that there was no obligation on her part so to do, and that a pilot was not needed. He set up that the vessel was partly laden with coal mined in the United States; that she carried twenty-five

VIII. Outward bound pilotage.

Where a pilot brings a vessel into port he has the exclusive right, under the Georgia statute, to take her out, and no other pilot can be employed for that service unless it can be proved to the satisfaction of the commission of pilotage that the one bringing the vessel in had misbehaved while in charge of her, or had in the meantime been deprived of his license or had obtained the inward pilotage against the right of some other pilot first offering his services. *Melssner v. Stein*, 72 Ga. 234.

A pilot cruising outside the bar, who tenders his services to an incoming ship, with certain exceptions under the Georgia statute, is entitled to compensation if his services are rejected, and should such services be accepted it entitles him to pilot her out again or to recover compensation therefor, except in cases of misbehavior, revocation of license, etc. *Melssner v. Stein*, 72 Ga. 234.

And a duly licensed pilot who brought a vessel into port, with whom the master arranged to meet him at a certain time and place, from whence they were to go together on board and he was to pilot her out, makes a proper tender of services, so as to entitle him to pilotage fees as outward pilot, where he presented himself at the time and place appointed, though the master did not then appear but went on board his vessel and put to sea without a pilot. *The Francisco Garguilo*, 14 Fed. Rep. 486.

And a pilot hired by the month to serve as pilot between the ports of San Francisco and Portland, who goes on board upon pilot ground and pilots the vessel out to sea, may be considered as first offering his services to the ship so as to prevent the recovery of another pilot for services offered and refused, though the latter tendered such services before the former went on board. *The Panama*, *Deady*, 27.

It is the duty of a pilot who is to pilot a vessel out to sea to be on hand at high water on the morning of the day she is to start, however, and a vessel of deep draught in shallow water is not bound to wait for him, and where he mistakes the hour of high water and is left, he is not entitled to compensation. *The Ocean Express*, 22 Fed. Rep. 176.

And a licensed pilot approaching the master of a vessel at the customhouse where he was engaged in clearing his ship and inquiring if he wanted a pilot, to which he answered "I don't know," does not constitute a speaking of the ship within the meaning of Cal. Pol. Code, § 2468, providing that when a vessel is spoken inward or outward bound and the services of a pilot are declined half pilotage shall be paid. *The Australian*, 36 Fed. Rep. 332.

And a conversation between the master of a vessel and a pilot, which was half jocular, conveying the impression that the pilot was teasing the master respecting the question of pilotage, in which the master answered in the same vein saying, "I will take you" when he knew that the pilot personally would not go, does not show a refusal to take a pilot which will warrant a claim of compulsory pilotage. *The Harriet S. Jackson*, 32 Fed. Rep. 110.

So, a duly commissioned pilot who tenders his services to a shipmaster outside the harbor to bring his vessel into port, which services are declined and paid for, is entitled to recover under Ga. act 1799 (*Cobb's Digest*, 37), providing that all vessels enter-

ing and clearing within the state shall pay rates of pilotage if a pilot is offered, and giving preference to the pilot bringing in the ship to carry the same out, where he again tenders his services to the master to take the vessel out of port, which services the master declines, and refuses to pay fees therefor. *Wright v. Lake*, 75 Ga. 219.

In that case, *Thompson v. Sprague*, 69 Ga. 409, 47 Am. Rep. 760, *supra*, VII. d, was explained and distinguished, the court saying that in that case all that was decided was that the pilot first offering his services and who was refused upon the arrival of the vessel in port could recover the full rates of pilotage established by law, and that what was said as to the policy of the law was by way of argument.

A pilot who brings a wrecked British vessel into port, which was libeled in admiralty and sold under a decree to which he was a party, and after the sale refitted by the purchaser and her name and nationality changed, who offers his services to carry her out to sea, which were declined, however, is not entitled to fees on the ground of such tender and refusal, under the Georgia statute providing that the pilot who brings in a vessel is first entitled to take her out, as she was not the same, but a new vessel. *Melssner v. Stein*, 72 Ga. 234.

In *Wright v. Lake*, 75 Ga. 219, *Melssner v. Stein*, 72 Ga. 234, was distinguished and explained, the court saying that the facts were essentially different from the facts in the case under consideration, and that, however much the argument may appear to fit the facts of the case being considered, it is not binding as a decision.

IX. To whom and what the liability attaches.

The person or thing to which liability for compulsory pilotage attaches depends largely upon the statute under which it is claimed, and under the different provisions of such statutes the master, owner, agent, consignee, and the vessel itself, have been respectively held liable.

Thus, Cal. act May 20, 1861, declaring that when a vessel is spoken by a pilot and his services are declined he shall be entitled to one half pilotage fees, creates a legal liability against the vessel, her master, and owners for such fees. *Pacific Mail S. S. Co. v. Joliffe*, 69 U. S. 2 Wall. 450, 17 L. ed. 805.

And the owners of a vessel, as well as the master thereof, are liable to pay pilotage fees to a pilot who duly offered to pilot the vessel into Boston harbor under Mass. Rev. Stat. chap. 32, and the rule of the commissioners of pilots thereunder, approved and published as required by the act of 1836, chap. 49, § 4, as that statute and the rules thereunder were not repealed by the act of Feb. 20, 1836, the tenor and effect of which were to revise and modify subsisting laws substituting the new for the old and preserving everything as it was before, except where specially altered. *Hunt v. Mickey*, 12 Met. 346.

And a master of a ship when acting within the scope of his authority is the agent of the owner, and his act of rejecting the proffered services of a pilot is the act of the owner which will render him responsible for the pilot's fees, under Ga. Code, § 1512, providing for such payment to the first pilot offering his services and refused. *Thompson v. Sprague*, 69 Ga. 409, 47 Am. Rep. 760.

So, one whose duties were to discharge a vessel in

tons or more at the bottom of her hold, the balance of her cargo being lumber; and that both the coal and lumber had been shipped in the usual way. He claimed that the vessel was exempt from all pilotage charges. He denied that the coal was shipped for the purpose of evading the pilot laws, and claimed that there was no ground upon which any claim for pilotage could be lawfully made. The case came on to be regularly heard, when quite a number of witnesses were examined in open court, all of the testimony being set out in the record. The district judge entered a decree in favor of the libellant for the sum claimed, together with the costs of the suit. From that decree this appeal was sued out.

The decision of the questions raised by the assignment of errors depends upon the meaning of the amendment to the Maryland Code, set forth in the libel,—upon its proper construction. There is no material conflict in the testimony, and no trouble as to the facts. The case is so clearly stated in the opinion filed by Judge Morris in the court below, and the con-

struction he gives the legislation in question coincides so fully with the conclusion we reach, that we deem it eminently proper to adopt his views as the judgment of this court. We quote from his opinion, as follows:

"The legislature of Maryland, by the amendment to the pilot laws contained in the act of 1896 (chap. 40), did not intend to exempt all American vessels bound to or from Baltimore, engaged in foreign commerce, from the payment of pilotage, but only those laden in whole or in part with coke or coal mined in the United States. The exemption obviously was intended as a relief or encouragement to the coal trade. Being a statute to affect trade and commerce, it should receive a sensible construction, looking to its object. It was intended to continue to the pilots their statutory fees for compulsory pilotage, unless the fact of the cargo which the vessel was carrying made it an advantage to the coal trade to exempt her. It would seem, therefore, that to hold that putting on board a few bushels or a few tons of coal gratifies the law is to defeat

a foreign port and enter her at the customs and collect the freight and obtain a cargo and clear the vessel under directions from the owners is a consignee within the meaning of N. Y. Pilot Laws 1857, chap. 242, p. 502, providing that pilotage shall be paid by the master, owners, or consignees where the master refuses to take a pilot upon coming into the port of New York by way of Sandy Hook. Gillespie v. Winberg, 4 Daly, 318.

And a ship broker who had procured a cargo for a vessel and cleared her at the customhouse for a foreign port, where she took in a cargo and returned with a cargo consigned to a third person, the captain reporting to such ship broker, who collected the freight and paid the bills for the vessel and cleared her for another voyage, is the consignee of the vessel, within the meaning of that act, who is bound to pay in such case. Gillespie v. Winberg, 4 Daly, 318.

To charge a person in the capacity of agent with half pilotage for tender and refusal of the services of a pilot, however, it is at least necessary to show that he had some connection with the vessel, and a tender is not good where it was made to one who was not the consignee of the vessel and did not act for her under any general employment, or collect her freight, or appear to be in any way connected with her. Mason v. Ingraham, 5 Ben. 81.

And the sum of 10s. and 6d. a day due to a pilot under the merchant's shipping act of 1854, § 357, over and above his pilotage, where without his consent he is taken out to sea beyond the pilotage limits, is not pilotage which can be recovered of the ship's broker under § 6068 of that act providing that a ship's broker at the port where the services of a pilot are obtained shall be liable to pay pilotage dues for her. Morteo v. Julian, L. R. 4 C. P. Div. 216, 48 L. J. M. C. N. S. 126, 41 L. T. N. S. 71.

The consignee under N. Y. Pilot Act 1853, chap. 407, § 18, as amended by the act of 1857, providing that pilotage shall be payable by the master, owner, consignee, or agent clearing the vessel, where the master refuses to take a pilot upon coming into the port of New York by way of Sandy Hook, is the consignee of the vessel, and not of the goods with which she is laden. Gillespie v. Winberg, 4 Daly, 318.

So, a claim by a pilot under a state statute for half pilotage as compensation for tendering his services to pilot a ship out of a harbor, which were refused, is a claim for pilotage which by the general maritime law is a lien upon the vessel, and may

be enforced by action in admiralty. The California, 1 Sawy. 468; The America, 1 Low. Dec. 176.

Or by a libel *in rem*. The Edith Godden, 25 Fed. Rep. 511; The Alzena, 14 Fed. Rep. 175; The William Law, 14 Fed. Rep. 722.

And the lien of a pilot upon a vessel for pilotage is not lost by taking a note therefor, where it was with the express understanding that he would not receipt the bills and would not give up the lien unless the note was paid. The Pirate, 32 Fed. Rep. 486.

And a statute giving a pilot a lien on a vessel for his fees does not take away his right of action against the master therefor. Perkins v. O'Mahoney, 131 Mass. 546.

So, a claim for half pilotage within the Oregon statute for services offered and refused stands, so far as the remedy is concerned, upon the same footing as an ordinary claim for pilotage, and the right to a lien upon the vessel, therefore, is not affected by the fact that the consignee of the ship is made expressly liable in case the master omits or refuses to pay. The George S. Wright, Deady, 591.

The right of a pilot under the general maritime law to a lien upon a vessel for his services actually rendered, however, does not extend to a lien for compensation provided by statute for services tendered and refused. The Robert J. Mercer, 1 Sprague, 234.

In The America, 1 Low. Dec. 176, The Robert J. Mercer, 1 Sprague, 235, was distinguished upon the ground that in that case the law expressly or by implication denied the right to a lien.

And to make pilotage a charge upon the ship itself or upon the owners there must be an express or implied contract with the owner or with his authorized agent, and it cannot be done where the pilot was engaged by wrongdoers or usurpers of the command of the ship. The Anne, 1 Mason, 508.

And the master of a vessel has no lien thereon for his services as such, and where he also serves in the capacity of pilot he has no lien upon the vessel for his services as pilot. The Eolian, 1 Bias, 321, Reversing 1 Bond, 267.

A person who acts as master and pilot of a vessel has no lien for his services upon the vessel for a fund derived from its sale for his entire wages as master and pilot or for any part, where there has been no segregation of the amount due in the different capacities. The Willamette Valley, 76 Fed. Rep. 333.

But one who engages and ships on a vessel as a

the law in both these respects. It deprives the pilots of their fees, and does not benefit the coal trade. In the present case a vessel of 657 tons was chartered to take a full and complete cargo of spruce lumber to South America, but the owners reserved the privilege of putting some coal on board as part of her ballast. They bought twenty-five tons at a cost of \$55, and put it in the hold as ballast. The pilotage fees amount to \$92.50. The agent of the owners confesses that the incidental advantage of escaping pilotage was a motive, but states that he had also the wish to try the market for coal at the vessel's port of discharge, never having before made a shipment there. Obviously the owners could not lose, for they would be gainers even if they had to throw the coal overboard. I think, to be entitled to exemption, the vessel's cargo must, in some substantial proportion, consist of coal or coke, and that this vessel was not in part laden with coal, in any fair commercial sense. It is not sufficient, in my opinion, to entitle the vessel to exemption, if the quantity is of no commercial

value as a shipment. Legislation with regard to commercial matters should be construed, if the language will permit, so as to give effect to the scheme which it is apparent the lawmakers had in mind; and it cannot be supposed that when the legislature of 1896 amended a general law, intended to provide for the support of pilots, by introducing into it an exemption in favor of vessels carrying coal, they intended to leave the law in such a state that it would deprive the pilots of their support without benefiting the coal exporting trade. It is urged against the proposed construction that it will become a matter of doubt and dispute, as to every vessel which has any coal aboard, whether or not it is sufficient to enable her to say that she is laden in part with coal. But this is a difficulty which attaches to all similar legislation. It must be determined by considering all the circumstances by which reasonable men would be controlled in similar business transactions. If the legislature has failed to establish a definite criterion which can be applied with certainty, all that can be done

pilot, and not in the character of master, is entitled to a lien upon the vessel for his compensation, where the captain and his agent performed all the duties of master, though he did not come on board and the duties of navigating were performed by the pilot. *The Atlas*, 42 Fed. Rep. 793.

X. The amount or rate.

Compulsory pilotage being purely a statutory matter, the rate charged therefor is always fixed by statute or under statutory authority.

The computation of pilotage at certain rates per foot according to the draft of the vessel, and the computation for the fractions of a foot, are not prohibited, and the usual practice to make a rest at the half foot and compute the rates according to the even foot or half foot, whichever is nearest the actual draft, is recommended by its practical convenience. *The France*, 50 Fed. Rep. 125.

And N. Y. Laws 1853, chap. 467, providing a compensation to be added to pilotage for detention at the wharf or in the harbor, etc., and fixing certain compensation for services rendered by pilots for removing or transporting vessels in the harbor of New York, and providing additional compensation for pilotage in the winter, is not superseded by N. Y. Laws 1884, chap. 90, in regard to the fees of pilots for piloting inward and outward bound vessels. *The France*, 50 Fed. Rep. 125.

So, an act providing for pilotage and rates to be paid pilots, and declaring that the several boards of pilot commissioners for the several ports of the state are to determine the rate, is not objectionable as a delegation to an inferior body of the power delegated to the legislature by Congress, such power being local in character, and not national. *The Chase*, 14 Fed. Rep. 864.

And Fla. act March 7, 1819, authorizing pilot commissioners to determine the rates of a pilotage which should be paid by any vessel at other ports, authorizes them to determine also what rate shall be paid by a vessel spoken by a pilot which does not accept services, the liability for which is provided for by a statute previously existing. *The Chase*, 14 Fed. Rep. 864.

So, pilots licensed for the port of New York by state authority are entitled to off-shore pilotage where they comply with the regulations prescribed by tendering their services at sea to vessels about to enter that port, provisions therefor being within the limits of state jurisdiction. *Cisco v. Roberts*, 36 N. Y. 222.

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But a New Jersey pilot who boarded a vessel bound to New York some 30 miles southeast from Barnegat, but who went to bed and was waked when Sandy Hook light hove in sight, and then first took charge as pilot, taking the vessel into harbor, is entitled to inshore pilotage only. *The Alaska*, 3 Ben. 391.

Labor performed and services rendered by a pilot, consisting only of such acts as the duty of a pilot demands, and requiring the peculiar knowledge of a pilot as to the depth of water and the rise and strength of the tides and the management of the vessel, must be considered as pilotage services, and not as salvage services, though the vessel was in distress and his exposure was unusual and the risk more than ordinary; but extra compensation may be made him by the allowance of extra pilotage. *The Grid*, 21 Fed. Rep. 423.

But extra compensation will not be allowed a pilot because he had encountered danger in boarding the vessel piloted, or because there was but little water under her keel. *The Grid*, 21 Fed. Rep. 423.

A pilot whose services were those of a pilot only is not entitled to additional compensation unless in boarding the ship or while on her he personally incurred extraordinary danger and risk, whether or not his services saved the vessel from great peril. *The C. D. Bryant*, 19 Fed. Rep. 608.

And a pilot going upon a vessel when the weather was calm and the sea was smooth and there was a thick fog, while the vessel was grounded upon a sand-bar, who leaves her until the tide rises and the wind freshens when she rubs across the sand into deep water and is afterwards carried out to sea where she remains until daylight, when he pilots her over the bar where she is taken in tow by a tug, there being at no time any probability of her going to pieces, does not incur extraordinary danger and risk which will entitle him to additional compensation. *The C. D. Bryant*, 19 Fed. Rep. 608.

Penalties imposed by 52 Geo. III. § 11, providing for forfeiture of double the sum which would have been demanded for the pilotage of a vessel and the further sum of £5 for every 50 tons burden thereof for neglect or failure to take a pilot on board on arriving at Dungeness, are to be calculated on a ship bound for the river, not on pilotage due from Dungeness, but on that which would be due on the ship arriving at her ultimate place of destination in the river. *Mackie v. Landon*, 1 Marsh. 585, 6 Taunt. 256.

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is to apply a reasonable one. It is a matter of common knowledge in the port of Baltimore that coal is usually shipped in full cargoes, but it is also a fact that, for long voyages, coal is sometimes too weighty if the vessel is filled full, and, therefore, lighter cargo is used to fill up the vessel. It is not improbable that it was for this reason that the legislature, intending to favor the coal trade, provided that vessels should be exempt even when not fully laden with coal, and that it should be held to be essential to entitle a vessel to the exemption that she should be, in a commercial sense, a coal-laden vessel, carrying a reasonable quantity to constitute a cargo, looking to her capacity and the voyage she is to sail. In the present case, at all events, it seems to me clear that one car load of coal, belonging to the owners and of less value than the pilot fees, dumped as ballast into the hold of a large ves-

sel, which was under charter to carry a complete cargo of lumber, is not a substantial part of her cargo, but is an attempt to evade the law. The other points are not strongly insisted upon, and I think could hardly constitute a good defense. The statute obviously contemplates that the consignee, as well as the vessel's owner, shall be liable. It seems to me that the offer of a pilot was made in good faith. It was made by a pilot who was competent and qualified to take the vessel himself, and the offer was declined solely and openly upon the ground that the vessel was not required to take a pilot because she had on board a cargo partly of coal. The issue was intended to be raised, and it seems to me that it was distinctly raised, and that what took place was an offer and a refusal. I shall sign a decree for the libellant."

The decree appealed from is affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

John J. BERGIN, Admr., etc., of Timothy Delaney, Deceased, *Appt.*,

v.

SOUTHERN NEW ENGLAND TELEPHONE COMPANY *et al.*

(.....Conn.....)

1. **The use of the same poles by a telephone company and an electric railroad company** at the request of the municipal authorities is not unlawful when it is not shown to be necessarily attended with increased danger.
2. **Negligence is a question of fact** which cannot be reviewed on appeal unless the trial court failed to apply the correct standard of duty or violated some rule or principle of law applicable to the facts as found.
3. **A telephone company may require its lineman to inspect and test for himself** the guy wires or circuit breakers of an electric railroad company which uses the same poles that are used by the telephone company, when it furnishes him with suitable appliances for that purpose, and he knows that there are no other persons employed to do such testing.
4. **The right of a telephone lineman** to assume that an electric railroad company has used suitable and safe appliances to prevent the escape of electricity from its main or trolley wire to the guy wires does not excuse him from exercising proper care to prevent injury when he knows as a fact that the wires are not safe.
5. **Errors in rulings which could not affect the trial or decision will** not be prejudicial.

(November 30, 1897.)

A PPEAL by plaintiff from a judgment of the Superior Court for New Haven County awarding him nominal damages only

NOTE.—As to liabilities for injuries by electric wires in highways, see note to *Denver Consol. Electric Co. v. Simpson* (Colo.) 81 L. R. A. 566.
89 L. R. A.

in an action brought to recover damages for the alleged negligent killing of his intestate. *Affirmed.*

Deceased was in the employ of the defendant telephone company as a lineman. The city of Meriden had requested the telephone company and the Meriden Electric railroad company to use one line of poles through certain streets. The wires of the street railway company were kept in place by guy wires attached to telephone poles and containing circuit breakers which if in good order were sufficient to prevent the passage of electricity to the poles. Deceased was engaged in removing a wire from one of the poles and stood on the ground drawing it toward him and coiling it. The result of that action would be to cause the wire when it dropped from the last cross arm to fall directly over one of the guy wires which deceased had been warned was unsafe. The safety of the wire could be tested by connecting it with the ground by means of another wire when if it was unsafe the electricity would cause flashes at the point of connection. Linemen had the facilities for doing such testing and were supposed to do it. When the wire which deceased was coiling fell across the guy wire he immediately fell to the ground and died within a few minutes.

Further facts sufficiently appear in the opinion.

Messrs. James P. Pigott and Cornelius J. Danaher, for appellant:

Delaney's death was caused by the exercise of a power not authorized to the defendants by law, and this conduct of the defendants directly contributed to his death.

If a man while violating the law receives an injury due directly to his own law-violating he cannot recover for such injury.

Broschart v. Tuttle, 59 Conn. 11, 11 L. R. A. 83.

The converse of this ought to be true.

The question of negligence and of contributory negligence is one of fact and final unless

it appears from the record that some erroneous standard of duty was applied in reaching such a determination.

Dundon v. New York, N. H. & H. R. Co. 67 Conn. 286.

In any given state of facts the law prescribes the duty.

Schoonmaker v. Albertson & D. Mach. Co. 51 Conn. 393; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 471; *Furrell v. Waterbury Horse R. Co.* 60 Conn. 244; *Morrissey v. Bridgeport Traction Co.* 68 Conn. 215; *Hayden v. Allyn*, 55 Conn. 289.

Duty is not an issuable fact, it is a conclusion of law.

Atwood v. Welton, 57 Conn. 522.

If the court required of the defendant a higher degree of care, or of the plaintiff a lesser degree of care, than the law requires, in either case there is a question of law.

Morrissey v. Bridgeport Traction Co. 68 Conn. 215; *McAdam v. Central R. & Electric Co.* 67 Conn. 447.

If it was the duty of the trolley company to provide proper circuit-breakers, and to so supervise its lines that such circuit-breakers should be known to perform the functions for which they were used, then the failure of the trolley company to perform this duty was the failure of the telephone company.

Driscoll v. Norwich & W. R. Co. 65 Conn. 252.

The defendants are liable for want of ordinary care unless the proximate negligence of the plaintiff materially contributes to the injury.

New Haven S. B. & Transp. Co. v. Vanderbilt, 16 Conn. 421; *Isbell v. New York & N. H. R. Co.* 27 Conn. 406, 71 Am. Dec. 78; *Williams v. Clinton*, 28 Conn. 267.

The negligent act or omission of the plaintiff must operate as a proximate cause of the injury and not merely as a condition.

Smithwick v. Hall & U. Co. 59 Conn. 271, 12 L. R. A. 279; *McElligott v. Randolph*, 61 Conn. 157.

Delaney never stipulated with the trolley company to assume risks arising from the negligence of its employees.

Zeigler v. Danbury & N. R. Co. 53 Conn. 555.

A railroad company entering into contract relations with another company, by which the safety of its own passengers may be affected, will be held to have made the other company its own agent in this respect.

Murray v. Lehigh Valley R. Co. 66 Conn. 512, 32 L. R. A. 539.

It is not necessary in all cases to make two parties liable as joint tortfeasors that there must be some concert of action between them in causing the injury, or some common duty resting upon them which both have violated.

Carstesen v. Stratford, 67 Conn. 436.

The defendants were liable as joint tortfeasors, for the injuries to Delaney, resulting in his death, because they were at said time and place jointly using and employing their poles and wires without legislative authority.

Broschart v. Tuttle, 59 Conn. 1, 11 L. R. A. 38; *Slater v. Mesereau*, 64 N. Y. 188; *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418; *Cincinnati Street R. Co. v. Murray*, 58 Ohio St. 570, 30 L. R. A. 508;

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Southwestern Teleg. & Teleph. Co. v. Robinson, 2 U. S. App. 205, 16 L. R. A. 545, 50 Fed. Rep. 810, 1 C. C. A. 684; *Ahern v. Oregon Teleph. & Teleg. Co.* 24 Or. 278, 22 L. R. A. 635; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L. R. A. 84, and notes.

Where an act is unlawful in itself the wrongdoer will be held responsible although other causes may have subsequently contributed in producing the injury.

Weick v. Lander, 75 Ill. 96; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 496; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 473; *Shearm. & Redf. Neg. § 8*; *Keasbey, Electric Wires*, 166, 167; *Bigelow, Torts*, 277; *Thompson, Electricity*, §§ 464-466; *Gould, Pl.* § 66, p. 190, § 74, p. 194.

Gross or wanton negligence exists when the conduct of the party causing the injury clearly shows such reckless indifference to the rights of others, or is equivalent to an intentional and wanton violation of their rights.

Gibney v. Lewis, 68 Conn. 395; *Mason v. Hayes*, 52 Conn. 12, 52 Am. Rep. 552; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *St. Peter's Church v. Beach*, 26 Conn. 366; *Linsley v. Bushnell*, 15 Conn. 235, 38 Am. Dec. 79; *Cooley, Torts*, 574.

There having been negligence on the part of the defendants, it was not sufficient for them, in order to excuse themselves, to show merely that there was a want of care on the part of the plaintiff, unless it was a want of such a degree of care as it was incumbent on the plaintiff to exercise.

Beers v. Housatonic R. Co. 19 Conn. 571.

The master is liable for sending his servant into an exceptionally dangerous place where injury results therefrom.

Cooley, Torts, 2d ed. p. 655, * 555, ¶ 3.

If the defendant is guilty of gross negligence, he cannot set up a trifling negligence or inadvertence of the plaintiff as a defense.

Field, Damages, § 168, pp. 159-163; *Whart. Neg. §§ 300, 301*; *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78.

The Southern New England Telephone Company was guilty of the only negligence causing the injuries.

McAdam v. Central R. & Electric Co. 67 Conn. 445; *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 984, 7 L. R. A. 172; *Ilingsworth v. Boston Electric Light Co.* 161 Mass. 583, 25 L. R. A. 552; *Griffin v. United Electric Light Co.* 164 Mass. 492, 32 L. R. A. 400; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 597; *McElligott v. Randolph*, 61 Conn. 157; *Ryan v. Chelsea Paper Mfg. Co.* 69 Conn. 454.

The Meriden Electric Company was guilty of the only negligence causing the injuries.

Van Amburg v. Vicksburg, S. & P. R. Co. 87 La. Ann. 650, 55 Am. Rep. 517.

The combined negligence of the defendants caused the injuries.

Carstesen v. Stratford, 67 Conn. 434; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L. R. A. 34, and notes; *Slater v. Mesereau*, 64 N. Y. 188; *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418; *Webster v. Hudson River R. Co.* 38 N. Y. 260.

It is not contributory negligence to engage in a dangerous occupation.

Beach, Contrib. Neg. p. 370; Wood, Mast. & S. § 768.

The risk assumed by the servant is such as is ordinarily incident to the employment; and this is synonymous with unavoidable accident.

Wood, Mast. & S. § 788; Beach, Contrib. Neg. p. 370.

An employee is not bound to inquire as to latent but only patent defects.

Whart. Neg. § 214; Wood, Mast. & S. §§ 786, 787.

The master is liable for subjecting the servant, through negligence, to greater risks than those which fairly belong to the employment.

Wood, Mast. & S. § 777; *Faren v. Sellers*, 89 La. Ann. 1020; *Ahern v. Oregon Teleph. Co.* 24 Or. 276, 22 L. R. A. 685; *Atlanta Consol. Street R. Co. v. Owings*, 97 Ga. 663, 33 L. R. A. 798.

The plaintiff was entitled to substantial damages.

Atlanta Consol. Street R. Co. v. Owings, 97 Ga. 663, 33 L. R. A. 798; *Wynne v. Parsons*, 57 Conn. 80; *Knight v. Goodyear's India Rubber Glove Mfg. Co.* 38 Conn. 443, 9 Am. Rep. 406; *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 964, 7 L. R. A. 175.

The implements furnished to Delaney by the Southern New England Telephone Company at the time of the injury were not such as the law requires.

Wilson v. Willimantic Linen Co. 50 Conn. 433, 47 Am. Rep. 653; *McElligott v. Randolph*, 61 Conn. 157.

The place at which Delaney was put to work by the Southern New England Telephone Company at the time the injuries were received was not a suitable place for the work required.

McElligott v. Randolph, 61 Conn. 165.

The Southern New England Telephone Company were obliged to give its linemen specific warning of the dangers incident to their employment at this point, and were obliged to supervise the duty of testing its wires when in proximity with high-power wires.

McAdam v. Central R. & Electric Co. 87 Conn. 445; *Ryan v. Chelsea Paper Mfg. Co.* 69 Conn. 454; *Kelley v. Cable Co.* 7 Mont. 70; *McDonald v. Chicago, St. P. M. & O. R. Co.* 41 Minn. 439; *Carpenter v. Mexican Nat. R. Co.* 39 Fed. Rep. 315; *Western U. Teleg. Co. v. McMullen*, 58 N. J. L. 155, 32 L. R. A. 351; *Lofrano v. New York & Mt. V. Water Co.* 55 Hun. 452; *Smithwick v. Hall & U. Co.* 59 Conn. 261, 12 L. R. A. 279; *Bennett v. Syndicate Ins. Co.* 39 Minn. 254; *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 964, 7 L. R. A. 172; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204.

Delaney had the right to presume that a circuit breaker or insulator, known to be defective on August 10, 1895, or one that could be easily so known to the defendants, or either of them, on said August 10, 1895, was not still in a leaky, defective, and dangerous condition.

Smith, Neg. 478; *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766; *Bland* 89 L. R. A.

v. Shreveport Belt R. Co. 48 La. Ann. 1057, 36 L. R. A. 114; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L. R. A. 43; *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 964, 7 L. R. A. 172; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 597; *Beach*, Contrib. Neg. p. 370; *Wood, Mast. & S.* §§ 681, 788, 789, 749, 751, 763, 777, 786, 789; 2 *Thomp. Neg.* 975, 1172; 2 *Whart. Neg.* §§ 214, 215; *Faren v. Sellers*, 89 La. Ann. 1020; *Shearm & Redf. Neg.* § 81; *Deering, Neg.* § 16; *Knowles v. Crampton*, 55 Conn. 336; *Hickman v. Missouri P. R. Co.* 22 Mo. App. 344; *Pleasants v. Raleigh & A. Air-Line R. Co.* 95 N. C. 195; *Rogers v. Ludlow Mfg. Co.* 144 Mass. 198, 59 Am. Rep. 68; *Goodrich v. New York C. & H. R. R. Co.* 116 N. Y. 398, 5 L. R. A. 750; *Morrissey v. Bridgeport Traction Co.* 68 Conn. 215.

The court imposed a higher degree of care upon Delaney than the law required.

Burt v. Douglas County Street R. Co. 83 Wis. 229, 18 L. R. A. 479; *Kelley v. Cable Co.* 7 Mont. 70; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204; *Morrissey v. Bridgeport Traction Co.* 68 Conn. 215; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 473; *Wood, Mast. & S.* §§ 681, 788, 783; 2 *Whart. Neg.* § 215, p. 975; *Griffin v. United Electric Light Co.* 164 Mass. 492, 32 L. R. A. 400; *Illingsworth v. Boston Electric Light Co.* 161 Mass. 588, 25 L. R. A. 552; *Ryan v. Chelsea Paper Mfg. Co.* 69 Conn. 454; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810.

The Meriden Electric Railroad Company was guilty of negligence for having a defective insulator, from August 10 to August 12, 1895, on the guy-wire, with which the wire Delaney was coiling came into contact.

Myhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L. R. A. 172; *Atlanta Consol. Street R. Co. v. Owings*, 97 Ga. 663, 33 L. R. A. 798; *McAdam v. Central R. & Electric Co.* 67 Conn. 445; *Barnes v. Beirne*, 38 La. Ann. 280; *Williams v. Louisiana Electric Light & P. Co.* 43 La. Ann. 300; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658, 32 L. R. A. 700; *Ennis v. Gray*, 87 Hun. 355; *Griffin v. United Electric Light Co.* 164 Mass. 492, and notes to this case in 32 L. R. A. 401; *Western U. Teleg. Co. v. McMullen*, 58 N. J. L. 155, 32 L. R. A. 351; *Morrissey v. Bridgeport Traction Co.* 68 Conn. 215; *Pomponio v. New York, N. H. & H. R. Co.* 66 Conn. 535, 33 L. R. A. 530; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L. R. A. 43; *Ahern v. Oregon Teleph. Co.* 24 Or. 276, 22 L. R. A. 685.

When the defect existed a sufficient length of time for the defendant to have had knowledge and to have remedied the defect, the question of his duty to have done so is a question of law.

Louisville, N. A. & C. R. Co. v. Lynch (Ind.) 34 L. R. A. 298.

Everyone has the right to presume that others will act in a lawful and proper manner, and consequently will not hold it improvident in a plaintiff to act upon the presumption that the defendant has done or will do its duty.

Morrissey v. Bridgeport Traction Co. 68 Conn. 218; *Newson v. New York C. R. Co.* 29 N. Y. 383; *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 14; *Kansas P. R. Co. v. Ward*, 4

Colo. 30; *McGuire v. Spence*, 16 N. Y. Week. Dig. 222; *Morrissey v. Wiggins Ferry Co.* 47 Mo. 521; *Fowler v. Baltimore & O. R. Co.* 18 W. Va. 579; *Deering, Neg.* § 16; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461.

The Southern New England Telephone Company owed to its employees the duty of inspection at the time and place of the injury.

Gottlieb v. New York, L. E. & W. R. Co. 100 N. Y. 463; *Goodrich v. New York C. & H. R. R. Co.* 116 N. Y. 898, 5 L. R. A. 750; *Bailey v. Rome, W. & O. R. Co.* 139 N. Y. 802; *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 815; *McAdam v. Central R. & Electric Co.* 67 Conn. 445; *Griffin v. United Electric Light Co.* 164 Mass. 493, 32 L. R. A. 401; *Illingsworth v. Boston Electric Light Co.* 161 Mass. 583, 25 L. R. A. 552; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L. R. A. 43; *McElligott v. Randolph*, 61 Conn. 157; *Wood, Mast. & S.* § 376, p. 715, note; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 573, 2 L. R. A. 520; *Keith v. New Haven & N. Co.* 140 Mass. 175; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204.

The Meriden Electric Company owed to Delaney the duty of inspecting its wires at the time and place of the injury.

Doble v. Baird, 15 Daly, 287; *Taylor v. Baldwin*, 78 Cal. 517; *Kossman v. Stutz*, 25 N. Y. S. R. 953; *Central R. Co. v. Haslett*, 74 Ga. 59; *Kelley v. Wilson*, 21 Ill. App. 141; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 67 Am. Dec. 812; *Dale v. St. Louis, K. C. & N. R. Co.* 63 Mo. 455; *Mansfield Coal & C. Co. v. McEnery*, 91 Pa. 185, 36 Am. Rep. 662; *Pingree v. Leyland*, 105 Mass. 398; *Umbach v. Lake Shore & M. S. R. Co.* 88 Ind. 191; *Perigo v. Chicago, R. I. & P. R. Co.* 55 Iowa, 326; *Shanny v. Androscoggin Mills*, 66 Me. 420; and cases in *Beach*, Contrib. Neg. p. 479.

Where the master did not inspect he should be held liable for negligence in failing so to do.

Atlanta Consol. Street R. Co. v. Owings, 97 Ga. 663, 33 L. R. A. 798; *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 964, 7 L. R. A. 172; *Illingsworth v. Boston Electric Light Co.* 161 Mass. 583, 25 L. R. A. 552; *Benzing v. Steinway*, 101 N. Y. 547; *Wright v. New York C. R. Co.* 25 N. Y. 562; *Gibson v. Pacific R. Co.* 46 Mo. 163; *Lewis v. St. Louis & I. M. R. Co.* 50 Mo. 495, 21 Am. Rep. 885; *Walsh v. Peet Vallee Co.* 110 Mass. 23; *Ford v. Fitchburg R. Co.* 110 Mass. 240.

The statement of Flannigan in the presence of Delaney, on August 10, 1895, as to the receipt of a slight shock by Flannigan, was not knowledge on Delaney's part that the defective circuit breaker which caused the shock, if it did cause it, on August 12, 1895, was still defective.

Myhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L. R. A. 172; *Atlanta Consol. Street R. Co. v. Owings*, 97 Ga. 663, 33 L. R. A. 798; 14 Am. & Eng. Enc. Law, pp. 842 et seq.; *Bland v. Shreveport Belt R. Co.* 48 La. Ann. 1057, 36 L. R. A. 114; *McAdam v. Central R. & Electric Co.* 67 Conn. 445; *Morrissey v. Bridgeport Traction Co.* 68 Conn. 218; *Indiana Car Co. v. Parker*, 100 Ind. 192.

The knowledge claimed to have been imparted to Delaney by Flannigan, on August 30 L. R. A.

10, was not a continuing knowledge, and did not so continue until the time of the injury on August 12.

Field, Damages, § 168, pp. 159-163; *Whart. Neg.* §§ 300, 301; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658, 32 L. R. A. 700; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605.

It was not the duty of Delaney to test the wires of the Meriden Electric Railroad Company.

Myhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L. R. A. 172; *Wood, Mast. & S.* pp. 681, 788, 763; 2 *Whart. Neg.* § 215, p. 975; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546; 2 *Thomp. Neg.* p. 975; *Gillette v. Goodspeed*, 69 Conn. 863; *Zeigler v. Danbury & N. R. Co.* 52 Conn. 553; *Chicago, B. & Q. R. Co. v. Avery*, 109 Ill. 815; *McElligott v. Randolph*, 61 Conn. 157; *McAdam v. Central R. & Electric Co.* 67 Conn. 445; *Ryan v. Chelsea Paper Mfg. Co.* 69 Conn. 454; *Wilson v. Willimantic Linen Co.* 50 Conn. 433, 47 Am. Rep. 653.

If the defendant and the telephone company were negligent in the matter of the contact of the wires, they are liable jointly and severally for such negligence.

Keasbey, Electric Wires, 166, 167; *Bigelow, Torts*, 277; *Thompson, Electricity*, §§ 464-466; *Gould, Pl.* § 66, p. 190, § 74, p. 194.

There may be faults in a plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering.

Isbell v. New York & N. H. R. Co. 27 Conn. 412, 71 Am. Dec. 78.

Messrs. John W. Alling, James T. Moran, and Seymour C. Loomis for appellees.

Hall, J., delivered the opinion of the court:

It was not unlawful for both defendants to use the same poles. Such joint use was with the consent of both companies, and with the consent of the municipal authorities. It has not been shown to be necessarily attended with increased danger. By reducing the number of poles, the highway is used with greater convenience. Full control of the location of such wires and structures is given to the local authorities by § 8946 of the General Statutes, and § 8 of chapter 169 of the Public Acts of 1893.

The court has found that the defendant telephone company was not negligent. This is a question of fact which it has been repeatedly held cannot be reviewed by this court upon an appeal, unless it appears that the trial court did not apply the correct standard of duty in reaching its conclusion, or violated some rule or principle of law applicable to the facts as found. *McAdam v. Central R. & Electric Co.* 67 Conn. 445; *Dundon v. New York, N. H. & H. R. Co.* 67 Conn. 266; *Sprague v. New York & N. E. R. Co.* 68 Conn. 345, 37 L. R. A. 638. The degree of care and duty imposed by law was apparently applied to the defendant telephone company by the trial court in testing its conduct in regard to negligence. Neither its conclusion from the facts found, nor any ruling of the court during the trial, indicates that it did not charge the telephone company with

its legal duty as to providing for its employees a reasonably safe place and reasonably safe tools and appliances for their work, and competent collaborators. But it is said that this rule imposed upon the telephone company, as a matter of law, the duty of inspecting and testing the guy wires or the circuit breakers of the electric railroad company, and that it is apparent that that duty was not placed upon the telephone company by the trial court. There is no such absolute requirement of law. Whether the employer or employee should discharge such duty must depend upon the circumstances of each particular case. In many instances either may properly perform that work, and in some cases who should perform that duty is a question of fact, to be determined by a variety of circumstances, such as the nature of the task of inspection, the skill, opportunity, and means of the workman to properly do it, and the terms of the contract of employment. *McGorty v. Southern N. E. Teleph. Co.* 69 Conn. 635.

The facts found in the present case clearly show, and the court held, that when, in the performance of the work in which they were engaged, it became necessary to handle a wire of the electric railroad company, or when a contact with such wire was likely to occur, the duty devolved upon the servant, and not upon the master, to first ascertain whether such wire was charged with electricity. As to the negligence of the electric railroad company, the trial court has not decided adversely to the plaintiff. The extent of the injury having been shown, the plaintiff was entitled to a judgment for substantial damages against the defendant who should fail to show either that it was not negligent as alleged, or that the injury was the result of the contributory negligence of the deceased. *Sprague v. New York & N. E. R. Co.* 68 Conn. 345, 37 L. R. A. 638. In its effort to show that it was free from fault, the defendant electric railroad company failed. From the facts found, the trial court evidently, and we think justly, concluded that the electric railroad company, "in the construction and operation of the appliances" for using in the public streets an agency so dangerous to human life, did not take the required precautions for the safe treatment of such an agency, and "for providing against all dangers incident to its use." *McAdam v. Central R. & Electric Co.* 67 Conn. 445. But, unless the court erred in holding that Delaney was guilty of contributory negligence, the plaintiff would gain nothing by a decision that both the defendants were negligent. That is the controlling question in the case, and, unless the ruling of the court below upon that point ought to be reversed, it seems unnecessary to consider the other questions raised by plaintiff's counsel.

The complaint alleges that it was not Delaney's "business" to know the unsafe condition of the guy or span wire. It is found by the court "that in doing work which is dangerous by reason of the possible contact of the telephone wires with the highly charged wires of the street-railway or other companies [and this, the record shows, is work which the linemen of the telephone company are frequently required to perform], the linemen do their own

testing," that they know that there are no others employed by the telephone company to do such testing, and that they are supplied with suitable appliances for testing such wires. Delaney was an experienced lineman, acquainted with the duties and dangers of his employment. As against the telephone company, his negligent failure to perform one of the duties of his employment must defeat a recovery for an injury caused by such failure. The relation of Delaney to the electric railroad company was different. As he was not their employee, he was under no contract duty to test their wires or circuit breakers. Under different circumstances, he might have assumed that the electric railroad company was performing its duty, and using suitable and safe appliances to prevent the escape of electricity from the main or trolley wire to the guy wires. But when the accident happened he knew, as an experienced lineman, that such was not the fact, and that it was unsafe to act upon such a belief. He had been expressly warned of the danger of a contact with wires of this kind. Two instances upon this same work of damages caused by the escape of electricity to the telephone wires by reason of defective circuit breakers had been called to his attention, and a fellow workman, but a day or two before this accident, pointed out to him this particular guy wire as one from which he had himself just received a shock. With such knowledge, and after such warning, Delaney heedlessly pulled the wire which he was coiling, from the arm of the telephone pole, in such a manner that it would obviously fall, as it did, upon the guy wire, and when, as the court finds, it would have been easy for him to have thrown the wire from the pole so as to avoid contact with the dangerous guy wire. The defendant electric railroad company can be only liable in this action for an injury caused by its negligence to one who was himself in the exercise of ordinary care. Its negligence did not excuse Delaney from exercising such care to avoid an injury. Applying that test to the conduct of Delaney, namely, the care which a person of ordinary prudence and judgment should have exercised under similar circumstances,—and we have no reason to think that any different standard was applied,—the trial court has found that he was not in the exercise of due care, as alleged in the complaint, and that his negligence essentially contributed to cause his injury. This conclusion of the court is final. *Peltier v. Bradley, D. & C. Co.* 67 Conn. 42, 32 L. R. A. 651. Were it reviewable, we should say that it was fully sustained by the facts found.

The action of the court in receiving the evidence offered to prove a discharge by the plaintiff, before he was appointed administrator, of the cause of action against the telephone company, could not have harmed the plaintiff. The court very properly refused to hold that the facts proved constituted a release. *Cadden v. Fletcher*, 4 Mees & W. 378; *Taylor v. Moore*, 47 Conn. 278. Had the court held that such facts constituted a release of the alleged cause of action, the record shows that, by reason of the contributory negligence of Delaney there was no cause of action which could have been discharged.

Manifestly the plaintiff was not prejudiced by the rulings of the court in permitting the hypothetical question to Boynton, in admitting the notice which had been served upon the electric railroad company, and in excluding proof of the declarations of Butler. We think these rulings can be sustained, but assuming that they were erroneous, as the plaintiff's right to recover beyond nominal damages is defeated by Delaney's contributory negligence, and as these rulings could not have affected the trial or decision of that question, the plain-

tiff was not injured thereby, and we have no occasion to discuss them further.

We have considered all the questions which we think are involved in the rulings and decision of the court below. At least twenty of the twenty-seven reasons of appeal assigned seem to be unnecessary for the proper presentation of those questions in this court.

There is no error

The other Judges concur.

ILLINOIS SUPREME COURT.

Christ M. DAHNKE, *Plff. in Err.*,

vs.
PEOPLE of the State of Illinois.

(168 ILL. 102.)

1. **Locking the door of a court room** during the adjournment of court, and refusing to allow the judge of the court and his officers and the parties to the suit on hearing before him to enter the court room at the time to which court was adjourned, are a contempt of court.
2. **An assignment of the different court rooms in the court-house to the different judges** of the courts of record is not within the power of the county board under statutes requiring the board to provide a court-house and proper rooms and offices for the accommodation of such courts, but it rests with the judges of the courts to arrange among themselves how they will occupy the several court rooms provided by the board.
3. **The power to manage county affairs**, given to the county board by Const. 1870, art. 10, § 7, does not include the power to assign court rooms to the different judges of the courts of record.
4. **The custody and care of the court-house and jail**, given to the sheriff by Rev. Stat. chap. 125, § 14, is a limitation of the provision of chap. 34, § 25, giving to the county board the care and custody of all the real estate owned by the county.
5. **The custody of a court-house which the sheriff**, as the court's executive officer, has, is the custody and care of the building as a court-house, while as real estate simply, it is in the care and custody of the county board, which controls the title and keeps it in repair.

(November 1, 1897.)

ERROR to the Appellate Court, First District, to review a judgment affirming the judgment of the Superior Court for Cook County fining defendant for contempt. *Affirmed.*

Statement by **Magruder, J.:**

This was a proceeding against the plaintiff

NOTE.—As to the power of courts to provide necessary places and equipment for their business, see *Vigo County Comrs. v. Stout* (Ind.) 22 L. R. A. 308; also *White County Comrs. v. Gwin* (Ind.) 22 L. R. A. 402.

As to lease of rooms in court-house, see *State, Scott, v. Hart* (Ind.) 33 L. R. A. 118.
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in error in the superior court of Cook county for contempt in interfering with the use of one of the court-rooms in the court-house of Cook county by Judge Henry V. Freeman, one of the judges of the superior court of said county. Notice was given to plaintiff in error of an application for a writ of attachment for criminal contempt, based upon an affidavit showing the facts in regard to such interference. A writ of attachment was issued, and plaintiff in error was arrested. On December 8, 1894, an order of court was entered, showing that the sheriff had brought plaintiff in error into court, and ordering that the attorney for the people should forthwith file interrogatories to be propounded to the plaintiff in error. Such interrogatories were filed, and answers thereto made by the plaintiff in error. Upon filing such answers, plaintiff in error moved to be discharged as purged of contempt. The court found plaintiff in error guilty of contempt, and overruled the motion for discharge, and fined him \$50, and ordered that he stand committed to the custody of the sheriff until the fine was paid. The judgment imposing this fine was taken by writ of error to the appellate court, and there affirmed. The present writ of error was then sued out from this court for the purpose of reviewing such judgment of affirmance entered by the appellate court.

The facts as they appear from the affidavits filed and the answers to the interrogatories are substantially as follows: It appears that, since 1891, the board of county commissioners of Cook county has assumed control of the court-house in that county, and appointed a custodian therefor. The plaintiff in error was, at the time of the contempt charged against him, holding the position of such custodian. There are a number of court rooms in the court-house in said county, prepared for the use of the judges of the superior and circuit courts of Cook county, who are of equal dignity, and have the same jurisdiction. There are about twenty-three of such judges who hold court in said court rooms; and, in view of the number of judges and the limited number of court rooms, it has happened that there is not a sufficient number of court rooms in the court-house to accommodate said judges with separate court rooms. Hence there are times when some one or more of said judges are without court rooms in said court-house. It appears that the county board have assumed to assign

the court rooms in the court-house to the various judges of said courts. On September 17, 1894, Judge McConnell, of the circuit court, who had been occupying court room No. 421, left that room for the purpose of holding criminal court in the criminal-court building, which is a separate building from that in which the civil courts are held. Upon such vacation of the room by Judge McConnell, Judge Freeman, of the superior court of Cook county, took possession of said room 421, although the same had not been assigned to him by the county board, and occupied it for the purpose of holding his court therein, and continued so to occupy it until November 5, 1894, when the occurrences hereinafter mentioned took place. In the meantime, and on October 15, 1894, the county board assigned said room 421 to Judge Windes, of the circuit court, room 207 to Judge Haency, of the circuit court, and room 327 to Judge Freeman, of the superior court to be used by him temporarily, until another judge, who was holding criminal court, should return from the criminal-court building to take up his civil docket. Before the order of October 15 was entered by the county board, and on or about October 1, 1894, Judge McConnell resigned his position as judge in the circuit court. On November 5, 1894, Judge Freeman was holding court in the court room No. 421, and hearing a chancery cause therein. On the evening of that day, by order entered of record, he adjourned said court until 10 o'clock a. m. on November 7, 1894; November 6 having been the day of the general election. When court adjourned, the files in the cause on hearing, and in other causes pending in said court, as well as the memoranda and papers of the judge, were in said court room No. 421. In the interval between the adjournment of the court on the evening of November 5 and the hour of 10 o'clock on the morning of November 7 the plaintiff in error, acting under the directions of the county board, changed the locks on the doors of said court room 421; and on the morning of November 7 refused to permit Judge Freeman, and the sheriff and his bailiffs attending the court, and the attorneys, parties, and witnesses interested in the cause on hearing, to enter said court-room. By this conduct the judge, and the officers of his court, and the witnesses, attorneys, and parties interested in the cause on hearing, although in attendance and ready to proceed with such cause, were unable to gain admission to the court-room. The plaintiff in error, acting under such order of the county board, declared that the session of said court should not be held in the said room. The plaintiff in error, as custodian as aforesaid, had been directed by the county board to remove the property of Judge Freeman from room 421, and turn over said room 421 to another judge. In view of this conduct of plaintiff in error as such custodian, the bailiffs in attendance upon Judge Freeman's court threatened to break into said court room; and thereupon the plaintiff in error unlocked the doors thereof, and allowed such bailiffs to take possession until he could report to the county board, and ask further instructions.

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Mr. Robert S. Iles, for plaintiff in error:

In order to sustain the charge of contempt upon the record, it must appear that the acts complained of were committed against the lawful authority of the court and in defiance of the power vested in the court by law.

The power to punish for contempt is not an arbitrary power to be used for all purposes, and can only be exercised in cases where the act of offense is committed against the court as a court, and where such act weakens, or tends to weaken, or to destroy, the power of the court to enforce the law or to administer justice.

Any act directed against the court as a court and in defiance of its lawful authority, which defeats or tends to defeat the objects for which the court is established and maintained, is contempt of court, and no other act or class of acts can be so construed.

The act complained of did not and does not tend to defeat the purposes and objects for which the said court was established.

The act complained of was not directed against the court as a court, and was not in defiance of the court's lawful authority.

The record shows that the sheriff at that time was not the *de facto* custodian, and was not recognized as such by either the judges or the county board, and that he did not assume to exercise any of the functions of that office.

The sheriff, under the Constitution of this state and the statutes enacted thereunder, is not, and was not at that time, *de jure* or the legal custodian of the court-house for the purposes involved in this cause, to wit: he was not the legal custodian for the purpose of furnishing court-rooms, caring for, repairing, or controlling the use of the building.

Const. art. 10, § 7; Rev. Stat. chap. 34, § 24.

Mr. S. P. Shope, for defendant in error:

It is the duty of the county authorities under the statute (§ 27, chap. 34, 1 Starr & C. 655), to erect or otherwise provide, "and keep in repair, a suitable court-house, . . . and to provide proper rooms and offices for the accommodation of the several courts of record of the county, and for the county board, county clerk, . . . and the clerk of said courts, and to provide suitable furniture therefor."

People, Bull. v. La Salle County Supers. 84 Ill. 303.

The duty to provide suitable rooms for the accommodation of the several courts of record in no way carries with it the power to designate what particular judge shall occupy any particular room.

The power to make an assignment of rooms among the judges, and to designate what particular rooms shall be occupied by the judges, severally, is not conferred by law upon the county board.

Const. of 1870, art. 10, § 7; *Andrews v. Knox County Supers.* 70 Ill. 69; *People, Bull. v. La Salle County Supers.* 84 Ill. 303.

The board of county commissioners can exercise only such powers as are given by law, or such as arise by necessary implication from the grant, or are indispensable to carry into effect the objects and purposes of the corporation which they represent.

Cook County v. Gilbert, 146 Ill. 274.

Magruder, J., delivered the opinion of the court:

1. The first question which arises in this case is this: Was the conduct of the plaintiff in error in locking the door of the court room during the period of adjournment, and refusing to allow the judge of the court, and his officers, and the parties to the suit on hearing before him, to enter the court room, a contempt? In *Stuart v. People*, 4 Ill. 395, we held that the power was inherent in every court of justice to defend itself when attacked just as much as the individual man has a right to defend himself for his own preservation; and we also there held that in the power to punish for contempt are necessarily "included all acts calculated to impede, embarrass, or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court." The doctrine of the *Stuart Case* was reaffirmed in *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528. The conduct of the plaintiff in error was certainly such as was calculated to obstruct the court in the administration of justice. Rapalje, in his work on Contempt (at § 22), classifies, among contempts which are direct, those which are committed within the presence of the court while in session, "or so near to the court as to interrupt its proceedings." It is true that the acts of the plaintiff in error were not performed while the court was actually in session; but, having been performed during the brief adjournment of the court from one session to another, and having had the effect of preventing the judge of the court from gaining access to his court room, they may be regarded as being so near to the court as to interrupt its proceedings. "Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, or for disturbing them in their proceedings." 8 Am. & Eng. Enc. Law, p. 780. There can be no doubt that the conduct of plaintiff in error here disturbed and interfered with the court in its proceedings, and while it was engaged in the administration of justice. Contempt of court is a despising of the authority, justice, or dignity of the court. He is guilty of such contempt whose conduct is such as "tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties litigant, or their witnesses during the litigations." Oswald, Contempt of Court, pp. 3, 4. "Any conduct which is calculated to interfere with the proceedings, by assailing litigants or witnesses within the precincts of the court, or preventing or hindering, or endeavoring to prevent or hinder, them in their access to the court or otherwise, is a contempt." Id. p. 27. It has been said that the power of the court in the matter of contempt cannot be defined within any limits, and that the primary question in all cases of alleged contempt is "whether there has or has not been an interference or an attempt to interfere with the due administration of justice." Id. p. 70. Applying the definition of "contempt" as thus laid down to the facts of this case, we are of the opinion that there was here a contempt of court, which the judge was justified in punishing, if the facts hereinafter set forth do not constitute a suffi-

cient excuse or justification for the conduct of the plaintiff in error.

2. It is claimed that the county board had a right to assign the different court rooms in the court-house to the different judges of the circuit and superior courts of Cook county; that each one of such judges was bound to occupy the particular court room so assigned to him; that room 421, though in the actual occupancy of Judge Freeman, had, while he was so occupying it, been assigned to another judge; that Judge Freeman had been assigned to occupy court room 327; that, therefore, the county board had the right and power to order plaintiff in error, as their custodian, to remove Judge Freeman's property from room 421 to room 327, and to prevent his access to room 421; and that, inasmuch as plaintiff in error was merely acting under orders of the county board, he was justified in doing what he did.

We know of no law or statute, and have been referred to none, which authorizes the board of county commissioners of Cook county to assign the court rooms in the court-house in that county to particular judges. Section 26 of the act of March 31, 1874, "to revise the law in relation to counties," provides as follows: "It shall be the duty of the county board of each county: First.—To erect or otherwise provide when necessary, and the finances of the county will justify it, and keep in repair, a suitable court-house, jail, and other necessary county buildings, and to provide proper rooms and offices for the accommodation of the several courts of record of the county, and for the county board, county clerk, county treasurer, recorder, sheriff, and the clerks of said courts, and to provide suitable furniture therefor." 1 Starr & C. Anno. Stat. 2d ed. p. 1089. Section 4 of the act of February 16, 1874, "to revise the law in relation to circuit courts and the superior court of Cook county," provides as follows: "If there is no court-house in the county, or if from any cause the court-house is unfit for the holding of court therein, the proper authorities of the county may temporarily provide another place at the county seat for the holding of court, or the court, by order entered upon its records, may adjourn to a suitable place at such county seat, and the place so provided, or to which such adjournment is made, shall, during the time the court is so held thereat, be held to be the court-house of such county for all judicial purposes connected with such court." Id. p. 1157. Under these provisions of the statute it is the duty of the county board to erect and keep in repair a suitable court-house, and to provide rooms therein for the accommodation of the several courts of record of the county. When the board has provided rooms for the accommodation of the courts, the rooms so provided are then in the possession and under the control of the courts and their officers. If there are a number of court rooms in any court-house, the duty of the board is discharged when it turns over such court rooms to the judges of the courts. It rests with the judges of the courts to arrange among themselves how they will occupy the several court rooms thus provided for them by the county board. The county board has no right to dictate to the judges as

to what particular room each judge shall occupy. To make the judges of our courts depend upon a legislative or political body for the rooms in which they shall hold their sessions, in the manner indicated in this record, would be to destroy the dignity and independence of the judiciary. A county board, having such a power of assignment, would be tempted to assign the best court rooms to its favorites among the judges, and would thus be enabled to put the judiciary under obligations to themselves. The judiciary should be free from obstruction by county boards; it should be independent in all matters relating to the execution of judicial functions. There is danger that such independence will be sacrificed, if the judges are not allowed free access to their court rooms and control over the same during the sessions of the court, and during its necessary seasons of adjournment. Whenever it happens that there are not rooms enough to accommodate all the judges, then such a state of things exists as is described in the following words of the statute above quoted: "If there is no court-house in the county, or if from any cause the court-house is unfit for the holding of court therein." It is then the duty of the county board to provide another place or places at the county seat for the holding of court by the judges who are thus without suitable court rooms. Section 7 of article 10 of the Constitution of 1870 provides that "the county affairs of Cook county shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the city of Chicago, and five from towns outside of said city, in such manner as may be provided by law." The power to manage the county affairs of Cook county, as thus conferred by the Constitution, in no way includes the power to assign court rooms to the different judges of the courts of record in such manner as is claimed in this case. The power to so manage is such power as is provided by law, and therefore such power as is specified, so far as the present subject is concerned, in the statutes already quoted.

Reference, however, is made by counsel for plaintiff in error to §§ 24 and 25 of chapter 84 of the Revised Statutes in relation to counties. Said § 24 provides as follows: "Each county shall have power: First—To purchase and hold the real and personal estate necessary for the uses of the county, and to purchase and hold, for the benefit of the county, real estate sold by virtue of judicial proceedings in which the county is plaintiff. Second—To sell and convey or lease any real or personal estate owned by the county. Third—To make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate powers." 1 Starr & C. Anno. Stat. 2d ed. p. 1085. Said § 25 provides as follows: "The county boards of the several counties shall have power: First—To take and have the care and custody of all the real and personal estate owned by the county. Second—To manage the county funds and county business, except as otherwise specifically provided." Id. p. 1086. It is contended on behalf of plaintiff in error that inasmuch as under §§ 24 and 25 the county board has the power to purchase and hold the real and

personal estate of the county, and to take and have the care and custody of all such real and personal estate, it therefore has the right to have the care and custody of the court-house and all the court rooms therein. But § 14 of chapter 125 of the Revised Statutes, in relation to sheriffs, provides that the sheriff "shall have the custody and care of the court-house and jail of his county, except as is otherwise provided." 3 Starr & C. Anno. Stat. 2d ed. p. 3768. The act in regard to counties is general in its terms, and provides for the care and custody by the counties of all the real estate belonging to the county. The act, however, in regard to sheriffs, specifically provides that the sheriff shall have the care and custody of the court-house. The two acts, the one in regard to counties, and the other in regard to sheriffs, were passed at the same session of the legislature in 1874. It is a well-settled rule of construction that, where there are two provisions, one of which is general and designed to apply to cases generally, and another is particular and relating only to one subject, the particular provision must prevail, and must be treated as an exception to the general provision: *Chicago & N. W. R. Co. v. Chicago*, 148 Ill. 141; *People, Herdman, v. Rose*, 166 Ill. 422. Hence it would seem to follow that, while the county board is entitled to the general care and custody over the ownership of the real estate belonging to the county, so far as to hold the title thereto, and preserve the evidence of title, and so far as it is necessary to erect and keep in repair the buildings thereon, yet, after the particular court rooms in a court-house have been provided for the judges, the possession thereof is in the hands and under the control of the courts themselves, and the care and custody thereof rightfully belong to the sheriff, as the executive officer of the courts. If the general provision in the act in regard to counties entitles the board of county commissioners to have the custody and care of the court-house, then it cannot be otherwise construed than as giving the county board the power to have the care and custody of the jail, because § 14 of the act in regard to sheriffs couples the custody and care of the court-house with the custody and care of the jail. One of the common-law powers of the sheriff is that he shall be custodian of the county jail. 23 Am. & Eng. Enc. Law, p. 525. The Constitution of this state provides for the election of sheriffs. Const. art. 10, § 8. Sheriffs, as elected under the Constitution, have the same powers with which they were clothed at common law. Murfree, in his work on Sheriffs (chap. 2, § 42), says: "The very name and office of sheriff implies the possession by that functionary of all the powers, and the obligation to perform all the duties, of a common-law sheriff, except so far as those powers and duties may have been modified by state Constitutions or constitutional statutes." The same author also says: "When the office of sheriff is a constitutional office in any state, recognized and designated *eo nomine*, by the Constitution, as a part of the machinery of the state government, the sheriff, *ex vi termini*, must possess in that state, all the substantial powers appertaining to the office by common law. It is competent for the state legislature

to impose upon him new duties growing out of public policy or convenience, but it cannot strip him of his time-honored and common-law functions, and devolve them upon the incumbents of other offices created by legislative authority." *Id.* § 41. It has accordingly been held that the legislature cannot transfer to other officers elected by the board of supervisors the power of the sheriff to have the custody and control of the jail and the prisoners therein, when the Constitution provides for the election of sheriffs, without designating what their powers shall be. *State, Kennedy, v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84; *People, McEwan, v. Keeler*, 29 Hun. 175. It being true, therefore, that the general provision in the act in regard to counties, giving the care and custody of all the real estate of the county to the county board, cannot have the effect of transferring to that board the care and custody of the jail, it must also appear to be true that it could not have the effect of transferring to the county board the care and custody of the court-house.

This conclusion receives indorsement from several other considerations. In the first place, § 38 of chapter 27, in regard to "counties and county commissioners' courts," of the act of March 3, 1845, provided as follows: "The county commissioners of said counties shall have the care and custody of said court-houses." Ill. Rev. Stat. 1845, p. 135. Section 7 of the act of March 3, 1845, in regard to sheriffs and coroners, also provided as follows: "It shall be the duty of the sheriff of each county to attend all circuit courts and courts of county commissioners in his county at the terms and sessions of such courts; and he shall have the custody and care of the court-house and jail." Ill. Rev. Stat. 1845, p. 515. These two statutes of 1845, passed on the same day, would seem to conflict with each other, as one gives to the county commissioners the care and custody of the court-house, while the other gives to the sheriff the care and custody of the court-house and jail. We need not stop to advance any theory for the purpose of reconciling these two statutes of 1845. It is sufficient to say that, in 1874, when the legislature adopted a new revision of the statutes, it left out that provision of the act of March 3, 1845, in relation to counties, which specifically gave the care of the court-house to the county commissioners, and merely provided, in general terms, that the county boards should have the care and custody of all the real estate owned by the county without specifically mentioning court-houses. At the same time, while it adopted this general provision in regard to counties, it adopted the specific provision which gave the custody of the court-house to the sheriff. In the second place, § 24 of the act in regard to sheriffs provides as follows: "When a sheriff goes out of office he shall deliver to his successor all writs, process, papers, and property attached or levied upon, except such as he is authorized by law to retain, and

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also the possession of the court-house and jail of his county, and shall take from his successor a receipt," etc. 3 Starr & C. Anno. Stat. 2d ed. p. 8770. Here is a provision which directs the sheriff specifically when he goes out of office to deliver the possession of the court-house to his successor. No other inference is possible than that, during his term of office, he was to have the possession of that which, at the close of such term, he was to deliver over to his successor. If, therefore, the sheriff is entitled to hold possession of the court-house, it would seem to follow that the county board has no right to such possession, except in the manner already specified. We have held that the county board can exercise such powers only as are expressly given by law, or such as arise by necessary implication from the powers granted, or are indispensable to carry into effect the objects and purposes of the creation of the municipal corporation. *Cook County v. Gilbert*, 146 Ill. 274. Hence we are inclined to concur with the view expressed by Judge Freeman in deciding this case in the court below, as follows: "As real estate simply, the court-house is in the care and custody of the county board. As a court-house it is in the custody and care of the sheriff. As real estate the county board controls the title, and keeps the building and its furniture in repair. As a court-house the sheriff, who is himself an officer of court, guards and cares for it. Should the building cease to be a court-house, it would revert to the care and custody of the county board like the other real estate. . . . The custody of the court-house by the sheriff is the custody of an officer of the courts, who is subject to their control. In other words, it is the custody of the courts themselves. . . . The sheriff himself has no power to control the use of the court rooms by the courts or judges thereof. His custody and care cannot be construed to include the power of dictating to the courts what special court rooms they shall occupy. This matter rests with the courts themselves, as a matter of inherent power, not with the sheriff even, and certainly not with the county board." [27 Chicago Legal News, 140]. The same doctrine is also well expressed by Mr. Justice Shepard of the appellate court, in deciding this case, in the following words: "The custody and control which the county board is entitled to exercise under the authority of the Constitution and statutes are such as attach to and flow from the ownership of the court-house by the county; those of the sheriff are such as attach to and flow from the inherent powers and duties of his office at common law, and as recognized by the Constitution and declared by the statutes as the attendant upon the court and as the court's executive officer." 57 Ill. App. 619.

For the reasons herein stated the judgments of the Appellate Court and of the Superior Court of Cook County are affirmed.

V. H. GIBSON *et al.*

v.

SAFETY HOMESTEAD & LOAN ASSOCIATION,

John R. CHALLACOMBE, Intervener,
Plff. in Err.

(170 Ill. 44.)

1. Notice of withdrawal from an insolvent loan association does not entitle members to priority of payment over their fellow stockholders.

2. The illegality of an issue of paid-up stock by a building and loan association cannot be asserted by stockholders who have taken it and paid for it in order to place themselves in a better position with respect to other stockholders, who do not question its validity, than they would be if the stock had been valid.

(Phillips, Ch. J., dissents.)

(November 8, 1897.)

ERROR to the Appellate Court, Third District, to review a judgment affirming a decree of the Circuit Court for Montgomery County ordering a distribution of the assets of the Safety Homestead & Loan Association which were in the hands of a receiver, John J. McLean. *Affirmed.*

The facts are stated in the opinion.

Messrs. Howett & Jett and James M. Truitt, for plaintiff in error:

Nowhere in the act authorizing the organization of associations similar to that which defendant in error represents is the issue of such stock known as paid-up stock authorized or permitted.

Rhodes v. Missouri Sav. & Loan Co. Ottawa Sup. Ct. Oct. 1896; see 63 Ill. App. 77; *Murray v. Scott*, L. R. 9 App. Cas. 519.

The holders of paid-up stock should have been considered to be preferred creditors for an amount in excess of the sum for which they would have been liable for monthly dues as the holders of common stock.

Paid-up stockholders who had given thirty days' notice of withdrawal should have been declared to be preferred creditors.

Walton v. Edge, L. R. 10 App. Cas. 38; *United States Bldg. & L. Assn. v. Silverman*, 85 Pa. 394; *Wetterwulph v. Knickerbocker Bldg. Assn.* 2 Bosw. 381.

Messrs. Lane & Cooper, for defendant in error:

A stockholder by giving thirty days' notice on an insolvent association cannot cease to be a member thereof and thereby become a creditor and be entitled to priority of payment.

Re Sunderland 36th Universal Bldg. Soc. L. R. 24 Q. B. Div. 394; Strohen v. Franklin Sav. Fund & L. Assn. 115 Pa. 278; *Christian's Appeal*, 102 Pa. 154; *Thomp. Bldg. Assn.* 67; *Endlich, Bldg. Assn.* 2d ed. § 108; *Chapman v. Young*, 65 Ill. App. 181.

All parties purchased stock in this association in good faith, and, without the fault of any of said stockholders so far as this record

discloses, the society failed; now it is sought to cast the entire loss on the holders of common stock.

The holders of paid-up stock have no equity to make such a demand, nor do we think the court has any power to grant it.

Criswell's Appeal, 100 Pa. 488; *People v. Love*, 117 N. Y. 175; *Knoblanck v. Robert Blum Bldg. & L. Assn.* 25 Pittsb. L. J. 39; *Toivle v. American Bldg. & L. Assn.* 75 Fed. Rep. 938.

The funds of an insolvent association should be administered by the court between stockholders upon principles of equity, and to the end that all members should equally and mutually bear their just proportion of the losses sustained in the course of the life of the society.

Chapman v. Young, 65 Ill. App. 181.

The holders of preferred stock are not creditors but members of the corporation.

28 Am. & Eng. Enc. Law, p. 611.

Withdrawing members of an insolvent building association are not entitled to priority.

42 Cent. L. J. 374; *Thomp. Bldg. Assn.* 67; *Heinbokel v. National Sav. Loan & Bldg. Assn.* 58 Minn. 340, 25 L. R. A. 215.

It may be true that this association had no power to issue paid-up stock and sell the same to the plaintiffs in error. But that question cannot now be raised either by the association or the parties who purchased the stock.

Bradley v. Ballard, 55 Ill. 413, 7 Am. Rep. 656.

The holders of paid-up stock assented to the acts of the association for they were chargeable with a knowledge of the law at the time that the corporation had no power to issue paid-up stock if such is the fact.

They are estopped by their own acts, as the association is estopped from claiming it had no power to issue such stock.

Kadiash v. Garden City Equitable Loan & Bldg. Assn. 151 Ill. 538; 2 Parsons, Contr. 790.

The plea of *ultra vires* must fail.

2 Beach, Priv. Corp. §§ 424 *et seq.*; *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 459; *Heims Brewing Co. v. Flannery*, 137 Ill. 318.

Members are chargeable with notice of the charter and by-laws of the association.

Citizens' Sav. Bldg. & L. Soc. v. Ruhl, 55 Ill. App. 70; *Manufacturers' & M. Mut. Ins. Co. v. Gent*, 13 Ill. App. 308.

The plaintiffs in error voluntarily purchased the stock without any fraud or false representations, and during the life of the association accepted interest on such stock, and they cannot now question its validity.

Bloomington Mut. Ben. Assn. v. Blue, 120 Ill. 128, 60 Am. Rep. 558; *Criswell's Appeal*, 100 Pa. 488.

Wilkin, J., delivered the opinion of the court:

This is an appeal from a judgment of the appellate court of the third district confirming an order of distribution in the circuit court of Montgomery county in the matter of the Safety Homestead & Loan Association. The order of the circuit court is as follows: "The court finding from reports of John J. McLean, receiver, that there is sufficient money in the re-

NOTE.—As to withdrawals from building and loan associations, see note to Englehardt v. Fifth Ward Permanent Dime Sav. & L. Assn. (N. Y.) 85 L. R. A. 220.

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ceiver's hands to pay a dividend of 25 per cent to shareholders, and still leave enough money in the receiver's hands to pay taxes and other expenses of administration of said estate, orders, adjudges, and decrees that the receiver may pay a dividend of 25 per cent to all shareholders of said association in the following manner: First. Receiver is ordered to pay, from any money in his hands as receiver, a dividend of 25 per cent among all shareholders, irrespective of withdrawals of paid-up stock, as follows: The principal sum upon which dividends shall be paid to holders of common stock shall be the total amount of monthly instalments paid by the several shareholders of such stock, with 6 per cent interest on the several instalments, computed according to the average time of monthly payments from date of payment to April 23, 1895. Second. The principal sum on which dividends shall be paid shareholders of paid-up stock shall be the total amount paid by the several shareholders of such stock, with 6 per cent interest from date association failed to pay 6 per cent interest on said stock to April 23, 1895. Third. Borrowing shareholders shall be credited with amount of dividends payable on their shares when they pay off their loan to said receiver, but the credit shall be as of the date when dividends are paid to nonborrowing shareholders. Fourth. Receiver shall only pay dividends to persons by stock books as owners of stock on which dividends are paid. Fifth. Dividends shall only be paid upon presentation of certificates of shares to receiver at time dividends are paid for indorsement, or credit thereon of amount paid."

Two objections are urged against this order: First, that it gives stockholders who had served notice of withdrawal upon the association no preference or advantage over stockholders who had not given such notice; and, second, that it treats those who are called "paid-up stockholders" the same as all others.

It is not denied, but fully appears from the record, that, at the time notice of withdrawal was given by the stockholders now claiming the benefit of such notice, the association was insolvent. The decree of the circuit court very properly gave such stockholder no advantage over the common stockholders. Notice of withdrawal from an insolvent society does not entitle members to priority of payment over their fellow stockholders. *Endlich, Bldg. Asso. 2d ed. § 108; Chapman v. Young, 65 Ill. App. 131, and cases cited.*

The second point is a novel one. It seems that the association issued to certain persons what is called paid-up stock. The form of the certificate is as follows:

This is to certify that —, of —, is the owner of — shares of the — series, dated —, of the prepaid capital stock of the Safety Homestead and Loan Association of East St. Louis, Ill., having therefor paid the sum of \$50.00 per share in advance, transferable only on the books in person or by attorney upon surrender of this certificate, and is entitled to the dividends and is subject to the conditions printed on the back of this certificate and the constitution and by-laws of the association.

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The certificate bore the following indorsement: "The stock represented by this certificate is entitled to semiannual dividend of 3 per cent on amount paid therefor, which will be deducted from profits earned on stock, balance being credited on stock represented by this certificate. When amount to credit of stock equals \$100 per share, stock is matured; and holder may withdraw same by surrender of this certificate, properly indorsed, and receive \$100 per share therefor. Holder may surrender stock by giving thirty days' notice any time after one year, and receive full amount paid and portion of profits equal to earned and unpaid dividends thereon. Board of directors reserved right to call in, cancel, and pay off certificates any time by giving person to whom issued thirty days' notice by mail at post last known, and by paying him withdrawal value. After expiration of such notice, stock represented by this certificate will not be entitled to further dividends, whether presented for redemption or not."

Each of these certificates was issued upon the payment to the association of \$50. The holders now say that the association had no authority under the law to issue them. In other words, they contend that a building and loan association, under the statute of this state, cannot lawfully issue paid-up stock; and from that premise they conclude that they themselves may repudiate the validity of the stock, and, to the extent of the money paid therefor, they should be treated as preferred creditors of the association. If it be true that the association had no authority of law to issue the stock, it is equally true that the holders of that stock had no right or authority of law to accept it; and, if they were claiming any benefit therefrom, other stockholders might, with propriety, question the legality of the transaction. But the holders of that stock are in the anomalous position of themselves repudiating its validity, and thereby seeking to obtain an advantage over those who are the legal stockholders of the association. It seems to us unreasonable to say that these stockholders may be allowed to assert the illegality of the action of the building association to which they themselves were parties, and at the same time, by reason of that illegality, place themselves in a better position than they would have been had their stock been valid. They bought paid-up stock. They paid for it. No one is questioning their right to the benefit of that stock, and, clearly, they cannot be heard to do so. In case the whole of this paid-up stock shall not be considered as a preferred indebtedness, plaintiffs in error ask the court to hold that the holders thereof be charged with monthly dues on the amount of their stock, from its date, so that they may be placed upon an equal footing with other stockholders as to that part, and, as to any excess, they be declared creditors of the association and paid in full. In other words, their contention is that, if the whole of their stock cannot be paid in full as a preferred indebtedness, part of it may be. Certainly, no good reason appears why the holders of paid-up stock should be entitled to any more advantage as to this excess than they would be as to the whole of the stock.

The judgment of the Appellate Court affirm-

ing the decree of the Circuit Court will be affirmed.

Boggs, J., having passed upon this case in the appellate court of the third district, took no part in the decision of the case in this court.

Phillips, Ch. J., dissenting:

I hold that a shareholder may, with the consent of the association, pay up in full for his stock, as near as the amount to be paid therefor can be estimated. In other words, he may deposit a sum of money with the association to be used by the secretary in crediting payments on the shares as the monthly dues become due. The association may allow interest on the amount deposited or paid in until required for the payment of dues. Paying in advance is nothing more than a transaction of that character. When an association fails, then, to the extent shares were paid by reason of their hav-

ing become due, such shareholder paying in advance is in the same position as a shareholder who has paid his dues monthly. There is no reason why he should be in a worse position. The association has, to the extent of the money not yet used for paying dues, the money of the shareholder, which it was to apply in payment of dues, but, by reason of its failure, cannot so apply. It has the money of the shareholder, which it has not the right to retain. To such amount the association is a debtor to the shareholder, and that sum should be paid in full if there be sufficient funds to do so, and to that extent there should be a preference over dividends to shareholders. As to the amount of dues that have become due, his dividends should be the same as other shareholders,—no greater, no less. I cannot concur in this opinion.

Rehearing denied December 14, 1897.

IOWA SUPREME COURT.

William MORAN, Exr., etc., of John Moran,
Deceased,
v.

William D. MORAN, Impleaded, etc., Appt.

(.....Iowa.....)

1. A devise absolute in form cannot be shown by oral evidence to be in trust for other persons.
2. A bequest of money "to be divided among the Sisters of Charity," without any limitation as to locality, state, or nation, and without any provision for the exercise of discretion by the trustees, is void for uncertainty.
3. A bequest to the pastor of a specified church, "that masses may be said for me," although not a charity, creates a valid private trust.
4. A bequest for a known and lawful purpose, where the power of execution is prescribed and available, should never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law.

(December 18, 1897.)

APPEAL: by defendant, William D. Moran, from a judgment of the District Court for Dallas County upholding the provisions of the will of John Moran, deceased. *Modified.*

Statement by **Granger, J.:**

This is a proceeding asking for the construction of the will of John Moran, deceased. The will is in the following language, so far as it is important for the purpose of this proceeding: "Will of John Moran. Before these present, I will and bequeath to Patrick Moran five hundred dollars of money. I will and be-

queath to William Toomey nine hundred dollars of money. I will and bequeath to Patrick Doyle three hundred dollars of money. I will and bequeath to the Catholic priest who may be pastor of the Beaver Catholic Church when this will shall be executed three hundred dollars, that masses may be said for me. I will and bequeath to my brother William five hundred dollars, and to my brother Michael fifteen hundred dollars, and to my sister, Mary Moran, five hundred dollars, and to be divided among the Sisters of Charity by William Toomey, William Moran, and Rev. H. V. Malone, five hundred dollars. And I will to William Moran, my nephew, a son of my sister, Mary, my farm."

The witnesses to the will are William Moran and William Toomey, both of whom are legatees in the will. The probate of the will was contested on the ground, among others, that the subscribing witnesses were legatees thereunder. The testator died without issue and unmarried. He left surviving him William D. and Michael and Mary Moran, as brothers and sister, who, in the absence of the will, would inherit the estate. They are defendants in this proceeding, with others, and each is a legatee under the terms of the will. After the filing of the objections to the probate of the will, William Moran, who was a legatee under, and subscribing witness to, the will, filed his answer to the objections, in which he expressly denied that he had any interest in any devise or legacy provided by the will, and alleged that the devise of the farm to him was in trust, only, for the children of his sister, Bridget Tiernan, which trust was declared by parol to the testator, and by the parol agreement on his part to accept said trust. William Toomey, the other subscribing witness, also filed his written relinquishment of any provisions of the will in his favor, and upon a hearing the will was admitted to probate. The plaintiff, as executor, institutes this proceed-

NOTE.—As to validity of bequests for masses, see *Festorazzi v. St. Joseph Roman Catholic Church* (Ala.) 25 L. R. A. 380.
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ing, with all parties if interest as defendants, and asks the court to determine what provisions of the will are valid and should be executed. Defendant William D. Moran answers the petition, representing that the bequest of \$300, that masses might be said, and also of \$500, to be divided among the Sisters of Charity, are void, and also that the devise of the farm to William Moran cannot be established and treated as a trust in favor of the children of Bridget Tiernan, but that, because of the relinquishment by William Moran, the same becomes a part of the estate, for distribution among the heirs at law as if the said John Moran had died intestate. Other pleadings were filed, by other parties, presenting their respective claims for construction in accord with their interests. The district court adjudged the bequests for masses and to the Sisters of Charity valid and that the devise to William Moran, of the farm, was in trust for the children of Bridget Tiernan. The defendant William D. Moran, appealed.

Messrs. Robert S. Barr and Shortley & Harpel, for appellant:

Wherever the prior disposition of the property imports absolute and uncontrolled ownership, and also wherever a clear discretion and choice to act or not to act is given, equity will not construe a trust from the language employed.

Randall v. Randall, 135 Ill. 393; *Jones v. Storms*, 90 Iowa, 369; *Richardson v. Haney*, 76 Iowa, 102; *Koster v. Miller*, 149 Ill. 195; *Van Buskirk v. Van Buskirk*, 148 Ill. 9; 1 Perry, Tr. 113; *Maroney v. Maroney*, 97 Iowa, 711; *Lantry v. Lantry*, 51 Ill. 465, 2 Am. Rep. 810.

There is no fraud proved or claimed inducing the devise, hence no constructive trust, and parol evidence is incompetent to prove an express trust.

Perry, Trusts, 4th ed. § 73, p. 55; Hill, Trustees, 8d Am. ed. pp. 86, 87; *Allen v. Willrow*, 110 U. S. 119, 28 L. ed. 90.

Fraud, imposition, mistake in the original transaction, may constitute the purchaser or donee, a trustee *ex maleficio*. It is fraud then, and not subsequent fraud, if any exist, which justifies a court of equity in intervening for the relief of the party injured by it.

Patton v. Beecher, 62 Ala. 579; *Manning v. Phippen*, 86 Ala. 357; *Brock v. Brock*, 90 Ala. 86, 9 L. R. A. 290; *Barr v. O'Donnell*, 76 Cal. 470; *Gore v. Clarke*, 87 S. C. 537, 20 L. R. A. 465; 3 Redf. Wills, pp. 578, 579.

Parol evidence is not admissible to show an agreement to hold property in trust where it is conveyed by a deed absolute on its face, unless the instrument was obtained by fraud, or was made absolutely by mistake.

27 Am. & Eng. Enc. Law, p. 52; *Orth v. Orth*, 145 Ind. 184, 32 L. R. A. 299; 1 Bigelow, Fr. 189, 190; *McGinness v. Barton*, 71 Iowa, 644; *Andrew v. Concannon*, 76 Iowa, 251; *Champlin v. Champlin*, 136 Ill. 809; *Peterson v. Boswell*, 137 Ind. 211; *Moore v. Campbell*, 102 Ala. 445; *Martin v. Baird*, 175 Pa. 540; *McClain v. McClain*, 57 Iowa, 187, citing *Brown v. Barngrover*, 82 Iowa, 208.

There can be no resulting trust in this case, for the reason that the plaintiff relies upon an express agreement.

Bispham, Eq. 80; *Andrew v. Concannon*, 39 L. R. A.

76 Iowa, 253; *Brown v. Barngrover*, 82 Iowa, 204; *McClain v. McClain*, 57 Iowa, 169; *Keltum v. Smith*, 33 Pa. 165; *Barnet v. Dougherty*, 32 Pa. 872; *Minot v. Mitchell*, 30 Ind. 228, 95 Am. Dec. 685; *Acker v. Priest*, 92 Iowa, 610; *Dunn v. Zwilling Bros.* 94 Iowa, 233; *Lantry v. Lantry*, 51 Ill. 465, 2 Am. Rep. 310; *Tollerson v. Blackstock*, 95 Ala. 510; *Acker v. Priest*, 92 Iowa, 610.

The alleged bequest in the will in regard to masses is invalid for the reason that it contains no element of a charitable use.

Nichols v. Allen, 130 Mass. 221, 39 Am. Rep. 445; *Carter v. Balfour*, 19 Ala. 829; *Williams v. Pearson*, 88 Ala. 307; 3 Jarman, Wills, 87, 379-490; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397; Pom. Eq. Jur. 599; *Owens v. Missionary Soc. of M. E. Church*, 14 N. Y. 880, 67 Am. Dec. 160; *Holland v. Alcock*, 108 N. Y. 312; *Atty. Gen. v. Fishmongers' Co.* 2 Beav. 168; *Re Blundell's Trusts*, 30 Beav. 360; *Re Schouler*, 134 Mass. 426.

The soul of the deceased being a use not recognized in law, and the donor and usee being the same, and not in life, the bequest should be held void.

Holland v. Alcock, 108 N. Y. 312; *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397; *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 25 L. R. A. 360; *Sargent v. Burdett*, 96 Ga. 111; *Lefevre v. Lefevre*, 2 Thomp. & C. 341; *Methodist Episcopal Church v. Jackson Square Evangelical Lutheran Church*, 84 Md. 173; *Lapage v. McNamara*, 5 Iowa, 142.

Messrs. White & Clarke, for appellee:

The case is not within the statute of frauds, or of wills.

Dowd v. Tucker, 41 Conn. 208; *Hooker v. Azford*, 33 Mich. 453; *Hoge v. Hoge*, 1 Watts, 216, 26 Am. Dec. 52; *Williams v. Vreeland*, 29 N. J. Eq. 417.

Equity will enforce the performance of an agreement made by the defendant with a testator.

Jarman, Wills, 356; Browne, Fr. § 108; *Church v. Ruland*, 64 Pa. 432; *Jones v. McKee*, 3 Pa. 496, 45 Am. Dec. 661.

Where a gift or bequest is procured from a testator through a promise to hold the subject in whole or in part for a third person, whom the giver desires to benefit, a trust will arise *ex maleficio* if the promise be not fulfilled.

1 Jarman, Wills, 6th ed. Bigelow, p. 494, and notes; *Russell v. Jackson*, 10 Hare, 206; *Tee v. Ferris*, 2 Kay & J. 357; *Gaither v. Gaither*, 8 Md. Ch. 158; 1 Bigelow, Fr. 447; *Headley v. Renner*, 129 Pa. 542; *Etter v. Greenwalt*, 98 Pa. 422; *Eyre's Appeal*, 106 Pa. 184; *Abbott, Trial Ev.* pp. 129-150; Underhill, Ev. p. 328; *Glass v. Hulbert*, 102 Mass. 42, 3 Am. Rep. 418; *Stickland v. Aldridge*, 9 Ves. Jr. 516; *Kingsman v. Kingsman*, 2 Vern. 559; *Barrow v. Greenough*, 3 Ves. Jr. 152; *Pring v. Pring*, 2 Vern. 99; *Chamberlain v. Agar*, 2 Ves. & B. 259; *Podmore v. Gunning*, 7 Sim. 644; *Schouler*, Wills, § 586.

An extensive brief on this question will be found in *note to Gore v. Clarke* (S. C.) 20 L. R. A. 465.

Where property is devised to one person on his promise to hold it for the benefit of another, such a trust may be proved by parol.

Carver v. Todd, 48 N. J. Eq. 102; *Rags-*

dale v. Ragsdale, 68 Miss. 92, 11 L. R. A. 816.

Although a devise on its face may import an absolute gift to the devisee in her own right, it is competent to show, by her written admissions, that she was to take the property in trust for herself and others.

Bromley v. Gardner, 79 Me. 246; 3 Redf. Wills, 8d ed. p. 576; 1 Redf. Wills, 8d ed. pp. 511-513; 2 Pom. Eq. Jur. 2d ed. § 1007.

The bequest in favor of the Sisters of Charity is a valid bequest for the reason that it was made to named trustees.

Quinn v. Shields, 62 Iowa, 140, 49 Am. Rep. 141; *Phillips v. Harrow*, 98 Iowa, 92; 2 Perry, Tr. §§ 781, 782; 2 Redf. Wills, pp. 401, 402, 580-584.

Testator having faith in the efficacy of masses, and no doubt regarding the provision for masses as a religious duty, there is no legal reason why the provision should not be carried out.

Rhymer's Appeal, 93 Pa. 142, 39 Am. Rep. 788, note.

Granger, J., delivered the opinion of the court:

We first notice the question whether or not what appears by the terms of the will to be an absolute devise to William Moran of the farm can be shown by parol evidence to be in trust for the children of Bridget Tiernan. It appears that the will was drawn by Father Malone, a Catholic priest. There were present, other than the priest and the testator, William Moran and William Toomey, who were subscribing witnesses. The situation will be best seen by quoting from the record a little of the evidence. Father Malone testified: "When I sat down, I told him now we were ready to write anything he wanted us to write; and he says to me, the very first thing, 'I want Billy, here, to take that farm, and give the benefit to those children.' I says, 'What children do you mean?' and he says, 'The Tiernan children.' We didn't understand how he wanted the title fixed—whether he wanted it left to the Tiernan children by will, or leave it to William in trust. Q. What was said by him? What did he say in reference to that? A. I stopped and hesitated quite a bit, because I didn't want to disturb the man any more than was necessary. I remember I said: 'John, you don't fix the title to that property, and, if we write it down the way you say, it would be very vague. Can't you make it clearer?' He says: 'Billy can explain it to you, if you want it.' And it seemed to worry him when I said that. I says: 'Let us drop that out until we write the rest, and leave that to the last.' When we had written the other items, I says: 'I believe we have written all but that.' He says: 'I want it left to Billy, simply.' I wrote it down, and says: 'Is that what you want?' He says: 'Yes, sir; that is it, exactly. Billy will know what to do with the children.' In order to get more information without questioning, I says: 'That is a very good idea. Some of the children are very young, and they might squander it.' He says: 'That is it, exactly. Some of them might not be as good as they might be, and, if they got any

part of this property, they might squander it; and, in order to prevent it, I want him to have that title, so that he can discriminate among them as he sees fit.' And then he made the remark that it would prevent litigation, and keep it out of court." William Moran, the devisee, testified as follows: "He said he wanted to leave it to these children, for their use and benefit, and he wanted to put it in my name, so there would be no costs or court expense. For that reason it was put as it was. . . . I asked him if he had any particular choice, that he should leave more to one than to others. He said, 'No; if they were all good, he wanted them to get equal amounts, and, if there was any poor ones (that is, ones of bad character), he didn't want them to have anything. I consented I would carry out his instructions if I was permitted to do so."

While there is a claim otherwise, we think it clearly appears by parol evidence, that the testator's intention was to devise the farm to Moran only for the use and benefit of the Tiernan children. With this expression of opinion as to the sufficiency of the evidence if admissible, we may better consider the legal proposition whether, under the provisions of our statute, such evidence is competent to show the fact. It will be remembered that the devise is absolute to Moran of the farm, in the following language: "I will to William Moran, my nephew, son of my sister, Mary, my farm." Can the devise so made, by evidence like the above, be so affected, changed, or modified as to give it the effect of a devise in trust to Moran for the use and benefit of said children? Upon this question the parties are in very earnest contention; appellant saying it cannot, because of the following provision of the Code of 1873, in force at the time of the execution of the will, and of the trial of the case in the district court:

"Sec. 1934. Declarations, or creations of trusts or powers, in relation to real estate, must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law."

"Sec. 2326. All other wills, to be valid, must be in writing witnessed by two competent witnesses and signed by the testator, or by some person in his presence and by his express direction."

Reliance is also placed on the statute of frauds.

Appellees maintain that the devise can be so affected, and state two propositions, either of which is said to be sufficient to support the conclusion,—first, that "the case is not within the statute of frauds or of wills," and "that it has been held universally, in such cases as the one at bar, that the statutes are inapplicable, and are not to be invoked to accomplish a fraud." A little sifting out of claims that we are disposed to disregard will tend to simplify the disposition of the question. The statute of frauds seems, by its express language, to prescribe a rule of evidence applicable to contracts; and, without any holding on the question, we may say that it is a matter of serious doubt if it was ever intended to apply to testamentary dispositions of real estate. Section 1934 of the Code of 1873, providing that "dec-

larations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance," is a section of a chapter on real estate, the purport of which seems to be as to transactions other than those of a testamentary nature; and, without placing any construction on the scope of either of those statutory provisions, they may be understood as in no way influencing our conclusion of this question. The statutory law that we do regard as applicable and controlling is that "Of Wills and Letters of Administration," wherein it is provided who may dispose of his property by will, and how it shall be done. After specifying the circumstances under which personal property may be disposed of by verbal will is the provision we have quoted above, that "all other wills, to be valid, must be in writing, witnessed by two competent witnesses and signed by the testator, or by some person in his presence, and by his express direction." This provision as to wills being in writing is a general, if not a universal, statutory requirement in this country; and hence judicial determinations and general rules of construction may prove valuable aids to a conclusion. Looking at the question solely in the light of our statutory language, if we permit the evidence in this case to ingraft on the will the modification sought, the effect will be to change the absolute devise to William Moran of the farm into a devise as follows: "I will to William Moran . . . my farm, in trust for the children of Bridget Tiernan." The provision established by oral evidence, and without which it could not be even thought of, entirely destroys the devise manifest from the language of the will, and makes another. Can such a devise properly be said to be in writing? From an extended examination of authorities, we are led to regard the rule as universal that the plain effect of the language as used in the will is not to be varied by external proof of what effect was really intended. Parol evidence may, indeed, be resorted to for the purpose of making intelligible in the will that which cannot without its aid be understood, or resolving a doubtful interpretation; but if the language of the will, in point of legal construction, requires one interpretation, and can be understood in that sense, evidence of intention cannot be adduced to give it another and a different interpretation. Such is the rule as stated in Schouler, Wills, § 587. Mr. Redfield, in his work on the Law of Wills (volume 3, p. 59), in a connection to make the language entirely applicable, uses this language: "The very purpose of requiring wills to be in writing would be wholly defeated if courts of equity were allowed to ingraft upon their provisions such parol trusts as seem probably to have existed in the mind of the testator." It is to be said that such a rule has general support in authority, but we are cited to a larger number of cases said to sustain the rule of appellees' contention. We cannot agree with appellees in the claim that they apply to the facts of this case. That there are authorities to the effect that where a testator, because of the fraud of a devisee, is induced to make the devise on the representation by the devisee that he will take the devise in trust for another, who was the real object of his bounty, equity

will enforce the trust, is not to be questioned. See *Hooker v. Azford*, 38 Mich. 454; *Hoge v. Hoge*, 1 Watts, 216, 26 Am. Dec. 52; *Dowd v. Tucker*, 41 Conn. 197; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Tee v. Ferris*, 2 Kay & J. 857. Numerous other cases could be cited, but it is not important to do so. In these cases—and, if there are exceptions, we have not noticed them—equity has interfered to enforce a trust on the ground of fraud, in the practice of which the devisee has, by his acts or silence, prevented the testator from, or led him to avoid, making provisions in his will which he intended; and the cases cited were not for the construction of the wills, but to declare a trust based on the fraudulent acts by which the making of the will, as intended, was prevented. The cases do not attempt to change the wills, or to construe them, but to fix obligations because of the acts of the devisee. In this case there is no claim of fraud, nor that the devisee in any way induced the devise. The will was written just as the testator desired it. He wanted Moran to have the title, and he gave it to him. He also wanted Moran to hold and use the property for specified purposes, and neglected to make any provision for it in his will, and that is what the authorities say cannot be ingrafted onto the will by oral proof. If, in this case, we sustain the trust, we must say that the testator intended by his will to create the trust, while he knew at its making, and all present knew, that he did not so intend, but he did intend verbally to create the trust. In fact, all was done as he intended to do it, but not in the way to give his intentions effect. Assuming that he knew the law, as we must, he purposely departed from its requirement to make the devise in writing. It is also to be said that the objector, who is a brother of the deceased, and urges the invalidity of the devise, had no part in, and, so far as the record discloses, had no knowledge of, the making of the will. He is in no way in fault that the will does not express the intention shown by the verbal proof. In this respect the case is unlike those in which a trust is sustained. We think the cases all expressly or impliedly guard the exercise of authority to maintain or enforce such a trust by the fact that the testator would have done what the trust is maintained for, had not fraud prevented it. That is not true of this case. It is also said by appellees that, if further writing is necessary to prove the trust, it is found in the answer of William Moran in the probate proceedings, in which he acknowledged the trust, and defined its extent. Mr. Moran is to be commended for his unselfish and faithful course in the matter, by declining so generous a bounty at the expense of a breach of confidence, but he cannot by his writing do what the testator should have done. The conditions of the will were fixed by the expressed intentions of the testator in the way provided by law. Inasmuch as William Moran has relinquished all claims under the will except such as should come from the trust sought to be shown, and as no trust can be sustained, the devise of the farm must fail; and it becomes a part of the residuary estate, to be disposed of as if no devise of it had been attempted.

2. Objection is made to the provision of the will in favor of the Sisters of Charity, which

is in these words: "I will and bequeath, . . . to be divided among the Sisters of Charity by William Toomey, William Moran, and Rev. H. V. Malone, five hundred dollars." It is said that the bequest is void because of uncertainty, and we think the objection must be sustained. We do not question the rule that it is competent for a testator to bestow a charity on a person or institution to be chosen by a trustee or executor, and that such bequests will be upheld. It is an historical fact, of which we may take notice, that Sisters of Charity are general throughout the state and country. It appears in evidence that they constitute a charitable sisterhood of the Catholic Church. The provision of the will is that the bequest is to be "divided among the Sisters of Charity." If the bequest should be sustained, how would the trustees execute it? No one would say that it should be divided among all of them, for such, in reason, could not have been the intention. There is no limitation as to locality, state, or nation. We infer that appellees think the trustees may select to whom the bequest shall be given. The will does not so provide. In *LePage v. McNamara*, 5 Iowa, 124, with a very similar question under consideration, as to the legal proposition it is said: "If there is such uncertainty as that it cannot be known who is to take as beneficiary, the trust is void; and the heir, by operation of law, will take the estate stripped of the trust." That rule is decisive of this question. There is no attempt in argument to say who the beneficiary of this bequest is, in language less uncertain than the will itself. There is no contention that the will is sufficiently specific, if the trustees may not use a discretion, and no such right is granted. The bequest is void for uncertainty.

3. It is also urged that the provision of the will, in order that masses might be said for him, is void. The bequest is as follows: "I will and bequeath to the Catholic priest who may be pastor of the Beaver Catholic Church when this will shall be executed three hundred dollars, that masses may be said for me." The testator was a member of Beaver Catholic Church. It had a definite and known location. It is not to be doubted that the words of the bequest "when this will shall be executed" mean when the will should be carried into effect. An objection to the bequest is that it contained no elements of a charitable use. That is true, but bequests are not limited to such purposes. We must assume that the bequest was inspired by his religious convictions as to duty in the way of furthering his hopes and purposes for security and happiness hereafter. Promises and pledges made in life for the support of religious observances to the same end are usual, and supported by undoubted authority. Why is not a bequest to secure such observance after one's death, for the same purposes, valid? It is said that "the soul of the deceased being a use not recognized in law, and the donor and uses being the same, and not in life, the bequest should be held void."

It is thought that *Russell v. Allen*, 107 U. S. 163, 27 L. ed. 397, sustains appellant's view, but a careful examination of the case shows otherwise. The case has to do with charitable

bequests, and where they are void, because the object of the charity is not so defined as that it may be known. We have in this case recognized the rule of that case in the respect stated; but, as we have said, this bequest is not a charity. It is an expenditure directed by the testator for a service promised to him, and the fact that, when the service is to be rendered, he will not be living, so as to be a beneficiary in this life, is a matter of no concern to the courts. His soul's welfare in the hereafter is a matter of his personal concern, for which, when not contravening public policy, he may act as his judgment and beliefs shall direct. It is not the province of the courts to inquire as to the soundness or reasonableness of religious beliefs, but to respect all such, and the ceremonies of their observance, wherein they do not militate against the public peace and security. The provision is little different from one for the erection of a monument after his death, or the doing of any other act that he might desire, not intended for the benefit of anyone living, but which, if living, he might lawfully do. Such bequests, if made so definitely as that the intent may be known and carried into effect, are valid. In a somewhat recent case in Alabama (*Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 25 L. R. A. 360), the legal effect of such a bequest is considered. The bequest there considered was in these words: "I give and bequeath to the Roman Catholic Church of Saint Joseph, in the city of Mobile, the sum of two thousand dollars, also to be used in solemn masses for the repose of my soul." The case treats the bequest as a private trust, which we think, is the proper class in which to place such a bequest. In holding the bequest invalid as such a trust, it is said: "It is not valid as a private trust, for the want of a living beneficiary. A trust in form, with none to enjoy or enforce the use, is no trust." The latter proposition is not to be doubted. The former we need not consider, for that branch of the case is made to turn on the fact that "there is no imaginable being possessing power to enforce the use declared in this bequest." The statement as to such a bequest being void for want of a living beneficiary is not argued. It will be noticed that in that bequest the trustee is the church; because of which it is said there is no imaginable person to enforce the trust. That is not true of this case. The priest of the church designated, at a specified time, is made the person to execute the trust; and when he accepts the money he becomes responsible to the court for the proper discharge of his duties as trustee.

The cases on this subject are not in accord. Some of the courts have been slow to get away from the rule of the English cases in which, under their amalgamated condition of church and state, such bequests and devises were held void, as superstitious uses or creating perpetuities. In *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 25 L. R. A. 360, it is said: "Under our political institutions which maintain and enforce absolute separation of church and state, and the utmost freedom of religious thought and action, there is no place for the English doc-

trine of superstitious uses." Similar language has been repeatedly used by the courts of this country. In *Gilman v. McARDLE*, 99 N. Y. 451, 52 Am. Rep. 41, the question was to the effect of an agreement, by which money was accepted during the lifetime of the decedent, to be applied to certain purposes, and the residue to be expended for Roman Catholic masses, to be said for the repose of her soul and that of her husband. The court declined to definitely settle the question as to the application of the residue for masses, but the opinion contains a discussion of bequests for such purposes, incidental to other questions, that is worthy of notice. The lower court in that case had held that, as to the surplus to be used for masses, it was held by one as mere agent, whose authority was revocable, and that no valid trust had been created; that there was nothing illegal or contrary to public policy in the purpose to which the money was intended to be applied, but that, as a trust, it was void for want of a beneficiary who could enforce it, both of the persons for whose benefit the masses were to be solemnized being dead. The same court expressed the opinion that the disposition of such surplus would have created a valid trust if contained in a will. This holding and language of the court is made the basis on which the court of appeals based its discussion and conclusion. The argument is clear to the effect that there is no such distinction in law as that an agreement during life, for the expenditure of money for masses after death, is invalid, but that a testamentary provision to that effect would be valid. The two methods are unmistakably made of equal validity, for the court, after specifying the facts, says: "Such a contract could be enforced by the legal representatives of the promisee, and in case of a refusal to perform they could recover the consideration paid. It certainly must be in the power of a person to provide, either by will or contract, for matters of this description, and I can see no legal reason why he should be confined to a testamentary direction." This conclusion follows some argumentative language that gives to it an added value, and we quote it as follows: "But in the case before us, even if it should be conceded that the agreement under which the defendant received the money could not be sustained strictly as a trust, on the ground of the want of a beneficiary to enforce it, it would not follow that it was of no effect whatever. As a trust the same objection, if valid, existed to the undertaking to apply the fund to defraying the funeral expenses of the deceased and her husband, and to the erection of a monument to their memories, but it would be a great abridgment of the rights of property to deny to any person the power, in his lifetime, to enter into a contract to be performed after his death by another person, to do or procure to be done any act not objectionable as against any rule of law, morals, or public policy, and to pay the consideration for the performance of such contract. It appears in this case that the defendant was an undertaker; that the deceased selected the kind of a coffin she desired, and described the monument she wished erected

and specified the times at which the masses were to be solemnized; and the finding of the court is that the defendant received the money on the terms stated by the deceased, and promised to apply it to the uses and purposes therein mentioned. There was no indefiniteness about this contract and it was easy of performance. There certainly can be no legal objection to a person contracting in his lifetime for his funeral, his coffin, and his monument and even for the solemnization of masses, and paying for them in advance. And if so, what reason can there be for denying him the power of paying a sum of money to a third person on his agreement to procure those things. Suppose a person should desire in his lifetime to provide for the writing of his biography, the publication of his literary works, the painting of his portrait, or the erection of a statue to his memory after his death. He certainly can make a valid contract with any person to do either of those things, and pay for them; and although they may be personal to himself and for the gratification of his own feelings and perhaps his vanity, and he cannot, in strictness, create a trust for the purpose, because there will be no beneficiary, as he will not live to enforce it, why should he not be at liberty in his lifetime to contract with some person of his confidence to procure them to be done, and as a consideration for such agreement, to pay him the sum necessary to defray the expense." We may assume that if such an agreement has the sanction of the law, because it has the elements of a valid contract, so would a testamentary provision with precisely the same elements for its support. It is not wise, in such cases, for courts to quibble about technical trusts or beneficiaries. Results are of greater importance than technical names, and a bequest for a known lawful purpose, where the power of execution is prescribed and available, should never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law.

We have said that this bequest, if the priest should accept the money, is a private trust; and we think it possesses the essential elements of such a trust, as much as it would if the object were the erection of a monument or the doing of any other act intended alone to perpetuate the memory or name of the testator. But even if there is a technical departure, because of no living beneficiary, still the bequest is valid. We have also said that it is not a charity, and we can discover no element of a charity in it. It seems to be a matter entirely personal to the testator. In one or more cases the courts have felt the necessity, in order to sustain such a bequest, to denominate it a "charity," because charitable bequests have had the sanction of the law. We know of no such limitation on testamentary acts as that bequests or devises must be in the line of other such acts, if otherwise lawful. Such a bequest has direct support in *Seibert's Appeal*, 18 W. N. C. 276. In *Re Schouler*, 184 Mass. 426, such a bequest is sustained, and it is said: "Masses are religious ceremonies or observances of the church, . . . and come within the religious or pious uses which are upheld as public charities." Our conclusion

is that, as to the devise of the farm and the bequest to the Sisters of Charity, the will must be held inoperative, and the property passes to the residuary estate. As to the bequest for

the saying of masses for the testator, the will is sustained.

The judgment will stand *modified and affirmed*.

KENTUCKY COURT OF APPEALS.

Bennett GLAZER, *Appt.*,

v.

Ed. W. HUBBARD.

(.....Ky.....)

1. Erroneous advice by a city attorney to the police justice as to his power to arrest an alleged fugitive from justice will give the justice no right of action over against him in case recovery is had against the justice, although he acts out of the line of his duty and apparently in ignorance of the law.

2. A police judge ordering the commitment to jail of a person of whose guilt there is no evidence and without any other warrant than a telegram to the chief of police to arrest him is guilty of false imprisonment, although his motives may not have been improper or corrupt.

(October 18, 1897.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Caldwell County in favor of defendant in an action brought to recover damages for false imprisonment. *Reversed*.

The facts are stated in the opinion.

Messrs. Hodge & Hodge, for appellant: Before a person can be legally arrested charged with a crime committed in another state, Ky. Stat. chap. 56, title *Fugitives from Justice*, art. 1, § 1930, must be complied with.

If not complied with the persons making the arrest and committing to prison are trespassers and guilty of false imprisonment.

As the law has given defendant capacity to entertain complaint against the person sought to be charged, the complaint required by the law must be actually made or preferred, and the person must have been properly brought before him to answer the charge, before he acquires jurisdiction.

7 Am. & Eng. Enc. Law, pp. 598, 664, note 2, 668, note 2, 669; *Botts v. Williams*, 17 B. Mon. 687.

Mr. John C. Gates for appellee.

Lewis, Ch. J., delivered the opinion of the court:

Appellant brought this action for false imprisonment, stating in his petition, substantially, that appellee maliciously, wrongfully, and without any authority of law, issued a mittimus directed to and commanding the jailer of Caldwell county to receive appellant into the jail, and keep him safely until discharged

by due course of law, and that in virtue of said wrongful order he was put into said jail, and there kept until released on a writ of habeas corpus issued by the judge of Caldwell county court. Appellee, in his answer, after denying that he either maliciously, with intent to injure appellant, wrongfully, or without authority of law, issued the order of commitment, stated that he was at the time police judge of the city of Princeton, and the order in question was made by him in discharge of his duty as such judge, as he believed it to be. As an additional defense, he stated that one J. T. Coleman, city attorney, advised him that it was proper to commit appellant to jail, and that, being himself ignorant of the law, he relied upon, and acted according to, his advice; that therefore appellee is entitled to judgment over against Coleman for any sum that plaintiff in the action may recover against him; and, to that end, his answer was made a cross petition. Coleman filed a demurrer to that part of the answer, as did also appellant, and, of course, both were properly sustained; for it constituted no defense to the action, nor cause of cross action against Coleman, though the latter acted out of the line of his duty, and apparently in ignorance of the relative rights and duties of appellant as a citizen, and of appellee as a judicial officer. As appears from the evidence, the only authority the marshal of the city of Princeton had for arresting and bringing appellant in custody before appellee as police judge, was the following telegram, purporting to be from E. F. Gibson, chief of police of Opelika, Alabama:

September 18, 1894.

To Chief of Police, Princeton, Kentucky:
Arrest Ben Glazer, and wire me.

And appellant was committed to jail by order of appellee, acting as police judge, with no other warrant than that telegram, and without any evidence whatever showing or tending to show him to be guilty of an offense against the law of either Alabama or Kentucky. Yet the lower court instructed the jury trying the case, in substance, that appellant was entitled to no reparation, unless appellee, in depriving him of his liberty, acted without an honest conviction of duty, and with corrupt and improper motives; and as there was no evidence showing that appellee acted corruptly, or with a bad motive, of course the verdict had to be, and was, for him. As early as the case of *Gregory v. Brown*, 4 Bibb, 28 (decided in 1815), this court held that where a magistrate acts judicially upon a subject within his jurisdiction, though he should act illegally or erroneously, he cannot be made liable for any dam-

NOTE.—As to the liability of a judicial officer for a judicial decision, see note to *Austin v. Vrooman* (N. Y.) 14 L. R. A. 138; *Thompson v. Jackson* (Iowa) 27 L. R. A. 32.

ages sustained by his conduct, unless he acted from impure or corrupt motives. And the rule has been extended and applied in the case of even an officer of elections, who may be required to act judicially in determining the qualification of a person offering to vote. But in all the cases it has been distinctly made a condition of immunity of judicial officers from damage for wrong and injury done by his decision or act that such decision be rendered or act done within his jurisdiction of the subject-matter or of the person affected. As said in *Cooley, Torts*, *418: "Every judicial officer, whether the grade be high or low, must take care, before acting, to inform himself whether the circumstances justify his exercise of the judicial function. A judge is not such at all times, and for all purposes. When he acts, he must be clothed with jurisdiction; and, acting without this, he is but the individual falsely assuming an authority he does not possess." Further, on page 420, he says: "The rule of law, therefore, which compels him to keep within his jurisdiction at his peril cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so."

In this case the marshal had no warrant of any kind to arrest appellant. It was too plain, for a person having any knowledge of the duties of the office of police judge, that appellee, as such, had no jurisdiction whatever of the person of appellant, or authority to inquire in regard to the matter, much less to commit him to jail, without any legal charge against him, or evidence in support of a charge. Kentucky Stat. § 1930, authorizes arrest and confinement in jail, and delivery over to the proper authority, of a person guilty of a felony anywhere in the United States, if found in this state, only when a warrant has been issued by judicial authority upon affidavit of the facts. But he cannot be committed to jail by any judicial officer before whom he may be brought, until satisfied, upon hearing evidence, of his guilt. In this case no warrant was issued at all, nor was it, at the time appellant was committed to jail, or subsequently, made to appear that he was guilty of a felony. As, therefore, appellee acted without legal power, and consequently without jurisdiction, he is liable to appellant, though the motives actuating him may not have been improper or corrupt, and it was error for the lower court to so instruct the jury.

The judgment is reversed, and the case remanded for a new trial consistent with this opinion.

HETTERMAN BROTHERS, *Appts.*,
v.

P. J. POWERS, *et al.*

(.....Ky.)

1. Organized labor may invoke the law to protect the fruits of its skill and handiwork from piracy and intrusion.

NOTE.—For protection of trade-union labels or trademarks, see note to *State v. Bishop* (Mo.). 29 L. R. A. 200.

89 L. R. A.

2. An employee whose skilled labor creates a demand for a commodity that secures for him higher remunerative wages has as definite a property right to the exclusive use of a particular label, sign, symbol, brand, or device adopted by him to distinguish and characterize said commodity as the product of his skilled labor as the merchant or owner has to the exclusive use of his adopted trademark on his goods.

3. Voluntary unincorporated labor organizations composed solely of practical cigar makers are entitled to the protection of a label adopted by them against use by an unauthorized person, although they do not own the cigars to which their label is affixed.

4. Other manufacturers of cigars are not attacked by the blue label of the cigar makers' international union declaring that the cigars to which it is affixed "are not the product of inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship."

(October, 27, 1897.)

APPEAL by defendants from a judgment of the Circuit Court for Jefferson County enjoining them from counterfeiting plaintiff's labels. *Affirmed.*

The facts are stated in the opinion.

Messrs. Humphrey & Davie for appellants.

Mr. Augustus E. Willson, for appellees:

At Sacramento, California, a dealer selling Chinese made cigars put up signs with the stamp of this union and upon a suit to compel him to remove the sign the court enjoined him from exhibiting the stamp or label or any facsimile of it.

Judge Hunt, in the supreme court at San Francisco, enjoined the defendants from selling cigars in boxes containing a counterfeit of this label, or to which the genuine label had been fraudulently affixed, May 8, 1888.

At Lincoln, Nebraska, injunction was granted against the unauthorized use of this label.

In the district court of Scott county, Iowa, injunction was also granted.

At Buffalo, New York, in the supreme court, three judges sitting, a judgment was affirmed, convicting the defendant of counterfeiting this label. The court also established that this is a trademark and entitled to the protection of trademarks.

At St. Louis, Missouri, the circuit court granted a permanent injunction upon the same label.

At Toronto, Canada, a like injunction was granted.

In the circuit court at Milwaukee, Wisconsin, a judgment for the plaintiff was entered in a like proceeding.

And in the superior court of Santa Clara, California, a like injunction was granted.

At New Haven, Connecticut, a temporary injunction was granted.

Haselrigg, J., delivered the opinion of the court:

The appellants were manufacturers and dealers in cigars in Louisville, Kentucky, and, without right, or claim of right, used on boxes of cigars manufactured and sold by them the

blue label of the Cigar Makers' International Union of America, a facsimile of which is as follows:

Sept. 1880.

Issued by authority of Cigar Makers' International Union of America. Union-Made Cigars. This certifies that the cigars contained in this box have been made by a first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship. Therefore we recommend these cigars to all smokers throughout the world. All infringements upon this label will be punished according to law.

A. Strasser, President C. M. I. U. of America.

Thereupon appellees Powers, Kieffer, and Wopprice, suing for themselves and all their associate and fellow members in the Cigar Makers' International Union and the Cigar Makers Protective Union, No. 82 and joining these two organizations also, as plaintiffs, brought this action to prevent this alleged wrongful use of the label. The International Union, embracing, according to the petition, some ——— members, and the local union, some ——— members, are voluntary, unincorporated labor organizations, composed solely of practical cigar makers. They are working men, who do not own the products of their labor, being exclusively wage workers. The purpose of these unions, as said in the petition is, generally, to maintain a high standard of workmanship, and secure fair wages to cigar makers; to elevate the material, moral, and intellectual welfare of the membership; and by legitimate, organized effort, to secure laws prohibiting labor by children under fourteen years of age, the abolition of the "truck" system, the tenement house cigar manufacture, and the manufacture of cigars by prison convict labor. Other praiseworthy objects are set out, which need not be detailed. It is further averred that, for the purpose of designating the cigars made by the members of the union, the label in controversy was adopted and extensively used as a trademark, or certificate of identification, and, when posted on the outside of cigar boxes containing cigars made by members of the unions, it is a guaranty that the cigars are made by first-class workmen, members of the cigar makers' union, etc.; that because the members receive fair wages, and were thus able to furnish good workmanship, the cigars so labeled commanded a higher price than did similar looking cigars not so labeled; that the label was therefore a source of great profit and benefit to the appellees, and other members of the union. The appellants, for defense, do not deny the use of the label as charged in the petition, but it is insisted by them that this label does not possess any of the elements of a trademark; that the appellees are engaged in no trade, having nothing to sell, and therefore nothing to protect by a trademark; that none of them are engaged in the business of selling cigars; that they are "simply workmen employed by other people making cigars—first by one person, and then by another—and those persons sell the cigars;" that the plain-

tiffs, therefore, "have not shown any property right in the label, as a trademark or otherwise;" moreover that the membership is an ever changing one, constantly varying in numbers, composed of a few thousands to-day, and many thousands to-morrow,—“a shifting crowd;” that the plaintiffs, therefore, are not qualified to sue, and have, in fact, no legal rights that can be made the subject of a suit. Moreover, it is urged that the plaintiffs do not come into court with clean hands; that they are members of an organization lately engaged in boycotting the defendants, and attempting to ruin their business; that the label itself cannot be approved, either in law or morals, as it denounces other cigars than union made ones as inferior and unwholesome, and the product of filthy tenement houses, or made by coolies and convicts.

And, first, we may admit that the label is not used as a "trade-mark," in the ordinary sense of that word. It is not a brand put on the goods of the owner, to separate or distinguish them from the goods of others. But we cannot agree, on that account, that it does not represent a valuable right, which may be the subject of legal protection. Why may not those engaged in skillful employments so designate the result of their labor as to entitle them to the fruits of their skill, when it is admittedly a source of pecuniary profit to them? And this though they may not own the property itself. They are not, it is true, "in business" for themselves, in the ordinary sense; but they have property rights, nevertheless. They may not select a label, and be protected in its use apart from its connection with some commodity; but they not only select it in this instance, but they apply it to property, and it does not at all matter that the tangible property is that of another. In order to get the benefit of the superior reputation of cigars made by them, the appellees select and apply this label, as a distinguishing brand or mark; and it would be strange if this thing of value,—this certificate of good workmanship, which makes the goods made by them sell and thus increases the demand for their work,—should be entitled to no protection, because those making the selection and application are not business men engaged in selling cigars of their own. The man who is employed for wages is as much a business man as his employer, in that larger sense in which the word "business" has come to be used by statesmen and legislators. In a number of the states, laws have been enacted giving protection to the men engaged in the business of working for wages; and their right of organizing and selecting appropriate symbols to designate the results of their handiwork is recognized, and ordained to be the subject of lawful protection, by the court. Thus, in this state, in April, 1890, a law was enacted by the general assembly providing that "every union or association of working men or women adopting a label, mark, name, brand, or device intended to designate the product of the labor of the members of such union, shall file duplicate copies of such label in the office of the secretary of state, who shall then give them a certificate of the filing thereof," and that "every such union may, by suit in any of the courts of the state, proceed to enjoin the man-

ufacture, use, display," etc., "of counterfeits or imitations of such labels," etc., "on goods bearing the same; and that the court having jurisdiction of the parties shall grant an injunction restraining such wrongful manufacture, use," etc., "of such label," etc. This suit was filed before the adoption of this statute, but it indicates the policy of the law, and the growth or expansion, and perhaps the creation, of legal remedies hardly known to ancient trademark law. The learned chancellor below, in an exhaustive opinion, reviewing all the authorities, among other things, said (and we can say it no more clearly) that "the known reputation of a particular kind of skilled labor, employed in the development of a particular product or class of products, determines, to a large degree, the value or price of such products when put on the markets. To stamp or label a commodity as the product of a particular kind or class of skilled labor, determines the demand for, and the price of, such product or commodity. The marketable price of a commodity influences the scale of wages paid for its manufacture. The higher the price, the higher the wages paid. Hence it is indisputable that the employee, whose skilled labor in the production of a particular commodity creates a demand for the same that secures for him higher, remunerative wages, has as definite a property right to the exclusive use of a particular label, sign, symbol, brand, or device, adopted by him to distinguish and characterize said commodity as the product of his skilled labor, as the merchant or owner has to the exclusive use of his adopted trademark on his goods."

The question has engaged the attention of a number of the courts of this country, but the conclusions reached have not been uniform. In *Weener v. Brayton*, 152 Mass. 101, 8 L. R. A. 640 (1890) it was held that an injunction against the wrongful use of the label of the International Cigar Makers' Union should not be granted because of special injury to plaintiffs, who were officers and members of the union, but were not manufacturers or dealers in the cigars on which such label is used; and to the same effect are the cases of *Cigar Makers' Protective Union No. 98 v. Conhaim*, 40 Minn. 243, 3 L. R. A. 125; *McVey v. Brendel*, 144 Pa. 235, 13 L. R. A. 377; *Schneider v. Williams*, 44 N. J. Eq. 391. However, a number of the courts have held otherwise. In the case of *Strasser v. Moonelis*, 23 Jones & S. 197, affirmed in court of appeals in 1888, 108 N. Y. 611, it was argued, as it is here, that the members of the union were not the owners or manufacturers of cigars, but merely laborers, and that, therefore, the label did not come within the settled definition of a "trademark." The court said: "It is needless to discuss this phase of the case, for the right to the exclusive use of this label may be sustained, although it fail to be a trademark, in the precise definition of the term as heretofore used. For whether we call the property-right which I believe the plaintiffs have in the label a trademark, or by another name, is a matter of slight import. It is a right entitled to the protection of a court of equity, on the same principle as that upon which courts have based their right to protect trademarks and goodwill. It has been accepted

as the rule that the court proceeds upon the ground that a person has a valuable interest in the goodwill of his trade or business, and that having appropriated to himself a particular label, or sign, or trademark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, . . . he is entitled to protection against any other person who attempts to pirate on the goodwill of his friends or customers . . . by sailing under his flag without his authority or consent." In *Cohn v. People*, 149 Ill. 486, the court upheld the constitutionality of the trades union act in that state; and as the court, independently of the statute, disposed of one of the contentions of counsel in the case, which is also relied on here, we quote, in part, its argument: "It is next objected that the label, an imitation and counterfeit of which is alleged to have been unlawfully used by plaintiff in error, could not have been rightfully adopted either as a trademark, or form of advertisement. It is said that it transgresses the rules of morality and public policy. We are referred to the rule in respect to trademarks, that 'to be a lawful trademark the emblem must avoid transgressing the rules of morality and public policy.' Browne, Trademarks, § 602. . . . By reference to the label heretofore set out, it will be seen that it is a certificate, signed by the president of the Cigar Makers' International Union of America, certifying that the cigars contained in the box upon which it is placed were 'made by a first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship.' And it concludes: 'Therefore we recommend these cigars to all smokers throughout the world.' The purpose, as derived from the label itself, is to send the cigars out to the public with the assurance that they are made by a first-class workman, who belongs to an order opposed to the inferior workmanship designated. It will be observed that the label attacks no other manufacturer of cigars. It says, simply, in effect, These cigars are not the product of inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship. Can it be said that one may not, without condemning or aspersing the product of other manufacturers, commend the article he has for sale? If he may do so himself, may he not procure the certificate of others as to the quality of the article he puts upon the market?" See also *State v. Hagen*, 6 Ind. App. 169; *Carrson v. Ury*, 39 Fed. Rep. 777, 5 L. R. A. 614.

Further, we agree with the learned chancellor that there is no competent evidence that the appellees, or any of them, have been engaged in boycotting the appellants, and thus deprived themselves of the right to enforce their legal remedies in a court of equity. Whatever may be said of the letters and circulars looking to this end, and exhibited in the proof, it is not shown by any competent proof that the appellees instigated, or had aught to do with, the attempted boycott. And, moreover, this boycott, which seems to have occurred in 1886, did not in any way grow out of the wrongful use of the label in controversy. On the whole case, therefore, we are of opinion that the law may be justly invoked by organized labor to

protect from piracy and intrusion the fruits of its skill and handiwork, and that brain and muscle may be the subjects of trade-law rules, as well as tangible property.

The judgment is affirmed.

W. H. JERNIGAN, *Appt.*,
v.
City of MADISONVILLE *et al.*

(.....Ky.....)

The assignment or transfer by a court of a town or city from one class to another, which Stat. §§ 3661, 3662, attempts to authorize, is in violation of Const. § 156, requiring the general assembly to make such assignments and transfers, and making no provision for delegating that power.

(December 1, 1897.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Hopkins County refusing a writ of prohibition to restrain defendants from exercising the powers and privileges belonging to cities of the fourth class. *Reversed.*

The facts are stated in the opinion.

Mr. C. J. Waddle for appellant.

Mr. J. F. Gordon for appellees.

Guffy, J., delivered the opinion of the court:

It appears from this record that the circuit court of Hopkins county entered an order and judgment transferring the city of Madisonville from cities of the fifth class to cities of the fourth class, and afterwards the appellant instituted this action in the Hopkins circuit court against the said city, H. H. Holman, mayor, and other officers thereof, seeking to enjoin and restrain said defendants from exercising, or attempting to exercise, the privileges and powers conferred by law upon cities of the fourth class. The defendants pleaded and relied upon the said orders and judgment of the circuit court transferring said city to the fourth class, to which answer the plaintiff demurred, which demurrer was overruled by the court, and the court refused to grant the writ of prohibition or order of injunction, and dismissed the petition, and from that judgment this appeal is prosecuted.

The sole question presented for decision is as to the constitutionality of the act empowering the circuit courts to make such transfers or assignments from one class to another class. Section 156 of the Constitution reads as follows: "The cities and towns of this commonwealth, for the purpose of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a population of 100,000 or more;

to the second class, cities with a population of 20,000 or more, and less than 100,000; to the third class, cities with a population of 8,000 or more, and less than 20,000; to the fourth class, cities and towns with a population of 3,000 or more, and less than 8,000; to the fifth class, cities and towns with a population of 1,000 or more, and less than 3,000; to the sixth class, towns with a population of less than 1,000. The general assembly shall assign the cities and towns of the commonwealth to the classes to which they respectively belong, and change assignments made as the population of said cities and towns may increase or decrease, and, in the absence of other satisfactory information as to their population, shall be governed by the last preceding Federal census in so doing; but no city or town shall be transferred from one class to another, except in pursuance of a law, previously enacted and providing therefor. The general assembly, by general law, shall provide how towns may be organized, and enact laws for the government of such towns until the same are assigned to one or the other of the classes above named; but such assignment shall be made at the first session of the general assembly, after the organization of said town or city." Sections 3661, 3662, Ky. Stat., provide, in substance, that when the population of any city or town, as ascertained by the last Federal census, or by the census taken pursuant to an ordinance of said town, authorizes it to be placed in a class other than that in which it is, the authorities of such a town may enact an ordinance setting forth the population of the town, and may file a petition in the circuit clerk's office declaring the facts, and upon the proper steps being taken, and evidence furnished to the circuit court of the county, said court may enter a judgment assigning such town to the class to which it belongs as appears from the petition and exhibits, and thereafter such town may be governed by and under the general laws relating to the class to which it has been assigned. It is conceded that the transfer or assignment under consideration was made pursuant to and in accordance with the provisions of the sections *supra*. We therefore deem it unnecessary to copy the sections in full. It will be seen from the provisions of § 156 of the Constitution that the cities and towns of the commonwealth shall be divided into six classes, and the classification is determined by the population of such town. The population of each class is fixed by the Constitution. It will be further seen that the general assembly is required to assign the cities and towns of the commonwealth to the classes to which they respectively belong, and change assignments made as the population may increase or decrease. It will be seen that the power and duty of assigning towns to the different classes and changing such assignments, is conferred alone upon the legislature; and no grant of power is given the legislature to delegate the power to make such change or assignment to any tribunal. It will be further seen that the power is given to the legislature to provide for the creation or organization of new towns, yet the legislature is required to assign such towns to the classes to which they belong at the first session of the legislature after such organization. It is further provided that no assignment

NOTE.—For power of court as to incorporation of municipalities, see also *Re North Milwaukee* (Wis.) 83 L. R. A. 638, and cases cited in footnote thereto.

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shall be made except in pursuance to a law previously enacted and provided therefor. It follows, therefore, that so much of §§ 3861 and 3862 of the Kentucky Statutes, *supra*, as attempts to authorize the circuit courts to assign or transfer a town or city from one class to another is unconstitutional and void, and that the judgment of the Hopkins circuit court attempting or assuming to transfersaid city of Madisonville to cities or towns of the fourth class is null and void, and of no effect. So much of said sections, however, as provides means for taking the census or determining the population of any such city or town is constitutional and valid, and, when the population of a town is ascertained pursuant to the provisions of said section, the legislature will be authorized to make the proper transfer of such town or city. The object of the framers of the

Constitution doubtless was to provide a certain, safe, and convenient means whereby it might be readily ascertained to what class any city or town belonged, and therefore provided that all assignments or changes from one class to another should be by an act of the legislature, which would always be a matter of record, and readily accessible to the whole people. The requirement of the general law providing for such changes was deemed proper and necessary to the end that the citizens of the several towns should know in advance how and when such changes might be lawfully made.

For the reasons indicated, *the judgment appealed from is reversed*, and the cause remanded, with directions to grant the writ of prohibition and injunction prayed for, and for proceedings consistent herewith.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Annie B. CROCKER *et al.*, Petitioners,
v.
Charles U. COTTING *et al.*, Trustees, etc.,
Apts.

(.....Mass.....)

1. **An agreement that the land should remain in common**, and not be partitioned, is not implied on the purchase in common of land subject to an easement already belonging to the purchaser.
2. **Land all of which is subject to an easement of a right of way** is nevertheless subject to partition, if owned in common, under Pub. Stat. chap. 178, § 1, providing that "tenants in common may be compelled to divide."

(January 5, 1898.)

APPPEAL by defendants from a judgment of the Supreme Judicial Court for Suffolk County reversing a judgment of the Probate Court denying partition of a passageway. *Affirmed.*

The facts are stated in the opinion.

Messrs. G. Putnam and J. L. Putnam, for appellants:

We have the payment of a considerable sum of money for a title in common, which was plainly more beneficial for each owner, considering the land as a passageway, than a divided title could be. It cannot be supposed that the money would have been contributed for a divided title. The essential feature of the purchase was that each purchaser controlled the whole way irrespective of his easement.

Morgan v. Moore, 8 Gray, 819.

In partitions under the statute, the passageways were formerly often, if not usually, left in common.

Peck v. Cardwell, 2 Beav. 187; *Coleman v.*

Coleman, 19 Pa. 100, 57 Am. Dec. 641; *Beach v. New York*, 45 How. Pr. 357.

It can make no difference whether the passageway was left in common in a division of the surrounding lands, or was bought in common after a division of the surrounding lands. In both cases the parties have mutually, for valuable consideration, entered into a passageway scheme which cannot equitably be changed without the consent of all.

Latahau's Appeal, 122 Pa. 142; *Coleman v. Coleman*, 19 Pa. 100, 57 Am. Dec. 641; *Conant v. Smith*, 1 Aik. (Vt.) 67, 15 Am. Dec. 669; *Swoyer v. Schaeffer*, 2 Pa. Dist. R. 749; *Eberts v. Fisher*, 54 Mich. 294; *Avery v. Payne*, 12 Mich. 540; *Peck v. Cardwell*, 2 Beav. 187; *Brown v. Lutheran Church*, 23 Pa. 495; *Baldwin v. Humphrey*, 44 N. Y. 609; *Selden v. Vermilya*, 2 Sandf. 568; *Beach v. New York*, 45 How. Pr. 357.

A mere way by itself is not a subject of partition proceedings. Involuntary partition could not be had at common law except between coparceners.

Many things coming within the technical meaning of "lands" are clearly not partible and could not have been within the meaning of the statute; such as rights of water, rights of way, mining rights, mill dams.

Adam v. Briggs Iron Co. 7 Cush. 361; *Miller v. Miller*, 13 Pick. 237; *De Witt v. Harvey*, 4 Gray, 486.

Remainders and reversions.

Wainwright v. Dorr, 13 Pick. 338.

Equity had power independently of statute to regulate the rights of tenants in common in property which could not be made the subject of strict partition.

Story, Eq. Jur. §§ 650 *et seq.*; *Jefferys v. Smith*, 1 Jac. & W. 298; *Adam v. Briggs Iron Co.* 7 Cush. 361; *De Witt v. Harvey*, 4 Gray, 486.

In *Husband v. Aldrich*, 135 Mass. 317, it was decided that there could be no partition by suit in equity of any subject-matter included within the scope of the statutes of partition.

NOTE.—For validity of agreement against right to partition, see *Haeussler v. Missouri Iron Co.* (Mo.) 16 L. R. A. 220.

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Messrs. Solomon Lincoln, Francis V. Balch, Felix Rackemann, and Harrison M. Davis, for appellees:

Every cotenant of lands, tenements, and hereditaments is entitled, as a matter of right, to partition.

Parker v. Gerard, 1 Ambl. 236; *Mitchell v. Starbuck*, 10 Mass. 5; *Hanson v. Willard*, 12 Me. 146, 28 Am. Dec. 162; *Baldwin v. Aldrich*, 34 Vt. 526, 80 Am. Dec. 695; *Hoyt v. Kimball*, 49 N. H. 324; *Richardson v. Monson*, 23 Conn. 97; *Johnson v. Olmsted*, 49 Conn. 509.

Where equity has concurrent jurisdiction of partition it is equally a matter of strict right as at law.

Parker v. Gerard, 1 Ambl. 236; *Willard v. Willard*, 145 U. S. 116, 36 L. ed. 644; *Turner v. Morgan*, 8 Ves. Jr. 143; *Mundy v. Mundy*, 2 Ves. Jr. 122, note.

The process provided by statute is equally a matter of right.

Mass. Pub. Stat. chap. 178; *Taylor v. Blake*, 109 Mass. 513; *Johnson v. Olmsted*, 49 Conn. 509.

The right cannot be defeated by showing that partition would be inconvenient, injurious, or even ruinous to the parties.

Freeman, *Cotenancy & Partition*, § 433.

Thus, partition has been decreed by a partition wall.

Mayfair Property Co. v. Johnston [1894] 1 Ch. 508.

Of a manor.

Hanbury v. Hussey, 5 Eng. L. & Eq. 81.

Of a mill.

Wood v. Little, 35 Me. 107.

Of a lake.

Menzies v. Macdonald, 36 Eng. L. & Eq. 20.

Of a mine.

Hughes v. Devlin, 23 Cal. 501.

Of a tract of pasture in which tenants had complicated grazing rights.

Parker v. Gerard, 1 Ambl. 236.

Of a cold bath.

Warner v. Baynes, 2 Ambl. 589.

Of a house.

Turner v. Morgan, 8 Ves. Jr. 143.

Of a moor or heath, where the shares of the owners were proportioned to the value of other lands owned by them respectively, and subject to incorporeal rights of strangers.

Agar v. Fairfax, 17 Ves. Jr. 533.

Of a cotton plantation.

Royston v. Royston, 13 Ga. 425.

Of a system of a dock.

Bentley v. Long Dock Co. 14 N. J. Eq. 480.

Of a hotel.

Willard v. Willard, 145 U. S. 116, 36 L. ed. 644.

Of a yard, where the land was subject to easements or rights of the cotenants to the continued use of the premises as a yard.

Fisher v. Deverson, 3 Met. 544.

The owner of the soil of a way, public or private, has all the rights of an owner which can be exercised without interference with the easement.

Com. v. Peters, 2 Mass. 127; *Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100.

The cases holding that the right of partition may be waived, suspended or limited by agreements between the cotenants divide themselves into four classes.

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1. Where an express condition in the deed originally conveying the land to the tenants in common prohibits partition, and amounts to a limitation of the estate conveyed.

Hunt v. Wright, 47 N. H. 399. Compare *Spaulding v. Woodward*, 53 N. H. 573, 16 Am. Rep. 892. See *Winsor v. Mills*, 157 Mass. 363.

2. Where cotenants have expressly covenanted or agreed in writing not to partition.

Coleman v. Coleman, 19 Pa. 100, 57 Am. Dec. 641; *Goesele v. Bimeler*, 55 U. S. 14 How. 589, 14 L. ed. 554.

3. Where parties become tenants in common of land pursuant to an express covenant or agreement in writing as to its use and disposition, in which case an agreement is implied that partition shall not be had so as to prevent or hinder the use or disposition expressly agreed upon.

Peck v. Cardwell, 2 Beav. 187; *Arery v. Payne*, 12 Mich. 540; *Baldwin v. Humphrey*, 44 N. Y. 609.

4. In Pennsylvania it is held that equity has no jurisdiction to decree partition of church property owned in common by two or more congregations or religious societies,—such lands are held under a charitable trust.

Latahaw's Appeal, 122 Pa. 142; *Swoyer v. Schaeffer*, 2 Pa. Dist. R. 749. See also *Potter v. Munson*, 40 Conn. 473; *Black v. Tyler*, 1 Pick. 150.

Rights or equities, both of cotenants and of their assignees, which would be protected in courts having concurrent jurisdiction in equity of partition proceedings are not regarded by our law.

Marks v. Sewall, 120 Mass. 174; *Barnes v. Lynch*, 151 Mass. 510; *Husband v. Aldrich*, 135 Mass. 317; *Freeman, Cotenancy & Partition*, § 425.

No purpose that this strip of land should remain in common, or that the tenants should be deprived of any of the ordinary rights incident to a tenancy in common, subject only to existing easements, is to be inferred from the fact that it was subject to easements when purchased, and was called a "passageway" in the deeds.

Atkins v. Bordman, 2 Met. 459, 37 Am. Dec. 100; *Sibley v. Holden*, 10 Pick. 249, 20 Am. Dec. 521; *Dickinson v. Lee*, 106 Mass. 557.

If it were possible to infer such an agreement, there is no warrant to suppose that such a novel incident could be annexed to land, even if evidenced by deed.

Norcross v. James, 140 Mass. 188; *Keppell v. Bailey*, 2 Myl. & K. 517.

No right of light and air, or easement that land should remain unbuild upon, can exist in this commonwealth without express grant or covenant.

Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80; *Brooks v. Reynolds*, 106 Mass. 31.

Nor are verbal agreements enforced under the doctrine of equitable easements with notice; unless in some special case where the breach of such an agreement would operate as a fraud on others who have acted on the faith of it.

Hubbell v. Warren, 8 Allen. 173; *Whitney v. Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715.

Except under Stat. 1871, chap. 111 (Pub. Stat. 178, § 65), enlarging power of the court

to order a sale, the manner of partition is exclusively to be determined by the commissioners and not by the court before issuing the warrant.

Aldrich v. Husband, 181 Mass. 480; *King v. Reed*, 11 Gray, 490; *Hall v. Hall*, 152 Mass. 136; *Ramsay v. Humphrey*, 162 Mass. 385.

Between tenants in common, partition is the natural and usually the adequate remedy in every case of controversy.

Calvert v. Aldrich, 99 Mass. 74, 96 Am. Dec. 693.

Holmes, J., delivered the opinion of the court:

This is a petition for partition of a strip of land subject to a passageway, which already has been before the court. *Crocker v. Cotting*, 166 Mass. 183, 33 L. R. A. 245. In the former case it was decided that the land under the way was not parcel of the adjoining estates. If it was not, then there was no question that it passed by two conveyances to the predecessors in title of the present parties as tenants in common, or that the present parties are tenants in common still. This proceeding was begun in the probate court after the above decision. Pub. Stat. chap. 178, §§ 1, 45. The case is here on appeal from the decree of a single justice of this court reversing the decree of the probate court and granting partition. The petition is resisted only on the grounds that the statute first cited does not apply to land subject to a right of way, and, more especially, that the implications of the purchase in common of the land subject to the easement already belonging to the purchasers are that the land should remain in common, and that it would be inequitable to divide it against that implied understanding.

To deal with the last argument first, we discover no such understanding as is supposed. Why the purchasers bought the land under the passageway is pure matter of conjecture. Their right of way was secure. Very possibly, their thoughts went no further than to get rid of outside ownership. Probably they did not contemplate partition, because probably they never thought about it, one way or the other. The fact that they would have provided against it if they had thought about it, if established, would not exclude the right to partition as a necessary consequence. But we have no warrant for saying that they would have provided against it. It is equally possible, on the facts before us, that they would have said, "When we get rid of outsiders, if it ever becomes convenient to divide the land, we will do it, keeping up our right of way." If, indeed, the tenancy in common of the servient land by the owners of the dominant estates had extinguished their several easements by merger, a very different question would be presented from that with which we are dealing. But the easements remained. They would not be extinguished so long as any difference in the quality of the title to the dominant and servient estates made it in any degree for the interest of the dominant owners to keep them alive. "That unity of titles in the dominant and servient estates should operate to extinguish an easement, the ownership in the two estates should be coextensive." *At-*
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lanta Mills v. Mason, 120 Mass. 244, 251; *Bradley Fish Co. v. Dudley*, 37 Conn. 136, 144, 145; *King v. Hermitage*, Carth. 239, 241; Washb. Easem. 518. See Littleton and Moile, in Year Book, 85, Hen. VI. pp. 55, 56, pl. 1. It is true that the petitioners make no mention of the easements to which the land is subject, but there is no indication that they hoped by this proceeding to cut off the respondents' rights of way; and that the respondents shall continue to have those rights may be made a term of the partition, for greater caution.

The fact, if it be one, that at the time of the original purchase in common passageways often were left in common in partitions under the statute, or that ways often were acquired by such a purchase, is far from sufficient to establish a binding surrender of one of the incidents of ownership. Mere inconvenience is equally insufficient. Partition is a matter of right. *Mitchell v. Starbuck*, 10 Mass. 5, 12; *Potter v. Wheeler*, 18 Mass. 504, 507; *Warner v. Baynes*, 2 Ambl. 589; *Parker v. Gerard*, 1 Ambl. 236; *Turner v. Morgan*, 8 Ves. Jr. 143, 145, note 1; *Mayfair Property Co. v. Johnston* [1894] 1 Ch. 508; *Hanson v. Willard*, 12 Me. 142, 146, 147, 28 Am. Dec. 162; *Wood v. Little*, 35 Me. 107; *Willard v. Willard*, 145 U. S. 116, 36 L. ed. 644; Freeman, Cotenancy & Partition, 2d ed. § 438.

But in the case at bar no inconvenience appears. On the contrary, the convenience of the petitioners will or may be met by partition, and that of the defendants not otherwise impaired than by depriving them of a right to prevent the petitioners doing what they want, which may have pecuniary value.

Then, as to the scope of the statute, Pub. Stat. chap. 178, § 1. The language is: "Persons holding lands as . . . tenants in common, may be compelled to divide such lands either by writ of partition at the common law or in the manner provided in this statute." This language applies to the present case as plainly as words can, unless for some reason it is narrowed from what it seems to mean on its face. There is no doubt that land is not withdrawn from partition by the fact that a part of it is subject to easement. *Weston v. Foster*, 7 Met. 297, 299. There is no greater obstacle in the fact that the whole of it is. Suppose that all the parties wanted a partition, but could not quite agree on the proportions and that, as in this case, it was or might be a great advantage to their several estates to have the land divided, it would strike everyone as monstrous, if, under this statute, the courts should decline to proceed, on the ground that they were not given power. But, if the voluntary jurisdiction extends to this case, the right to proceed *in initium* also does. The jurisdiction is not affected by a defendant's recalcitrance.

In England, when partition was asked and decreed of a moor, the objection was urged that the moor was subject to rights of common. But Sir William Grant, the master of the rolls, answered: "The rights of common are no objection to the commission, as that right will not be in the least affected by the partition, which regards only the freehold and inheritance of the soil. A partition never affects the interests of third parties. It is imma-

terial, whether others have a right over that soil and freehold which they have in common among them. Those rights will equally remain." *Agar v. Fairfax*, 17 Ves. Jr. 533, 544. The same thing is said concerning a right of way

by Chief Justice Shaw in *Weston v. Foster*, 7 Met. 297, 299, already referred to.

These considerations appear to us to dispose of the case.

Decree affirmed.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.

William THIELMAN, *Exceptant*.

(.....Mich.....)

Keeping open a saloon on Monday, July 5, is prohibited by Pub. Acts 1887, No. 313, § 17, providing that all saloons shall be closed on "all legal holidays," and Pub. Acts 1893, No. 185, designating July 4 as a holiday and providing that when such day falls on Sunday the next Monday following shall be deemed a public holiday for all or any of the "purposes aforesaid."

(November 17, 1897.)

EXCEPTIONS by defendant before sentence to rulings of the Circuit Court for Ottawa County made during the trial of a prosecution against him for illegal liquor selling which resulted in his conviction. *Affirmed.*

The facts are stated in the opinion.

Mr. Walter I. Lillie, for exceptant:

When after an enumeration the statute employs some general term to embrace other cases, the other cases must be understood to be cases of the same general character.

Brooks v. Cook, 44 Mich. 617, 88 Am. Rep. 282.

When the words used limit the provisions of the act to the specific things mentioned in the act, nothing can be added by implication or construction.

McDade v. People, 29 Mich. 50.

When we consider that the act is made expressly for the presentation of notes, etc., and says nothing about any other business, and then adds § 2 for the purpose of making Monday a holiday when one of the days mentioned comes on Sunday, for "the purposes aforesaid," and those purposes are the protesting of notes, etc., it cannot be a holiday within the meaning of How. Stat. § 2238e.

Detroit v. Putnam, 45 Mich. 263; *People, Houghton, v. State Land Office Comr.* 23 Mich. 270; *State v. Sparrow*, 89 Mich. 263.

This statute, like all criminal statutes, must be construed strictly, and nothing not within its words be held to be within its meaning.

People v. Reynolds, 71 Mich. 348.

A statute revising the whole subject of a former statute, and intended as a substitute, although it contains no words to that effect,

operates as a repeal of the former law, and the statute thus repealed must be considered as if it never existed.

Moore v. Kenockee Twp. 75 Mich. 332, 4 L. R. A. 555.

Therefore all prior acts were repealed by act number 185 of the Public Acts of 1893, and it is all the statute we have in reference to holidays.

Ruge v. State, 62 Ind. 388; *State v. Atkinson*, 139 Ind. 426.

Messrs. Fred A. Maynard, Attorney General, and **Arend Visscher**, for the People.

Long, Ch. J., delivered the opinion of the court:

Respondent was convicted in the Ottawa circuit court on a trial before a jury, and the case comes into this court on exceptions before sentence. It appears that the respondent was keeping a saloon in the city of Grand Haven, and the information charged him with keeping it open, and not closed, "on Monday, the 5th day of July, 1897, said 5th day of July, 1897, being then and there a legal holiday, commonly called the 'Fourth Day of July.'" The testimony was uncontradicted that the respondent did keep his saloon open on that day, and made sales of liquors there, the same as upon other days. The only question raised upon the trial, and the only question here, is whether Monday, the 5th day of July, 1897, was a legal holiday, within the meaning of the statute prohibiting the opening of saloons and the sales of liquors on legal holidays. The 4th day of July fell on Sunday. Section 17, act No. 313, Pub. Acts 1887 (the general liquor law), provides: "All saloons, restaurants, bars in taverns or elsewhere, and all other places, except drug stores, where any of the liquors mentioned in this act are sold, or kept for sale, either at wholesale or retail, shall be closed on the first day of the week, commonly called Sunday, on all election days, on all legal holidays," etc. This provision as to closing saloons, etc., on legal holidays, was first introduced into the statutes by act 267, Pub. Acts 1879, and has been continued in the liquor statutes since that time. Act No. 124, Laws 1865, is entitled "An Act to Designate the Holidays to Be Observed in the Acceptance and Payment of Bills of Exchange and Promissory Notes, in the Holding of Courts, and Relative to the Continuance of Suits." Section 1 of the act provides that "the following days, viz.: The 1st day of January, commonly called New Year's Day, the 4th day of July, the 25th day of December, commonly called Christmas Day, and any day appointed or recommended by the governor of this state

NOTE.—As to the law of holidays in respect to matters other than commercial paper, see note to *Merchants' Nat. Bank v. Jaffray* (Neb.) 19 L. R. A. 316.

39 L. R. A.

or President of the United States as a day of fasting and prayer or thanksgiving, shall for all purposes whatsoever as regards the presenting for payment or acceptance and of the protesting and giving notice of the dishonor of bills of exchange, bank checks, and promissory notes made after the passage of this act, also for the holding of courts, be treated and considered as the first day of the week, commonly called Sunday," etc. This act was amended in 1875, in 1881, and by act No. 77, Pub. Acts 1893. Section 1 of the amendatory act of 1893 also includes other days designated as legal holidays in addition to those enumerated in the act of 1865, and further provides that, "in case any of the holidays shall fall upon a Sunday, then the Monday following shall be considered as the said holiday." This last provision was first introduced into the statute by act No. 163, Laws 1875, and has continued therein to the present time, unless it may be said that there is a limitation placed upon it by act No. 185, Pub. Acts 1893 (which was an act passed later in the session of that year than act No. 77), again amending § 1 of the act and adding a new section.

It will be seen that, at the time the liquor law of 1879 was passed, the statute as to legal holidays provided that, "in case any of the holidays shall fall upon a Sunday, then the Monday following shall be considered as said holiday;" so that the legal holidays upon which all saloons, etc., were to be kept closed, included such Mondays, which were made by the act legal holidays. This continued up to the time act No. 185, Pub. Acts 1893, took effect. By the 1st section of the act, the 1st day of January, 22d day of February, 30th day of May, 4th day of July, 1st Monday of September (called Labor Day), and the 25th day of December are designated as holidays. Section 1 also provides that every Saturday, from 12 o'clock noon until 12 o'clock at night, shall be designated a half holiday; and the same section strikes out from the act the proviso that, in case any of the holidays shall fall upon a Sunday, the Monday following shall be considered as the said holiday. In § 2 is inserted the following: "Whenever the 1st day of January, the 22d day of February, the 30th day of May, the 4th day of July, or the 25th day of December shall fall upon Sunday, the next Monday following shall be deemed a public holiday for all or any of the purposes aforesaid." Counsel for respondent contends that the words "for any or all of the purposes aforesaid" are words of limitation upon the act, so that a Monday following a legal holiday can be treated as a holiday only for the purposes specified in that act, and that, therefore, such a Monday is not a legal holiday, in contemplation of the liquor statute. By § 17 of the liquor statute, heretofore quoted, saloons, etc., must be closed on all holidays. This statute does not provide that any specified day shall be a holiday. To

ascertain what days are holidays, we must look to the statutes providing for such days. This added clause to § 2 is of no more significance than the title of the act itself, and no more limits the liquor act than does that title. That title, as passed in 1865 and since continued in all the acts, is, "To designate the holidays to be observed in the acceptance and payment of bills of exchange and promissory notes, in the holding of courts and relative to the continuance of suits." In *Reithmiller v. People*, 44 Mich. 280, the respondent was convicted of an illegal sale of liquor on Christmas Day, it being alleged that the day was a legal holiday on which such sales were forbidden. The conviction was sustained. The court in speaking of the liquor statute said: "It is true that the statute does not enact in so many words that any specified day shall be a holiday. But that is not important. The past and present provisions concerning privileged days, including this act of 1879, are to our present purpose *in pari materia*, and are to be considered together, and the identical days contemplated by the legislature may be ascertained by such examination." The court said further: "Were Christmas Day to be excluded on the ground contended for, it would follow unavoidably that nothing could be retained to answer to the call for 'legal holidays.' The ground taken for excluding Christmas would, according to the necessary meaning of the context, equally exclude all other days possibly capable of being classed under the head of 'legal holidays,' and leave nothing whatever for that phrase to apply to." In *People v. Ackerman*, 80 Mich. 588, the respondent was convicted of keeping open a saloon on April 30, 1889. That day had been designated by the governor as a day of thanksgiving and prayer. It was known as Centennial Day. It was held that this was a legal holiday, within the meaning of § 17, Pub. Acts 1887, as fixed by the statutes defining legal holidays. That clause 2 of the act of 1893 cannot be given the construction contended for by counsel is made more apparent when we examine the provisions of § 1, making Saturday afternoons half holidays for certain purposes, as, in the latter part of the section, it is provided that "nothing herein contained shall be construed to prevent or invalidate the entry, issuance, service, or execution of any writ, summons, or confession of judgment or other legal process whatever, holding courts, or the transaction of any lawful business, except banking, on any of the Saturday afternoons herein designated as half holidays." So that on those half holidays any lawful business may be carried on, except such as is specifically designated in that section.

The conviction must be affirmed, and the court below is directed to proceed to judgment.

The other Justices concur.

PENNSYLVANIA SUPREME COURT.

Re Contest of Will of Alexander H. MILLER, Deceased.

(179 Pa. 645.)

1. A hypothetical question by contestant to an expert witness upon the question of incapacity of a testator need embrace only the facts which the evidence of the contestant tends to prove, and not those alleged by proponents, which he denies, or those which are irrelevant.

2. A finding by the court that testator had testamentary capacity of the highest order is erroneous where the ques-

tion of undue influence is also involved, if it appears that, possessed of property of over \$300,000 in value, he gave more than three fourths of it to one of his children, and for a period of ten years covering the time of the will he drank largely of intoxicating liquors and was afflicted with locomotor ataxia; while interested witnesses testify to the daily consumption of unusual quantities of intoxicants, and the failure of memory, and weakening of will power, although the evidence of incapacity is not sufficient to send the case to the jury.

3. The question whether or not a will was procured by undue influence must be submitted to the jury when the evidence tends

NOTE.—Drunkenness as affecting testamentary capacity.

I. *Present intoxication.*

II. *Habits of intoxication.*

III. *Drunkenness as evidence of incapacity.*

a. *Generally.*

b. *In connection with conduct and condition.*

c. *In connection with nature of the act.*

d. *In connection with undue influence.*

e. *Point of time under investigation.*

f. *Presumption and burden of proof.*

IV. *Inquisition of drunkenness as evidence.*

I. *Present intoxication.*

Intoxication is temporary insanity ceasing with the exciting cause. *Wheeler v. Alderson*, 3 Hagg. Eccl. Rep. 574.

And the rule that capacity requisite for the testamentary act is, that the testator can comprehend the property he is about to dispose of, the natural or other objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will,—is applicable to an allegation of incapacity from intoxication as well as insanity. *Re Lee*, 46 N. J. Eq. 193; *Re Halbert*, 15 Misc. 308.

But a testator who is in the habit of excessive indulgence in strong drink need not be wholly free from its influence in order to make a valid will. *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

One whose mind is partially clouded by drink may make a valid will. *Re Johnson*, 7 Misc. 230.

It is a species of insanity, and may invalidate a will made during a drunken fit. *Duffield v. Robeson*, 2 Harr. (Del.) 375.

But the intoxication of a party which will authorize setting aside a deed in the nature of a testamentary disposition must have been so excessive that he was utterly deprived of the use of his reason and understanding. *Belcher v. Belcher*, 10 Yerg. 121.

And in order to avoid a will made by an intemperate person, it must be proved that he was so excited by liquor or so conducted himself during a particular act as to be at the moment legally disqualified from giving effect to it, and as to disorder his faculties and pervert his judgment. *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

There is no standard of drunkenness which will defeat testamentary capacity short of downright imbecility. *Dimond's Estate*, 3 Pa. Dist. R. 554.

And the intoxication of a testator will not avoid his will if it was not sufficient to prevent him from knowing what he was about. *Pierce v. Pierce*, 38 Mich. 412.

A will is not rendered invalid by the mere fact that the testator was under the influence of liquor when it was made; to have avoided it the mind must have been in such a condition that the testa-

tor had no intelligent comprehension of the nature of the transaction. *Key v. Holloway*, 7 Baxt. 576.

A person under the influence of intoxicating liquors is competent to execute a will where he is capable of exercising judgment, reason, and deliberation, and of weighing to a reasonable degree the consequences of his act. *Re Convey*, 52 Iowa, 197.

A drunkard may make a valid will, even if at the time of the execution thereof he is under the influence of liquor, provided he comprehends the nature, extent, and disposition of his estate, his relations to those who have or might have a claim upon his bounty, and is free from undue influence, fraud, or coercion. *Re Reed*, 2 Connolly, 403.

So, in *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, the will of a confirmed drunkard was established though executed after a protracted debauch and the testator had drank several times in the course of the day, it appearing that at the time his excitement was not such as to disorder his faculties and pervert his judgment.

Where there is evidence in a will contest tending to show that at or near the time the will was made the testator was so drunk that he could neither stand up, understand anything, nor talk, however, it should be left to the jury to say whether at the time he signed the will he was so drunk that he had not sufficient reason and understanding to know his property and dispose of it in a rational manner according to a fixed purpose of his own. *Best v. Best*, 11 Ky. L. Rep. 215.

The effect of intoxication upon the capacity of an intoxicated person to make a will is not a scientific question to be determined by experts, but one within common observation depending upon the facts of each case and to be determined from such facts. *Pierce v. Pierce*, 38 Mich. 412.

II. *Habits of intoxication.*

Long continued habits of intemperance may greatly impair the mind and destroy the memory and other faculties so as to produce insanity which will invalidate a will. *Duffield v. Robeson*, 2 Harr. (Del.) 375.

When by habitual intoxication a man's senses are so affected and his understanding gone he cannot make a will. *Starrett v. Douglas*, 2 Yeates, 48.

And weakness of intellect from extreme age or great bodily infirmity, or from intemperance to the extent of disqualifying a testator from knowing and comprehending the nature and effect and consequences of his act, destroys testamentary capacity. *Leech v. Leech*, 5 Clark (Pa.), 86.

It cannot be said as a rule of law, however, that because a man is a drunkard he is of unsound mind. *Re Johnson*, 57 Cal. 529; *Weisman's Estate*, 5 Pa. Co. Ct. 561.

And drunkenness does not necessarily take away a testator's capacity to make a will. *Turner v.*

to show that for some time before it was made the testator had been addicted to the use of intoxicants to an unusual degree; and that the son to whom he gave three fourths of his property was always with him when he was intoxicated, and had, said there was boodle in it for him; and that he had deliberately prejudiced his father against the other children and ingratiated himself in his favor, although he was not actually present when the will was made.

4. Evidence tending to show testamentary incapacity is admissible upon the question of undue influence in the obtaining of the will, although it may be insufficient to show want of capacity to make the will.

(*Mitchell and Fell, J.J., dissent.*)

(January 4, 1897.)

Cheesman, 15 N. J. Eq. 243; Whitenack v. Stryker, 2 N. J. Eq. 8.

And mere drunkenness upon the part of a testator does not affect the validity of his will unless it absolutely disables him from disposing of his estate with intelligence and reason. *Starrett v. Douglass*, 2 Yeates, 48.

The question to be determined with relation to habits of intoxication of the testator, as well as with relation to his insanity, is whether his mind was so affected that he was not sufficiently master of himself to give expression to his real wishes. *Re Johnson*, 7 Misc. 220.

And a person whose intemperance has grown into a confirmed habit, and whose constitution is gradually giving away, may make a valid gift in the nature of a testamentary disposition when he is sober at the time, unless his indulgence has resulted in a settled derangement of mind independent of the immediate influence of drink. *Gardner v. Gardner*, 2 Woud. 526, 34 Am. Dec. 340.

To invalidate a will upon the ground of the intoxication of the testatrix, it must appear, not only that she was intoxicated or that she was usually intoxicated, but also that she was so in fact at the very time the will was executed, or that her mind was so clouded by drink that she was incompetent to give expression to her real testamentary intentions. *Re Halbert*, 15 Misc. 308.

Habitual intoxication will not incapacitate a testator to make a will unless the excitement was such as to disorder his faculties or pervert his judgment. *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Houster v. Lightner*, 42 Phila. Leg. Int. 239.

It must have been carried to the extent of intoxication generally or at the time of making the will. *O'Neil v. Murray*, 4 Bradf. 311.

And it will not invalidate his will where his mind was not so affected thereby as to render him incapable of comprehending the condition of his property, or the relation of the objects of his bounty, or the scope and bearings of the provisions of his will. *Re McLaughlin*, 2 Redf. 504.

So, old age, failure of memory, and drunkenness do not of themselves necessarily take away a testator's capacity to make a will; it may still be valid if he retain sufficient capacity to understand the business in which he was engaged. *Whitenack v. Stryker*, 2 N. J. Eq. 8.

Neither old age, weakness, failure of memory, eccentricities, intemperance, nor ill temper will invalidate a will if the testator knew the nature of his property and understood to whom and in what manner he wished to dispose of it. *Philadelphia Trust & S. D. Co. v. Drinkhouse*, 17 Phila. 23.

And a will is valid where the testator when he made it could comprehend the property he was about to dispose of, the objects of his bounty, the meaning of the business in which he was engaged, the relation of each of these factors to the others, 39 L. R. A.

A PPEAL by Alexander H. Miller from a decree of the Orphans' Court for Allegheny County dismissing his petition for an appeal from an order of the register of wills admitting to probate the alleged will of Alexander H. Miller, deceased. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Edward Campbell, Lazear & Orr, W. H. Tomlinson, and Charles E. Hogg*, for appellant:

Where there is a substantial dispute upon a material question of fact an issue *devocavit vel non* is a matter of right, and the test of substantiality in the dispute is that a verdict could be supported by the trial judge, upon a review of all the evidence adduced.

Sharpless's Estate, 184 Pa. 250; *Knauss's Ap-*

and the distribution that is made by the will, though he was addicted to the excessive use of intoxicating liquors, and to some extent his indulgence had impaired his mental and physical powers and contributed to the degradation of his moral character. *Bannister v. Jackson*, 45 N. J. Eq. 702.

And one whose mind was so weakened by habits of intoxication that he could not conserve his estate may nevertheless make a valid will where he could recollect its nature and extent and those for whom he naturally would provide. *Re Johnson*, 7 Misc. 220.

And a will made by one whose habitual and excessive indulgence in strong drink had not produced a mental derangement sufficient to destroy mental capacity is valid if at the very moment of the execution thereof he was not intoxicated to such a degree as to destroy his faculties or pervert his judgment. *Bannister v. Jackson*, 45 N. J. Eq. 702; *Hennessey v. Wolfe*, 49 La. Ann. 1876.

A person addicted to intemperance and subject to consequent fits of derangement may make a will if he be *compos mentis* at the time. *Hebert v. Winn*, 24 La. Ann. 385.

And habitual excessive indulgence in strong drink upon the part of a testator will not affect the validity of his will where it has not produced fixed mental disease sufficient to render him unable to comprehend the property he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will, and at the very moment of the execution of the document he is not so intoxicated as to disorder his faculties or pervert his judgment. *Bannister v. Jackson*, 45 N. J. Eq. 702, affirming 46 N. J. Eq. 598.

And the will of an habitual drunkard who was not properly a madman, but who while under the excitement of liquor acted in all respects like one, will be upheld where he was not under the excitement of liquor at the time he made it. *Ayrey v. Hill*, 2 Add. Ecol. Rep. 206.

So, habits of drunkenness do not affect a man's capacity to make a will where he was not intoxicated when he made it, though his habits were the cause of the disease of which he died. *Kahl v. Schober*, 36 N. J. Eq. 461.

And a will made at the request of a testator, which was his voluntary and spontaneous act, not under constraint and free from force or fraud and from imposition or importunity, is valid though the testator was proved to have been addicted to drink, and to have had delirium tremens a few days before, and though it was drawn up by one of the devisees at the devisee's house. *Handley v. Stacey*, 1 Fost. & F. 574.

III. Drunkenness as evidence of incapacity.
a. Generally.

Drunkenness, as has been seen, does not of itself,

peal, 114 Pa. 20; *Armor's Estate*, 154 Pa. 517.

A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty.

Wilson v. Mitchell, 101 Pa. 495; *Shaver v. McCarthy*, 110 Pa. 389; *Knauss's Appeal*, 114 Pa. 10.

The evidence of appellant shows a great and inordinate use of alcoholic liquors by an aged man, the moderate use thereof beginning as early as 1862 or 1863; that from 1878 or 1879

and as a matter of law, destroy testamentary capacity. It is a mere matter of evidence upon the question of its existence or nonexistence. *Re Harigan*, Myr. Prob. 135.

Thus, in stating the grounds of contest in a proceeding to contest a will on the ground of the unsoundness of mind of the testator induced by habits of intoxication, it is sufficient to state that the testator was not at the time of sound and disposing mind. Unsoundness is the ultimate fact to be found, and acts of inebriety are to go to the jury from which unsoundness may be found. *Re Gharky*, 57 Cal. 274.

So, whether habits of inebriety upon the part of a testator had the effect to render his mind unsound either permanently or temporarily covering the time of the execution of his will, so as to affect its validity, is a question for the jury. *Re Johnson*, 57 Cal. 629.

And a finding of the court below that a testator was of sound and disposing mind will not be disturbed on appeal where there was some evidence to sustain it, though there was other evidence tending to show that for twenty years he had been addicted to the excessive use of intoxicating liquors and had been for years a noted drunkard. *Re Johnson*, 57 Cal. 629.

Nor is mere evidence of the habitual use of liquors to excess by the testator alone sufficient to establish testamentary incapacity. *Weisman's Estate*, 45 Phila. Leg. Int. 274.

And occasional fits of intemperance are not evidence of a want of capacity on the part of a testator to dispose of his estate. *Violet's Will*, 1 Bibb, 617.

So, evidence that a testator was very nervous, weak, and suffering from mental and physical prostration at the time of making his will, due to over stimulation, will not justify the submission of the issue of testamentary capacity to a jury where there is nothing to show an inability to comprehend the nature and character of the testamentary power or of its exercise, and it appears that shortly afterwards he made the statement that he had changed his will stating the change made accurately. *Harmony Lodge*, 1 O. O. F.'s Appeal, 127 Pa. 269.

And evidence that a testator originally possessed a strong will which might have been weakened somewhat by disease and dissipation, and that he was frequently drunk and generally ill-natured and stubborn, is insufficient to warrant the submission of the issue of testamentary capacity to the jury. *McPherson's Appeal* (Pa.) 9 Cent. Rep. 408.

b. *In connection with conduct and condition.*

Occasional or habitual fits of intemperance, and want of domestic management, and generally bad conduct on the part of a testator, do not show testamentary incapacity. *Harper's Will*, 4 Bibb, 244. 89 L. R. A.

he drank as much as a pint, and often a quart, of whisky a day, keeping it at his own house in large quantities, and at his office in bottles.

The appellant's evidence further shows that the alleged testator was so weakened in body and mind by the inordinate use of whisky as to render him practically unable to transact business requiring thought, care, and judgment.

The appellant's evidence shows great failure of memory by the alleged testator at the time of and prior to the making of the will and codicils, as well as subsequent thereto.

There is also disclosed by the evidence of the appellant a marked change in the affections, disposition, and habits of the alleged testator, at the time of and prior to and subse-

Nor are frequent sleepiness, flightiness, and violent outbreaks of passion, resulting from excessive use of intoxicating drinks and narcotics, alone, sufficient. *McCullough's Will*, 35 Pittsb. L. J. 169.

And the presumption of the sanity of a testator is not rebutted by proof that his intellect was greatly impaired by the use of opium and ardent spirits, and that in consequence thereof he was frequently incapable of transacting business, in the absence of proof that such was his condition at the time the will was executed. *Temple v. Temple*, 1 Hon. & M. 476.

So, evidence of habitual drunkenness, old age, weakness of body, shortness of memory and a few incoherent expressions is not sufficient to establish testamentary incapacity. *Hight v. Wilson*, 1 U. S. 1 Dall. 94, 1 L. ed. 51.

Nor is evidence that the testator was old, intemperate, and irascible. *Keating's Appeal*, 15 Pittsb. L. J. N. S. 283. And see *Whitenack v. Styker*, 2 N. J. Eq. 8; and *Philadelphia Trust Co. v. Drinkhouse*, 17 Phila. 23, *supra*, II.

And evidence of habits of intemperance upon the part of a testator, and that he was occasionally wild and violent from the effects of intoxicating drink, and that his mind was undoubtedly impaired and weakened, and that capacity may have been temporarily suspended, is not sufficient to establish a total and permanent want of testamentary capacity. *Julke v. Adam*, 1 Redf. 454.

So, a will will not be set aside on proof that the testator at times acted with whimsical and ridiculous levity, where this was accounted for and attributable to fits of intemperance, and the evidence shows that he acted with a firm, collected, and efficient mind in the framing and execution thereof, and that his mind was sufficient to entitle him to the right of disposing of his property by will. *Violet's Will*, 1 Bibb, 617.

And one who transacts his own business, and keeps his own accounts, and makes his own returns for the assessment of taxes, is not insane so as to be incapable of making a will, though he was a drunken man and played drunken pranks. *Billingshurst v. Vickers*, 1 Phillim. Eccl. Rep. 193.

And a will is not invalidated by the fact that the testator was a dissipated man and had indulged in a protracted debauch for five days before that on which he signed it, where he is not shown to have committed any extravagances or to have exhibited any insane conduct on that day, except to indulge in improper and profane language as intemperate men will do, and the persons who were present at the very time the act was done, one of whom was from previous knowledge and present observation eminently competent to speak, saw nothing in him indicating a want of ordinary intelligence or entire sanity, and there was nothing extravagant or unreasonable in the will. *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

quent to the execution of the will in question and codicils thereto.

Appellant's evidence establishes, beyond question or doubt, that at the times the will in question and codicils were made, the testator was suffering from chronic alcoholism, and it had so affected and perverted the intellect, moral faculties, and will power of the patient as to render him incapable of the possession of that soundness of mind necessary to make a last will and testament.

There are the unequal provisions of the will itself, which the courts always treat as a strong circumstance bearing on the question of mental capacity.

Thomas v. Carter, 170 Pa. 272.

It is the practice of this learned court in

cases of this character to receive and consider expert evidence.

Pidcock v. Potter, 68 Pa. 342, 8 Am. Rep. 181; *Thomas v. Carter*, 170 Pa. 272.

On the trial of an issue *deviseavit vel non* a conflict in the evidence and contrariety of the opinions expressed, and the veracity of the witnesses, are matters peculiarly within the province of the jury, and with them the court has nothing to do.

Shaver v. McCarthy, 110 Pa. 339; *Newhard v. Yundt*, 182 Pa. 324; *Shaffer v. Clark*, 90 Pa. 94; *Weater v. Craighead*, 104 Pa. 288; *Sharpless's Estate*, 184 Pa. 250.

The evidence of all the witnesses in the case must be considered, and not the testimony of some to the exclusion of that of others.

Nor does the fact that a testator was an intemperate man, and that he was suffering from Bright's disease of the kidneys, show testamentary incapacity, where his signature to the will shows no evidence of unsteadiness, and his will was such as he might naturally have made. *Re Schreiber*, 22 N. Y. S. R. 862.

And evidence that a testator was of intemperate habits and accustomed to paroxysms of great intoxication, becoming insensible, and that his death was probably caused by exposure while intoxicated and by the effects of intoxication, together with that of experts that he was insane, is not sufficient to invalidate his will where it appears that he would remain sober for a considerable length of time, and was considered a man of good mind when sober, and the opinions of the experts were given without personal examination or engaging in conversations with him, and the parties with whom he lived and at whose house he died explicitly say that his mind was not impaired. *McIntyre v. McConn*, 28 Iowa, 483.

And evidence as to long-continued habits of intemperance on the part of a testator, and irrational conduct, and that for two years previous to his death he had been paralyzed on one side, and later had lost the power of intelligible speech, does not show testamentary incapacity as against evidence of the testator's neighbors who had known him for many years that he was of sound mind and memory, where it appears that the testimony as to his incapacity was extremely biased and in some respects false, and that a part of his property was bequeathed pursuant to an agreement that if the legatee would live with him and take care of him for life he would leave her his property after death. *Re Tacke*, 17 N. Y. S. R. 805.

So, inebriety accompanied by bona fide attempts to commit suicide, and accomplished suicide, though perhaps manifesting a deranged mind, do not necessarily show incapacity to make a will. *Koegel v. Egner*, 54 N. J. Eq. 623.

And in *McElwee v. Ferguson*, 43 Md. 479, a will was upheld which was made by a person recovering from an attack of mania a potu who on the following day committed suicide, there being evidence to the effect that his mind was clear at the time.

A belief upon the part of a testator that his only son was illegitimate, based upon reports and stories he had heard shortly after his marriage, but which had never been communicated to anyone except to his priest and to his wife while he was intoxicated, is not such an insane delusion as will invalidate a will made by him disinheriting such son. *Re Smith*, 53 N. Y. S. R. 658.

c. In connection with nature of the act.

The dispositions of a will may be examined in a contest thereof in which it is claimed that the testator was intoxicated when making it, to see, not 89 L. R. A.

whether they are in some degree extravagant or unreasonable, but whether they depart so widely from what would be considered natural as to be fairly referable to no other cause than a disordered intellect. *Peck v. Cary*, 27 N. Y. 2, 84 Am. Dec. 220.

And evidence of the reasonableness of a will, and testimony consistent with the existence of ability of the testator to execute it and of his understanding of the condition of his property, is sufficient to support a finding of testamentary capacity, though the testator was a man of intemperate habits and was suffering from the effects of a debauch when he made it, and a physician acquainted with his habits gave his opinion that at the time he was incapable of understanding what he was doing. *Re Peck*, 42 N. Y. S. R. 398.

And that a testator was an habitual drunkard, and that he had injured himself to a great extent by indulging his appetite for ardent spirits, do not establish his incompetency to make a will as against proof, derived from circumstances attending the execution, that he possessed such sanity of mind as would uphold the dispositions made by him, such dispositions being reasonable and in accord with previous intentions. *Hubbard's Will*, 6 J. J. Marsh. 50.

Nor will a deed in the nature of a testamentary disposition, made by a man seventy-six years of age just previous to his second marriage, be set aside though he had been addicted to the excessive use of intoxicating liquors throughout his life and his memory had begun to fail, where he still possessed sound practical judgment on business matters, and it was done in fulfillment of a purpose formed a long time before, and the division of the property made by it among his children was not so unequal as to shock a sense of justice. *Wiley v. Ewalt*, 66 Ill. 26. See also *Re Schreiber*, 22 N. Y. S. R. 892, *supra*, III. b.

In *Waters v. Cullen*, 2 Bradf. 354, however, an unequal will was denied probate where at the time it was made and for some time before the testatrix's death she had been subject to attacks of delirium tremens, and at the time of making it entertained delusions likely to affect her testamentary provisions.

And in *M'Diarmid v. M'Diarmid*, 3 Bligh, N. R. 374, a deed by an old man eighty-three years old by which he relinquished all his interests in a fund of £6,000, assigning it to his daughter and her husband to whom the reversion belonged, in consideration of an annuity of £40 a year for life and his funeral expenses, was held to be void where it appeared that he was weak and infirm and addicted to intoxication, and that the deed was drawn up by the agents of the daughter and her husband, and no agent or other person was employed on the part of the father.

And evidence that a testator had fallen from a

Grubbs v. McDonald, 91 Pa. 236; *Shaver v. McCarthy*, 110 Pa. 389; *Irish v. Smith*, 8 Serg. & R. 578, 11 Am. Dec. 648; *Rambler v. Tryon*, 7 Serg. & R. 92, 10 Am. Dec. 444; *McTaggart v. Thompson*, 14 Pa. 149.

Undue influence to affect a will must be such as to subjugate the mind of the testator to the will of the person operating upon it.

Tawney v. Long, 76 Pa. 106; *Den, Trumbull, v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; Redf. Am. Cas. on Wills, 251.

It is not to be supposed that fraud and undue influence are ordinarily susceptible of direct proof. Subscribing witnesses are called to attest the execution of wills, but not the antecedent agencies by which they are procured.

two-story window during an attack of delirium tremens, severely injuring himself, and that he mistakenly insisted that he had been pushed out by his wife's grandson, and that he labored under the delusion that his wife wanted to poison him and that persons in the house were trying to rob him, and that after making a will making a considerable gift to one of his sons he made another upon the mistaken idea that such son had broken open the sealed envelope and read it, which second will gave him nothing, radically changing bequests made to others, is sufficient to establish want of testamentary capacity. *Edge v. Edge*, 38 N. J. Eq. 211.

Nor will a will giving one of two sons of the testator a larger share than the other, and making a devise to his wife of property a part of which was her own and a part of which had been sold by him some time before, and giving her only about one half the amount devised to a sister and her children, notwithstanding the fact that she had cared for and watched over him faithfully, the testator having been several times committed to an asylum for alcoholic insanity and the physician who attended him and one of the attesting witnesses having testified that he was of unsound mind,—be admitted to probate, though there was evidence of rational acts. *Re Ely*, 16 Misc. 223.

In that case *Re Halbert*, 15 Misc. 308, and *Re Johnson*, 7 Misc. 220, *supra*, II. were distinguished upon the ground that in those cases there was no contention that a generally insane condition of mind existed caused by excessive indulgence in drink, the only issue being whether or not at the time of the execution of the will the testator was intoxicated.

A voluntary deed in the nature of a testamentary disposition, giving a favorite son much more than was given another son, will not be set aside, however, on the ground that at the time the deed was executed the father was in some degree intoxicated, where he was not insensible to what he was doing and no undue or improper means were used to procure the deed by the favored son. *Belcher v. Belcher*, 10 Yerg. 121.

And a will executed by a woman eight years before her death, who, though guilty of excessive drinking and great extravagances, managed her own property, received her dividends, did various acts of business, corresponded rationally with her friends, and was not shown to be under any delusion, cannot be set aside on the ground of insanity, though it totally excluded some of her next of kin with whom she had quarreled, and was in the handwriting of and executed at the office of her attorney, who was one of the executors and a residuary legatee to a large amount, he and his family both having large legacies, and the attesting witnesses speak to the bare execution, there being documents in her own handwriting showing both capacity and knowledge of contents, though not mentioning the residue, such documents supplying the addition.

The purposes to be served are such as court privacy rather than publicity.

Tyler v. Gardiner, 35 N. Y. 559; 1 Redf. Wills, 469, 470; *Marsh v. Tyrrell*, 2 Hagg. Eccl. Rep. 84; *Sears v. Shafer*, 6 N. Y. 272.

The question of undue influence exerted upon the execution of a will is a question of pure fact. Its disposition properly rests with the jury alone.

Herster v. Herster, 116 Pa. 626.

Great latitude in testimony is allowed where the object is to establish fraud.

Reeme v. Parthemere, 8 Pa. 462; *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282; *Hiss v. Weik*, 78 Md. 439; *Steadman v. Steadman* (Pa.) 14 Atl. 406.

tional proof required. *Wheeler v. Alderson*, Hagg. Eccl. Rep. 574.

So, in *Ritter's Appeal*, 59 Pa. 9, a deed in the nature of a testamentary disposition by a man of intemperate habits who was perfectly aware of his tendency to drink to excess, and made the deed for the benefit of his family, fearing that he would squander his property, was upheld where he was perfectly sober and in full possession of all his faculties, and thoroughly understood the nature and character of the act at the time.

d. In connection with undue influence.

A lesser degree of intoxication, or impairment of mind therefrom, would appear to be required to affect the validity of a will where undue influence was brought to bear upon the testator, than in cases in which drunkenness alone is relied upon.

Thus, evidence of incapacity from intoxication or otherwise, though not sufficient to warrant its submission to the jury on an issue of testamentary capacity, is admissible on the question of undue influence, the condition of the mind of the testator alleged to have been unduly influenced, although of testamentary capacity, being important in determining whether the act was the result of fraudulent arts practised upon him. *Re MILLER*.

So, evidence that a testator who was about seventy years old had been an habitual drunkard for fifty years, and that his appetite for drink was uncontrollable, and that he went to live with his brother, a saloon keeper, who offered him a home with full and free opportunity to drink when and what he pleased, and who resisted the efforts of his guardian to take him away, and that he had been drinking to some extent on the day he made his will which made such brother his sole legatee, warrants a finding of undue influence invalidating it. *Slinger's Will*, 72 Wis. 22.

And refusal to probate a will upon the ground of undue influence is warranted by proof that the testator was aed, and that his mental capacity was greatly impaired by habitual intemperance, and that his wife had for some time directed his intentions and controlled his acts, and that in her presence he directed a will, giving her two thirds of his property instead of one half provided for in a previous will, saying that he wanted to satisfy her and that it must be drawn as she desired it, she giving directions as to particular dispositions. *Julke v. Adam*, 1 Red. 454.

So, a will in English drawn for a German who possessed little familiarity with the English language and was habitually intoxicated, by his partner who supervised the execution and took substantial benefits under it, will be looked upon by the court, upon an allegation of fraud or undue influence, as an indication of fraud; and if it is not sufficient to raise a presumption against the instrument, it will at least induce a suspicious scrutiny. *Koegel v. Egner*, 54 N. J. Eq. 623.

Fraud vitiates everything it touches.
1 Redf. Wills, 522.

Where a testator, although possessed of testamentary capacity, is aged, infirm bodily, with mental faculties impaired, if a confidential adviser be largely a beneficiary under the will there is a presumption of fact that undue influence was brought to bear on the mind of the testator, and the burden is on him to rebut this presumption.

Wilson v. Mitchell, 101 Pa. 495; *Armor's Estate*, 154 Pa. 517; *Dean v. Negley*, 41 Pa. 312, 80 Am. Dec. 620.

Acts and declarations of Florence C. Miller, the principal legatee, are competent evidence, as well, also, as those of the testator.

Morris v. Stokes, 21 Ga. 552; 1 Redf. Wills,

And a will prepared by an attorney, who takes at least a fourth of the estate thereunder, the legatees taking the whole to the exclusion of the testator's own family, together with the fact that the testator was a person of slender capacity, addicted to drink, singular in appearance, and frivolous and even childish in his amusements and occupations, calls upon the court to watch the operation of the will itself with care, diligence, and suspicion. *Barry v. Butlin*, 2 Moore, P. C. C. 482.

And evidence of the character of women who had combined to impose upon a testator after he had lost the use of his rational faculties is admissible upon an issue of *deusavit vel non*, where it appears that they kept him in a state of intoxication and had represented each other as persons of virtue and good character, and urged him to make a will in their favor to the exclusion of his own blood relations. *Nussear v. Arnold*, 13 Serg. & R. 323.

See also *M'Diarmid v. M'Diarmid*, 3 Bilgh, N. R. 874, *supra*, III. c.

The act of a party addicted to intemperance in disposing of his property will not be invalidated on the ground of undue influence exercised over him by the inmates of his family, however, where the influence arises from kind offices springing from attachment or affection. *Re Johnson*, 7 Misc. 220; *Gardner v. Gardner*, 22 Wend. 826, 34 Am. Dec. 840.

And a will in favor of a legatee who had treated the testator kindly and furnished him with a home and cared for him and advanced him means, which he several times declared conformed with his wishes, will not be denied probate on the ground of mental incapacity and undue influence upon proof that he was much addicted to drink, and had been found an habitual drunkard by a jury, and had been such for two years, and had been committed to an insane asylum several times and twice committed to the penitentiary for drunkenness, a similar will having been previously made, and the persons who otherwise would have been entitled to his bounty had attempted to restrain his appetite for liquor and had refused him admission into their homes. *Re Reed*, 2 Connolly, 403.

So, a will prepared for a testator of slender capacity and addicted to drink, by a solicitor, under which he takes at least one fourth of the estate and the legatees take the whole to the exclusion of his son and heir, will be admitted to probate where it appears that there was a complete alienation between him and his son, and that they had ceased to speak with each other, and that the person preparing the will meant that it should be fairly and openly executed. *Barry v. Butlin*, 2 Moore, P. C. C. 482.

And the fact that a testator had become weak in will and impaired in memory, and was therefore an easy prey to fraud, compulsion, and improper conduct, and that at the time he made his will he was in a somewhat elated state of mind caused by drink-

200; *Herster v. Herster*, 116 Pa. 612; *Rambler v. Tryon*, 7 Serg. & R. 90, 10 Am. Dec. 444.

Even when the jury may differ in opinion with the court, it is no ground upon which to grant a new trial, where there is a conflict of testimony, or where the cause is submitted on the credibility of the witnesses.

Ausine v. Mayer, 5 Kulp, 523; *Blakeslee v. Scott*, 37 Phila. Leg. Int. 474.

The case at bar is much like that of *Hiss v. Weik*, 78 Md. 439.

Messrs. Clarence Burleigh and Watson & McCleave for appellee.

Dean, J., delivered the opinion of the court:

Alexander H. Miller, a member of the bar of

ing an intoxicant which was on the table near at hand, will not invalidate his will on the ground of undue influence where there is no evidence going to show fraud, compulsion, or improper practices. *Re Storey*, 20 Ill. App. 183.

And declarations made by a testator to the effect that he had never made the will in question, and if he signed it they got him drunk and made him do it, for he had no recollection of it, are inadmissible in evidence in a proceeding to invalidate the will on the ground of undue influence and unsoundness of mind by reason of intoxication, such declarations not being evidence of the truth of the facts stated. *Gibson v. Gibson*, 24 Mo. 227.

See also *Wheeler v. Alderson*, 3 Hagg. Eccl. Rep. 574, *supra*, III. c.

c. Point of time under investigation.

The point of time under investigation on an inquiry into testamentary capacity as affected by intoxication is that at which the will was made. *Hennessey v. Woulfe*, 49 La. Ann. 1376; *Dimond's Estate*, 3 Pa. Dist. R. 554.

Intoxication is a temporary condition, and testimony as to intoxication in a will contest must be confined to the time involved in the transaction, and if the testator was not overcome by drunkenness when he made his will it is not important what his condition was on other occasions. *Pierce v. Pierce*, 88 Mich. 412.

And in order to avoid a will made by an intemperate person it must be proved that he was so excited by liquor, or so conducted himself during the particular act, as to be at that moment legally disqualified from giving effect to it. *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Andress v. Weller*, 3 N. J. Eq. 604; *Wheeler v. Alderson*, 3 Hagg. Eccl. Rep. 574.

And, against affirmative proof of his competency at such time, all evidence as to his capacity or incapacity on other and earlier occasions is clearly irrelevant. *Dimond's Estate*, 3 Pa. Dist. R. 554.

To establish the legality of a will attacked on the ground of habits of intoxication upon the part of a testator all that is required to be shown is the absence of the excitement of liquor at the time the act was done, or at least the absence of excitement in any such degree as would vitiate the act done. *Ayrey v. Hill*, 2 Add. Eccl. Rep. 206.

And evidence that a testator was a drunkard does not warrant the submission of the issue of testamentary capacity to a jury in the absence of anything to show that he was not entirely sober and possessed of testamentary capacity when the will was made. *Levis's Estate*, 140 Pa. 179.

And an issue *deusavit vel non* is properly refused in a will contest when asked for on proof of habits of excessive drinking which were not continuous but periodical, where the fact of even ordinary intoxication at the time of its execution was not

Allegheny county, on September 4, 1887, died at the age of seventy-three years. His wife had died seven years before, but he left, surviving him, six children,—Alexander H. (this appellant), with four brothers, and a daughter, Virginia, married to Patrick H. Winston. He left a will dated May 24, 1883, to which were appended two codicils, one dated May 29, 1884, and the other July 30, 1886. His estate, made up of realty and personalty, was valued at between \$300,000 and \$400,000. By the will he gave to his executors, in trust for his daughter Virginia, \$25,000; to his son Zant, \$5,000; to

his son Hampton, an annuity of \$500 for life; to Thomas, \$5,000; to his brother George W., an annuity for life of \$200. All the residue he gave absolutely to his son Florence, and appointed him and James J. Donnell executors of the will. By the first codicil he adds \$5,000 to the bequest to his son Thomas, making it \$10,000; to his son Alexander H., who had been given nothing in the will, he gave an annuity for life of \$400. By the second codicil he gave to his son Hampton, in addition to his annuity, a house and lot then in the son's occupancy, and increased Alexander's annuity

proved, and it was proved without contradiction that it was dictated by himself and perfectly well understood by him both at the time of execution and after that date. *Harmony Lodge, I. O. O. F.'s Appeal*, 127 Pa. 269.

So, the fact that a testator was an habitual drunkard and subject to not infrequent attacks of mania a potu during the last ten years of his life will not invalidate his will where it does not appear that he was drunk and of unsound mind on the day it was executed. *Hebert v. Winn*, 24 La. Ann. 385.

And proof that a testator was not properly a mad man, but an habitual drunkard, who under the excitement of liquor acted in all respects very like a mad man, will not invalidate his will where it appears that he was not under the excitement of liquor when it was made. *Ayrey v. Hill*, 2 Add. Ecol. Rep. 206.

And the fact that a testator had hurt himself to a great extent by indulging in intoxicating liquors, and that he displayed acts of folly while drunk which drunkards so frequently display, does not show him incompetent to make a will where he appeared to be sober at the time of its execution. *Hubbard's Will*, 6 J. J. Marsh. 59.

So, proof of a long-continued habit of drinking intoxicating liquors to excess, and of the fact that such habit tends to impair the intellect and moral sense, is not enough to invalidate a will by reason thereof; it must appear that at the time of its execution the testator was so enfeebled in mind by his habitual use of intoxicating liquors, or so intoxicated at the time of its execution, as to be incapable of making a will. *Re Tracey*, 11 N. Y. S. R. 103.

And proof of occasional intemperance upon the part of a testator, and that during such periods he was not competent to attend to business, does not show testamentary incapacity, where there is no direct evidence to show that at the time the will was made he was not in possession of the ordinary degree of mind and memory, or that he was in such a state as not fully to understand the business in which he was engaged. *Goble v. Grant*, 3 N. J. Eq. 629.

Nor will evidence that a testator was occasionally under the influence of intoxicating liquor and was quite feeble affect the validity of his will where it appears that he was perfectly sober when the will was executed and there was nothing to show lack of memory, and he had a full understanding of his affairs and was entirely free from restraint. *Re Watson*, 34 N. Y. S. R. 906.

Nor will proof that a testator had spells of intemperance and spells of sobriety, and that whenever he had been drinking for some time he became crazy, extravagant, foolish, and delirious, invalidate his will as against evidence that he was rational when sober, and proof by subscribing witnesses that he was sober and rational at the time he made it. *Hart v. Thompson*, 15 La. 88.

And something more than vague statements to the effect that the testator was more or less under the influence of liquor at an early hour in the morning of the day on which his will was executed

is needed to destroy the presumption of testamentary capacity. *Dimond's Estate*, 3 Pa. Dist. R. 554.

So, the fact that during the last six months of the life of a testator he was for a large portion of the time more or less under the influence of intoxicating liquors will not invalidate his will made during that time, where it appears that at the very time of its execution four men saw him, who all unite in saying that he was free from intoxication and in full possession of his faculties, and the signature was not one of a trembling inebriate, but the bold rapid writing of a man in possession of power. *Fluck v. Rea*, 51 N. J. Eq. 233, *Affirming* 51 N. J. Eq. 639.

f. Presumption and burden of proof.

The legal presumption of a testator's capacity is not destroyed by proof of instances of longer or shorter incapacity from drunkenness. *Black v. Ellis*, 3 Hill, L. 68.

And habitual intoxication upon the part of a testator raises no presumption that there was incapacity or drunkenness at the time of making his will; such condition must be affirmatively proved or the presumption of capacity will prevail. *Koegel v. Egner*, 54 N. J. Eq. 623; *Re Lee*, 46 N. J. Eq. 193.

So, the burden of showing the want of capacity of a testator because of drunkenness at the time of the execution of his will rests with the party contesting it. *Harper's Will*, 4 Bibb, 244.

A will made by a person addicted to drunkenness is presumed to be valid, and its invalidity is to be established by the person alleging it. *Starrett v. Douglass*, 2 Yeates, 48.

And long-continued inebriety, though resulting in fits of insanity, does not require proof of a lucid interval to give validity to the acts of a drunkard, as is required where insanity is proved. *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Koegel v. Egner*, 54 N. J. Eq. 623; *Re Lee*, 46 N. J. Eq. 193.

Insanity from intemperance is generally of a temporary nature, followed, not merely by a lucid interval, but by permanent restoration to reason, and to such insanity the usual presumption of continuance does not apply. *Duffield v. Roberson*, 2 Harr. (Del.) 375.

And to prove that a testator about the time of the execution of his will was addicted to the habitual use of intoxicating liquors to such an extent that he was occasionally drunk is not sufficient to render it incumbent upon the proponents of the will to show that at the time it was executed he was free from incapacitating intoxication. The person who asserts such intoxication must affirmatively show that it existed at the very time the will was made. *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161.

But to uphold a will made by a testator who for some time before its execution and until his death was generally in a state of derangement produced by the habitual and intemperate use of ardent spirits, though he enjoyed some intervals in which his mind might be deemed competent, it should be shown by clear and satisfactory testimony to have

from \$400 to \$500. The result of the will and codicils was to leave fully three fourths of the estate to his son Florence. The will was proved September 10, 1887, without notice to the heirs or legatees. An appeal was taken by Hampton J. Miller from the decree admitting the will to probate, which was dismissed because of neglect of appellant to file the bond required by law. (See 159 Pa. 562.) On June 27, 1892, Alexander H. Miller (this appellant) presented his petition to the orphans' court for allowance of an appeal from the same decree.

In this petition he averred testamentary incapacity of his father at the date of the execution of the will and codicils and undue influence exercised over him by Florence C. Miller, the principal beneficiary, to procure the making of them. It is not important, in the issue before us, to notice and discuss the decree on this petition in the court below, in the interval between the probate and dismissal of petition. They afford us no aid in the decision of this contention. It is sufficient to say that the appellant got his case properly before the court

been made in one of such lucid intervals. Cochran's Will, 1 T. B. Mon. 204, 15 Am. Dec. 116.

And bare proof of execution is not sufficient to authorize the probate of a will of an aged person of a low grade of intellect who had become addicted to the excessive use of intoxicating liquors, and who was perfectly mad while under their influence; there must also be proof of instructions or knowledge of contents. Durling v. Loveland, 2 Curt. Eccl. Rep. 225.

And proof that a testatrix knew what was in the will she signed is imperatively demanded where there is no evidence that she had anything to do with its preparation or that she ever read it or heard it read or the contents stated,—especially where it affirmatively appears that her mental faculties were seriously impaired by the use of strong drink and opiates. Burritt v. Silliman, 16 Barb. 198.

A party seeking to invalidate a will upon the ground of the incapacity of the testator induced by habits of intoxication, which were not such as to render him habitually incompetent to transact business, however, must show the existence of the incompetency at the very time of executing the will. Andrews v. Weller, 3 N. J. Eq. 604; Fluck v. Rea, 51 N. J. Eq. 233; Sanderson v. Sanderson, 52 N. J. Eq. 243; Hebert v. Winn, 24 La. Ann. 385.

To invalidate a will upon the ground of the intoxication of the testatrix it is incumbent upon the contestants to prove, not only that she had been intoxicated or was usually intoxicated, but that she was so in fact at the very time the will was executed, or that her mind was so clouded by drink that she was incompetent to give expression to her real testamentary intentions. Re Halbert, 15 Misc. 308.

Keeping a will uncanceled gives rise to a presumption that it was not procured against the testator's will and intelligent consent, whether fraud, undue influence, or intoxication is set up against it. Pierce v. Pierce, 38 Mich. 412.

But the legal presumption that a testator understood the contents of her will which had been read to her is only prima facie where she was of great age and addicted to the use of opiates and ardent spirits to such an extent as to enfeeble and impair her faculties. Rutland v. Gleaves, 1 Swan, 198.

IV. Inquisition of drunkenness as evidence.

A retrospective finding of a jury on a commission of habitual drunkenness overreaching a will made by a testator is presumptive, and not conclusive, evidence of his incapacity. Re Patterson, 4 How. Pr. 34.

And the general rule would seem to be that the finding of an inquest that a testator was an habitual drunkard is only prima facie evidence of want of testamentary capacity, the effect of the inquest being to shift the burden of proof to the party asserting capacity. Lackey v. Cunningham, 56 Pa. 370; Dugan's Estate, 6 Pa. Dist. R. 322; Hannum v. Worrall, 2 Del. Co. Ct. Rep. 49.

Thus, a will made by an habitual drunkard while subject to a commission is not for that reason 39 L. R. A.

absolutely void. The existence of the commission is only prima facie evidence of incapacity, and may be rebutted by proof; and such a person, if of sufficient mental capacity, may make a valid will notwithstanding the commission. Lewis v. Jones, 50 Barb. 645.

And a finding of habitual drunkenness against a testator, adjudging him to be a fit subject for guardianship, is not conclusive against his capacity to make a will. It is prima facie only, and if actually restored to capacity he may make a will, though his restoration be not judicially determined; and the court may properly hear evidence as to whether or not he was actually restored to capacity at the time of its execution. Re Johnson, 57 Cal. 529.

To invalidate a will made by a person under commission the testimony must go to the extent of showing that at the time of the execution of the will the testator was mentally unfit to dispose of his property. Dugan's Estate, 6 Pa. Dist. R. 222.

In Re Patterson, 4 How. Pr. 34, however, the rule was laid down that while a commission remains unrevoked the lunatic or habitual drunkard cannot make a valid will without permission of the court, the existence of the commission being conclusive against the validity of the will.

But this holding was overruled by Lewis v. Jones, 50 Barb. 645, *supra*, in which Re Patterson, 4 How. Pr. 34, was distinguished and explained, the court saying that the determination that the order allowing the will to be made could be granted *ex parte* was all that was necessary for the determination of the appeal in that case, and that there was nothing in the decision which militates against the right of an habitual drunkard under a committee to make a will subject to the prima facie presumption that he is incompetent, the order in that case merely discharging the lunatic from the commission and inquisition so far as to permit him to make his will under the advice and with the sanction of a vice chancellor, but leaving him at liberty to revoke and cancel the will without such sanction; and that if there is a doubt of the power of a person under a commission of lunacy to make a valid will it does not necessarily follow that the same doubt applies to a will made by one under a commission as an habitual drunkard, drunkenness always having its sober intervals, while lunacy does not.

An application to the court to suspend an inquisition of habitual drunkenness so far as to permit a person to make a will is addressed to the discretion of the court, and may be made *ex parte* or on notice to the committee and next of kin, as the court shall direct. Re Patterson, 4 How. Pr. 34.

So, failure of the committee appointed for a person found to be an habitual drunkard to give bond and take charge of his property until his death, leaving him to manage his own affairs after a period of thirty-five years, raises a presumption that he had reformed and was competent to make a will, that being a fair inference after the lapse of more than twenty years. Leckey v. Cunningham, 56 Pa. 370.

F. H. B.

below, and that there was a regular judicial decree on the merits, after hearing, by a court of competent jurisdiction, against him, from which he now appeals to this court. He alleges the court erred—First, in not determining that there was evidence for a jury that the testator lacked testamentary capacity at the date of the execution of the will and codicils; and second, in not finding there was evidence for a jury that the will was procured by undue influence exercised over him by Florence C. Miller.

When the question before an appellate court is whether the evidence adduced in the court below was of that character which required its submission to a jury, and the answer of the appellate court is in the affirmative, a sort of restraint in the expression of an opinion is always necessarily imposed on the appellate court, not because of doubt in the correctness of its judgment, but because of the possible effect of elaborate discussion on the retrial of the cause. Hence, in whatever we may say in vindication of this judgment, we desire it to be distinctly understood that we are not pointing out what the verdict of the jury ought to be, but only the evidence on which a jury, after a consideration of it, may rest a verdict, if, in view of all the evidence, such verdict be warranted.

The appellant averred that the testator lacked testamentary capacity when he executed the will and codicils. The court below, as a question of fact, determined that this averment was so unfounded that there was no evidence which would warrant a jury in sustaining it, but that, on the contrary, he possessed "testamentary capacity of the highest order." It was alleged that the testator had become so addicted to the use of intoxicating liquor years before the date of the will, and at that date the habit was so aggravated and confirmed, that his mental powers were weakened, and bordered on imbecility. In proof of this, twenty witnesses were called, some of whom had peculiar and long-continued opportunities of observation, who testified that he began the drink habit about the year 1865, and kept it up until after the date of the will and codicils, and until his death; that it had so grown upon him as early as 1879 that he then drank at times as much as a quart a day, and, that it might be easy of access, he kept it, in large quantities, both at his house and law office; that he bought whisky for his own use, on more than one occasion, by the barrel. One of the witnesses to the excessive use of liquor was W. A. Lewis, Esq., who commenced reading law with him in 1865, and continued in his office until 1882. Some of the others were servants in his family; others street-car conductors on the lines leading past his home. Besides these disinterested witnesses were some of his children, living much of the time in his house. That he drank liquor to gross excess from 1879 to his death cannot be questioned, from this testimony, unless almost every one of the twenty witnesses be guilty of flat perjury. If they be believed, then, his brain was saturated with alcohol for almost ten years before his death. But, further than this, it was averred, and not denied, that the testator, when he executed the will and codicils, was afflicted with locomotor

ataxia. This, appellant alleged, contributed to his physical and mental prostration. As to the probable effects of alcoholism and the disease of locomotor ataxia on the mind, the testimony of reputable experts was offered by the contestants, but rejected by the court for the reason that a prima facie case of incapacity had not been made out, and the further reason that a hypothetical question put to the experts, purporting to embrace the facts, omitted material facts proved by appellee. We do not think the grounds of the rejection sufficient. The testimony, when added to that already in, might have, if duly considered, affected the judgment and changed the result. But a comparison of the hypothesis with the facts contestant's evidence tended to prove shows that it embraced every material fact he alleged. He was not bound to include in it facts alleged by proponents which he denied, or facts which may be fairly considered irrelevant. Hence, in passing on the testimony, we take into consideration that which was rejected.

The learned judge of the court below went beyond the issue in his finding, when he declared that the testator possessed "testamentary capacity of the highest order." And while, if the issue presented only this one question, the error might be of no consequence, yet, because of the two questions, as will be noticed in our discussion hereafter of that relating to undue influence, the error becomes very material, and therefore requires notice. Take first the undisputed facts: An aged man, worth over \$300,000, makes his will. He has six children. He gives more than three fourths to one of them. For ten years before his death—a period covering the date of the will—he drank largely of intoxicating liquors; besides, was sorely afflicted with an incurable disease. Next take the disputed facts. The testimony of disinterested witnesses shows that by reason of the excessive use of liquor, he was in almost a constant state of intoxication. Interested witnesses then testify to the consumption during that period by him, daily, of unusual quantities of intoxicant; that in consequence his memory had failed, and his power of will had weakened. Is it probable, in view of the undisputed facts, as well as those disputed, that testator had testamentary capacity of the highest order? Without considering the expert testimony, is not such a conclusion opposed to common knowledge derived from observation? In our judgment, there was manifest error in so finding. But, keeping within the scope of the issue, did he possess simply testamentary capacity? That is all the law requires in a valid testamentary disposition. This the court below could have found, notwithstanding testator's established habits of intoxication. Even a judicial decree that he was an habitual drunkard, and the appointment of a committee would have been, although conclusive as to contractual, only prima facie evidence of testamentary incapacity. *Leckey v. Cunningham*, 56 Pa. 370. While we are of opinion that the evidence wholly fails to establish a higher order of testamentary capacity, we will not say that the testator was destitute of that mental capacity requisite to a valid testamentary disposition of his

property. On the first branch we sustain the court in refusing an issue, not because the decree is clearly right, but because it is not clearly wrong. The evidence of incapacity, taken altogether, is not of that weight which should constrain us to send the case to a jury.

The next question is, Was the will procured by undue influence exerted over the testator by his son Florence C. Miller? This is a question of pure fact. As is said in *Herster v. Herster*, 116 Pa. 612: "Its disposition properly rests with the jury alone. Even if the trial judge should feel that, were he sitting as a juror, he could not regard the evidence as sufficient to induce him to find a verdict against the will, that is not enough to justify him in taking the case entirely from the jury. . . . If the testimony is such that after a fair and impartial trial resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence, it cannot be said that a dispute, within the meaning of the act, has arisen. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an issue to determine it should be directed. . . . It is perhaps well to say that undue influence may be exercised secretly as well as openly, and this is especially possible where a confidential relation exists between the principal devisee and the testator, and they dwell together in the same house." This is the substance of our authorities in Pennsylvania on the subject. Take now the undisputed evidence as to testator's age, habits, and disease at the date of the will and codicils; what is the reasonable inference to be drawn as to his testamentary capacity? Can it be of that order which it undoubtedly was twenty or thirty years before his death, and before it had become impaired by age, drunkenness, and physical infirmity? Assuming, as we do assume, with the court below, that testamentary capacity existed, and that, if voluntarily and independently exercised, testator was competent to make a valid will, yet was the capacity such as, by reason of its impairment, it could easily be operated upon by outside influence? Then follow the facts that Florence C., the son, lived in the house with his father, was his confidant for years, close to his person, his helper in his physical infirmities, his adviser in his business affairs. Then come to the gross inequalities in the distribution of the large estate. The confidant is largely the beneficiary. Next notice the affirmative testimony of the witnesses. B. F. Young testified that he frequently saw Florence with his father when the latter was intoxicated. Once, on the cars from Uniontown to Pittsburg, he says, "I spoke to Florence in reference to the old man's condition at the time, and asked him why he alone always accompanied the old gentleman in that condition. He answered, at the same time striking his chest with his hand, that there was boodle in it for him." Further on, after stating that he had remarked to Florence that he supposed his

father would leave his brother Hampton in good circumstances, Florence replied, "He mustn't be too — sure of that, because I have got something to say in the matter." Then, about four months after the father's death, he asked Florence what chance his brothers and sisters would have to break the will, and he replied: "They didn't have the least possible show on earth; that he had things too well fixed for that." Virginia B. Winston, the daughter, testified that in 1881 Florence made a proposition to her to join him in a conspiracy to have the other brothers disinherited, which she refused. Sarah Outlaw, a servant, testified that she had frequently heard Florence say that he could do anything he pleased with his father. Nine witnesses, interested and disinterested, give like testimony, tending to show the extent of the influence obtained by Florence over his father from a time antedating the will until his death. "Where the testator, although possessed of testamentary capacity, yet is aged, infirm bodily, with mental faculties impaired, if his confidential adviser be largely a beneficiary under the will, there is a presumption of fact that undue influence was brought to bear on the mind of the testator, and the burden is on the beneficiary to rebut this presumption. *Wilson v. Mitchell*, 101 Pa. 495; *Armor's Estate*, 154 Pa. 517. If, in aid of this presumption, many witnesses testify to positive acts and express declarations indicating the unscrupulous intention of the confidant to exert his influence in his own favor, can it be said that there is no case for a jury?

Many reputable witnesses were called by proponent, and heard by the court, whose evidence tended to establish a degree of sobriety on part of testator; that he correctly transacted legal business for his clients; and that when they saw him he was not under the influence of liquor, and conversed intelligently. The effect of their testimony was to show that certainly, at times, testator was not incapacitated to make a valid testament, and it properly had great weight with the court on this branch of the case. But it tended only in a slight degree to negative the testimony of contestant adduced to show the undue influence exerted by Florence over his father. The court treats the evidence of the brothers and sisters as deserving of little credit, because of their interest; but it must be borne in mind that on questions of this kind the members of testator's family, and the inmates of his home, are generally the only witnesses who have every opportunity to observe the relations between the maker of a will and him whose unlawful influence procures it. Their interest may affect their credibility, but, if they had no interest, they would seldom be in a situation to know anything material to the issue. The learned judge also denies the credibility of the disinterested witnesses, and arrives at his conclusions by practically disregarding the testimony of both classes, interested and disinterested. But it was peculiarly the province of the jury to pass on the credibility of these witnesses, as has been held over and over. The learned judge does not take up the evidence and determine whether there is a substantial dispute demanding an issue, but

he considers the bearing of the evidence on the issue as if granted; analyzes, weighs it on both sides, credits and discredits witnesses, then determines according to his judgment the truth of the matter. He performed, as one juror, a duty which the law imposes on twelve. In fact, there is no dispute of this character in which a jury could possibly have any duty to perform, if the judge chose to assume it, to the extent it was assumed in this preliminary inquiry. That Florence was not personally present when the will was executed is a fact to be considered with all the other evidence in the case bearing on the question of undue influence. The court treats this as most conclusive evidence in favor of the will. But this fact of itself has no such significance. If it had been alleged that Florence, by threats or other means, had excited the fears of the father on the day the will was made, and that in terror he had given him the bulk of his estate, the fact that he was not personally present when his father and the witnesses subscribed their names would have almost conclusively negated such a theory; but no such theory is put forward here. It is averred, however, that, by a long course of deception and falsehood practised upon his father, Florence had prejudiced him against his other children, and had ingratiated himself in his favor, with a special view to becoming the principal object of his bounty. Witness after witness was called whose testimony tended to show this. If such were the case, and the father became hereby embittered against the other children, and especially adopted Florence as his favored child, it was not specially important that Florence was not present when the will was signed. The machinations, it was alleged, which had prompted such a will, had been practised to that end for years preceding it, and were kept up for years after, to guard against a change of it. Assuming this to have been Florence's conduct, he would naturally absent himself at the time the will was actually subscribed.

We think, on the lines of the testimony pointed out, appellant had a case for a jury on the question as to whether the will had been procured by undue influence of the son upon

the father. And, while the evidence tending to establish testamentary incapacity is not sufficient to warrant its submission to the jury on an issue involving that question, it is admissible in the determination of the second question. The condition of mind of a testator alleged to have been unduly influenced, although of testamentary capacity, is important in determining whether the act was the result of the fraudulent arts practised upon him.

The decree of the court below is reversed, and it is further ordered that an issue be awarded to determine whether the alleged will and codicils were procured by the undue influence of Florence C. Miller.

Mitchell, J., dissenting:

There is in this case (1) strong affirmative proof of every element of testamentary capacity in the act itself, the will, the codicils, and the circumstances of their making; (2) the overwhelming testimony of witnesses who knew the testator, and who also knew the requisites of testamentary capacity; (3) the conclusive evidence of the actual transaction of business, personal, professional, and as trustee, amounting during the period involved to more than \$1,000,000, and no pretense that any single transaction showed incapacity; (4) on the other side the testimony of interested witnesses and the opinions of experts, not worth a rush against the proved facts. There is no trace of undue influence in the making of the will or the codicils, or in the separate custody of them by the testator for years before his death. That he preferred one child over others was his right as a parent, and that he preferred the son he did ought not to surprise anyone who reads the testimony even of the others. That the motives of the favorite may have been partly mercenary would not affect the fact that he was the only one who stayed with and assisted his father in his old age, or whose conduct in fact was not such as tended to drive him to drink or to the grave. As I am of opinion that the evidence is not sufficient to permit a jury to set aside this will, I would affirm the judgment.

Fell, J., joins in this dissent.

NEW YORK COURT OF APPEALS.

Charles McLOUTH, *Respt.*,
and
Pliny T. SEXTON, *Appt.*,
v.

George C. HUNT *et al.*, *Respts.*

(164 N. Y. 179.)

1. The only principle for determining the relative rights of life tenants and remaindermen in respect to the capital and

income of trust property under a will is to ascertain the intention of the testator from the language used, the relations of the parties to each other, their condition, and all the surrounding facts and circumstances of the case.

2. Grandsons, each of whom is entitled to the income of a share of a trust estate until he becomes thirty-five years of age, and then to the full payment of that share, if living, otherwise payment to be made to his descendants, if any, and if none, then to the other

NOTE.—As to rights of life tenants and remaindermen in respect to stock dividends, see *Spooner v. Phillips* (Conn.) 16 L. R. A. 461, and *note*; also 39 L. R. A.

Hite v. Hite (Ky.) 19 L. R. A. 173; and *Pritchett v. Nashville Trust Co.* (Tenn.) 38 L. R. A. 866.

grandsons, are to be regarded, with respect to the income and capital of the fund, as life tenants until they reach the age of thirty-five, and after that as remaindermen.

3. A decrease in the value of bonds by the lessening or wearing away of premium on account of the bonds reaching maturity should be borne, as between life tenants and remaindermen, by the *corpus* of the estate, where the bonds were held by a testatrix and transmitted as she held them to trustees with a direction that the life tenants should receive the full income.

4. A corporation cannot change accumulated earnings into capital, as between life tenant and remainderman, by its mere resolution, or conclude the courts on that question.

5. Stock certificates for the accumulated earnings of a corporation represent profits belonging to life tenants of stock, rather than an increase of capital for the benefit of remaindermen.

(November 23, 1897.)

APPEAL by plaintiff Sexton from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment entered in the office of the clerk of Wayne County upon the report of a referee in favor of the life tenants in a proceeding to determine the proper distribution of stock dividends and wearing away of premium on government bonds between life tenants and remaindermen. *Affirmed*.

The facts are stated in the opinion.

Mr. Pliny T. Sexton, in propria persona:

The cases cited by the referee do not, operatively upon our case, come within the doctrine of *stare decisis*, for in none of them, of which a competent court had jurisdiction, in which it was necessary to dispose of a stock dividend as such, was the question here under review litigated and decided upon principle.

Clarkson v. Clarkson, 18 Barb. 646; *Riggs v. Cragg*, 89 N. Y. 487; *Simpson v. Moore*, 30 Barb. 637; *Goldsmith v. Swift*, 25 Hun, 201; *Woodruff's Estate*, Tucker, 58; *Re Prime*, 64 Hun, 50; *Re Kernochan*, 104 N. Y. 618.

The principles enunciated in *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449, and *Re Kernochan*, 104 N. Y. 618, logically require the holding that stock dividends are principal and not income of trust estates.

Clapp v. Astor, 2 Edw. Ch. 379.

The only practicable, most just, and equitable rule, is that, as between beneficiaries of the current income of trust funds, and the remaindermen thereof, stock dividends are not distributable as income, but must be retained by the trustees as representing that which, notwithstanding such so-called dividend, still remains, as it was before, a part of the *corpus* of the trust estate.

Burrall v. Bushwick R. Co. 75 N. Y. 211; *People, Manhattan F. Ins. Co., v. Tax & A. Comrs.* 76 N. Y. 74; *Williams v. Western U. Teleg. Co.* 93 N. Y. 189; *Cross v. Long Island Loan & T. Co.* 75 Hun, 533; *Re Gerry*, 103 N. Y. 445, 18 Abb. N. C. 178; *Knight v. Lidford*, 3 Dem. 88; *Utica v. Churchill*, 33 N. Y. 237.

If corporate profits are improperly withheld

from shareholders, the courts have ample power to enforce the proper distributing of such profits.

Hiscock v. Lacy, 9 Misc. 578.

A cash dividend, after its declaration, becomes an obligation of the corporation to the shareholder, for which he may bring suit, and it is taxable to him as its owner.

People, United States Trust Co., v. Barker, 86 Hun, 181.

The most highly respected tribunals in other jurisdictions unite in holding that, as between a beneficiary of the current income of a trust estate and a remainderman, stock dividends are capital, and not income thereof.

Gibbons v. Mahon, 133 U. S. 549, 34 L. ed. 525; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Doland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Spooner v. Phillips*, 62 Conn. 62, 16 L. R. A. 461; *Mills v. Britton*, 64 Conn. 4, 24 L. R. A. 587; *Hite v. Hite*, 93 Ky. 257, 19 L. R. A. 173; *Thomas v. Gregg*, 78 Md. 545.

It was not Mrs. Cuyler's intention that the wearing away of the premiums on United States bonds, while or when held in the trust estates created in her will, should be borne by the *corpus* of said estates.

Re Gerry, 108 N. Y. 449; *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93; *Fosdick v. Delafield*, 2 Redf. 392.

The testatrix having made no provision, the income should bear the loss.

Whitson v. Whitson, 53 N. Y. 482; *Re Albertson*, 113 N. Y. 439; *Woodward v. James*, 115 N. Y. 346; *Re Vowers*, 113 N. Y. 571.

The changing of the general rules of law must be done so clearly and certainly as to leave no doubt of the testator's intention.

Re Vowers, 113 N. Y. 571; *Re Albertson*, 113 N. Y. 435; *Whitson v. Whitson*, 53 N. Y. 482; *Re Shipman*, 82 Hun, 116.

The general rule of law requires trustees to reserve and retain, as so much principal returned, such portion of each instalment of interest received upon United States bonds, or other securities, held in the trust estates at a premium, as will offset the current, proportionate wearing away of their premiums, caused by the progress of the securities toward their maturity.

Re Albertson, 113 N. Y. 439; *Whitson v. Whitson*, 53 N. Y. 482; *Scorel v. Roosevelt*, 5 Redf. 124; *Wilcox v. Quinby*, 73 Hun, 524; *Re Mason*, 98 N. Y. 534; *People, Cornell University, v. Davenport*, 30 Hun, 184; *Re Housman*, 4 Dem. 415; *Simpson v. Moore*, 30 Barb. 641; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; 1 Perry, Tr. 537, 538; *Minot v. Thompson*, 106 Mass. 585; *Farwell v. Thredle*, 10 Abb. N. C. 94; *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493; *Reynal v. Thebaud*, 8 Misc. 187.

A gift of the use of property generally will not authorize the consumption of perishable property that happens to form a part of testator's estate at his death.

2 Perry, Tr. § 547; *Re Housman*, 4 Dem. 415.

Mr. Charles McLouth, in propria persona:

A stock dividend made from surplus or net

earnings after the death of a testator is to be regarded as income and not capital.

Re Kernochan, 104 N. Y. 618; *Riggs v. Cragg*, 89 N. Y. 487, 26 Hun, 90; *Clarkson v. Clarkson*, 18 Barb. 646; *Goldsmith v. Swift*, 25 Hun, 201; *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449; *Simpson v. Moore*, 30 Barb. 637.

Dividends coming from a sale of part of the stock are principal.

Knight v. Lidford, 3 Dem. 88; *Re Skillman*, 24 Abb. N. C. 41; 2 Perry, Tr. 4th ed. 545; *Re Lawrence*, 2 Connolly, 53.

So, when a sum was given to a widow to be paid from certain stock, and such stock was transferred to her by the executors, it was held that certain dividends paid to the executors did not go to her.

Re Hodgman, 140 N. Y. 421; *People, Cornell University, v. Davenport*, 30 Hun, 177, 117 N. Y. 549.

A stock dividend representing profits made by the corporation is income belonging to the life tenants.

Hite v. Hite, 93 Ky. 257, 19 L. R. A. -173; *Earp's Appeal*, 28 Pa. 368; *Thomas v. Gregg*, 78 Md. 545; *Woodruff's Estate*, Tucker, 58; *Clarkson v. Clarkson*, 18 Barb. 646; *Goldsmith v. Swift*, 25 Hun, 201; *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449; *Simpson v. Moore*, 30 Barb. 637; *Riggs v. Cragg*, 89 N. Y. 487; *Re Warren*, 33 N. Y. S. R. 584; *Re Skillman*, 24 Abb. N. C. 41; *Re Prime*, 64 Hun, 50; *Wood v. Lary*, 47 Hun, 550; *Whitson v. Whitson*, 53 N. Y. 479; *Re Oliver*, 136 Pa. 43, 9 L. R. A. 421.

Where a stock dividend represented earnings of a corporation it was income and would go to the tenants for life; but where it represented the avails of the sale of a portion of the corporate property it would go to the remainderman.

Spooner v. Phillips, 62 Conn. 62, 16 L. R. A. 461.

Where a dividend is declared it belongs to the owner of the stock at the time.

Hopper v. Sage, 112 N. Y. 531; *People, United States Trust Co., v. Barker*, 86 Hun, 131.

Was the wear of premiums to be borne presently by the defendants, of the corpus of the estate? This is a question purely of fact, depending upon the ascertained intention of the testatrix.

It has been said that such intention is a mixed question of law and fact.

White v. Hoyt, 73 N. Y. 505; *Kenyon v. Knights Templar & M. Mut. Asso.* 122 N. Y. 247; *Stokes v. Mackay*, 140 N. Y. 649; *East Hampton v. Vail*, 151 N. Y. 463.

But the fact must first be determined.

Stuart v. Brown, 11 App. Div. 492; *Re Clinton*, 12 App. Div. 132; *Stimson v. Vroman*, 99 N. Y. 79.

The question has been determined as a question of fact, and that determination has been affirmed by the general term.

The question then arises, What jurisdiction has this court to entertain an appeal on that branch of the case? I say none.

Niendorff v. Manhattan R. Co. 150 N. Y. 276; *Hopkins v. Clark*, 149 N. Y. 329; *Seuchy v. Hillside Coal & I. Co.* 150 N. Y. 219; *Crim v. Starkweather*, 136 N. Y. 635; *Amherst College v. Ritch*, 151 N. Y. 320, 37 L. R. A. 305.

It must be held to have been within testatrix's 89 L. R. A.

contemplation that the securities which she purchased would be held in her estate, which she placed in trust after her death.

Bergen v. Valentine, 63 How. Pr. 221; *Shaw v. Cordis*, 143 Mass. 444.

And so she knew that for every reason the holding of government securities was not only a thing which people must, but it was for their interest to, do. She knew that by holding the premiums would wear off.

Reynal v. Thebaud, 3 Misc. 190.

The circumstances of the beneficiaries as known to the testatrix are circumstances to be considered on the question of intention.

Skullers v. Johnson, 38 Barb. 80; *Stimson v. Vroman*, 99 N. Y. 74; *Freeman v. Coit*, 96 N. Y. 63; *Roseboom v. Roseboom*, 81 N. Y. 356; *Tilden v. Green*, 130 N. Y. 29, 14 L. R. A. 33; *Starr v. Starr*, 132 N. Y. 154; *Re Gerry*, 103 N. Y. 449.

The "full income" is necessarily to be that part which is left after the payment of expenses, and to that in full, or entirely, or in gross, the defendants must be entitled.

Re Gerry, 18 Abb. N. C. 178, 103 N. Y. 445; *Shaw v. Cordis*, 143 Mass. 446; *Burleigh v. Center*, 9 Jones & S. 441; *Reynal v. Thebaud*, 3 Misc. 187; *Hemenway v. Hemenway*, 184 Mass. 446; *New England Trust Co. v. Eaton*, 140 Mass. 593, 54 Am. Rep. 493; *Knight v. Lidford*, 3 Dem. 90; *Porter's Estate*, 5 Misc. 274; *Re Hutchinson*, N. Y. L. J. Feb. 29, 1892; *Farwell v. Tweedle*, 10 Abb. N. C. 94; *Duclos v. Benner*, 62 Hun, 435; *Hite v. Hite*, 93 Ky. 257, 19 L. R. A. 175; *Re Jones*, 19 N. Y. S. R. 436.

Mr. S. N. Sawyer, for respondent Carlton C. M. Hunt:

Plaintiffs are not authorized or required by law to set aside and retain as a part of the corpus of the estate from the interest received upon the government bonds an amount sufficient to offset the wearing away of the market premiums.

Re Gerry, 103 N. Y. 445, 18 Abb. N. C. 178; *Re Pollock*, 3 Redf. 100; *Townsend v. United States Trust Co.* 8 Redf. 220; *Scovel v. Roosevelt*, 5 Redf. 121; *Wilcox v. Quinby*, 73 Hun, 524; *Farwell v. Tweedle*, 10 Abb. N. C. 94; *People, Cornell University, v. Davenport*, 117 N. Y. 549, 30 Hun, 177; *Bergen v. Valentine*, 63 How. Pr. 221; *Reynal v. Thebaud*, 3 Misc. 187; *Shaw v. Cordis*, 143 Mass. 443.

The subject under consideration is to be determined by the intent of the testatrix, if same can be gathered from a reading of her will in the light of her surroundings.

Masterson v. Townshend, 123 N. Y. 458, 10 L. R. A. 811; *Whitney v. Whitney*, 63 Hun, 59; *Woodward v. James*, 115 N. Y. 346; *Cahill v. Russell*, 140 N. Y. 402; *Riggs v. Cragg*, 26 Hun, 95; *Re Lapham*, 37 Hun, 15; *Re Powers*, 113 N. Y. 569.

The twenty-five and four-tenths shares of Western Union Telegraph stock received by the trustees for stock dividends are to be treated as income and distributed to these defendants.

Clarkson v. Clarkson, 18 Barb. 646; *Simpson v. Moore*, 30 Barb. 637; *Goldsmith v. Swift*, 25 Hun, 201; *Riggs v. Cragg*, 26 Hun, 90, 89 N. Y. 487; *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449; *Re Kernochan*, 104 N. Y. 618; *Knight v. Lidford*, 3 Dem. 88; *Re Woodruff's Estate*, Tucker, 58.

Messrs. William H. Stuart and Joseph A. Adlington, for other respondents:

The stock dividend of twenty-five and four tenths shares stock of the Western Union Telegraph Company is income, and should be turned over to the beneficiaries now, and should not be retained as a part of the principal of the trust estate which they are not to receive until they respectively become thirty-five years of age.

Riggs v. Cragg, 89 N. Y. 487; 1 Cook, Stock & Stockholders, §§ 552-557; 1 Spelling, Priv. Corp. § 457, note 2; Title to Dividends as between Life Tenants and Remaindermen, 19 Am. L. Rev. 737; *Williams v. Western U. Tele. Co.* 93 N. Y. 182; *Earp's Appeal*, 28 Pa. 374; *Moss's Appeal*, 83 Pa. 269, 24 Am. Rep. 264.

The suggestion that the intention of the directors should determine the question whether the dividend is capital or income cannot be correct.

Heard v. Eldredge, 109 Mass. 260, 12 Am. Rep. 687; *Hite v. Hite*, 93 Ky. 265, 19 L. R. A. 173; *Thomas v. Gregg*, 73 Md. 545.

The loss, if any, from the "wearing away" of the premiums on United States bonds, should be born by the corpus of the trust fund.

Reynal v. Thebaud, 3 Misc. 287; *Peckham v. Newton*, 15 R. I. 322; 83 Alb. L. J. 424, 427, article by Mr. Guy C. H. Corliss; Redfield, Surrogate Practice, 5th ed. 509; *Bergen v. Valentine*, 63 How. Pr. 221; *Re Pollock*, 3 Redf. 100; *Re Hutchinson*, N. Y. L. J. Feb. 29, 1892; *Shaw v. Cordis*, 143 Mass. 446; *Hemenway v. Hemenway*, 184 Mass. 446; *Whittemore v. Beckman*, 2 Dem. 276; *Furness's Estate*, 12 Phila. 130.

O'Brien, J., delivered the opinion of the court:

This was an action to procure a judicial construction of the provisions of a will, and incidentally for an accounting by the trustees of a testamentary trust. Caroline Cuyler died on the 18th day of September, 1888, leaving a will with two codicils, which was admitted to probate. The plaintiffs are the executors of the will, and trustees under the trust created thereby. The testatrix, after making various general and specific bequests and devises to collateral relatives, friends, and institutions of charity, disposed of the residue of her estate in trust for the benefit of three grandchildren named therein. The questions involved here relate wholly to the administration of the trust by the trustees, and to the distribution of the fund between the parties respectively entitled thereto. The trust provision is as follows: "After the payment of the above legacies, and any debts which I may owe, and the proper expenses of settling my estate, all of the rest, residue, and remainder of my estate, of every kind, I give, devise, and bequeath, in three equal parts, to my executors, in and upon three several, separate, and independent trusts, and in trust as follows, to wit: That they take, receive, hold, care for, preserve, maintain, invest and reinvest, convert, sell, lease, and collect the same, in all things, as in their discretion may seem advantageous for the benefit, respectively, of my said three grandsons, George Cuyler Hunt, Samuel Hall Hunt, and Carlton Charles McLouth Hunt, as follows: That my executors pay over to the use and ben-

efit of each of my said grandsons, respectively, during their or his minority, such portion of the income of said three parts, for their support, maintenance, or education, as in the discretion of my executors may seem proper. That from and after the arrival at age of my said grandsons, respectively, that my said executors pay over to each of them, respectively, annually from their arriving at age, the full income of one of said three parts. That my executors pay over to each of my said grandsons, respectively, on his arriving at the age of thirty-five (35) years, the full amount of one of said three parts, together with any accumulation thereupon which may remain. In case of the death of one of my said grandsons prior to his arriving at the age of thirty-five (35) years, I direct that my executors shall pay over his share (being one of said three parts) to his descendants, if any. If none, then that the same shall remain in trust, as above written, for his surviving brothers, my two remaining grandsons. In case of the death of the second of my said grandsons prior to his arriving at the age of thirty-five (35) years, I direct that my executors shall pay over his share (being one of said three parts) to his descendants, if any. If none then his original part or third, as above written, shall remain in trust, as above written, for his remaining brother, my surviving grandson; but the portion or share so received or inherited by said second of my grandsons dying from the share of his prior deceased brother shall be paid to such surviving brother, my remaining grandson."

The executors and trustees duly qualified, and took charge of the whole estate. On December 1, 1890, the surrogate having jurisdiction, by an order made on that day, directed the trustees to set aside and retain, for the purposes of the trusts, certain personal property belonging to the estate, including \$95,000, par value of United States 6 per cent bonds, valued at a premium of 28 per cent or at \$121,600; also \$12,000, par value of United States 4 per cent bonds, at the same premium, inventoried and valued at \$15,360.

The 6 per cent bonds will mature in 1898, and the 4 per cent bonds in 1907. There was also included in the trust, under the same directions, 254 shares of the capital stock of the Western Union Telegraph Company, upon which the trustees received a stock dividend of 10 per cent on the 10th day of November, 1892, represented by certificates issued to them for 25.4 additional shares. This dividend was declared upon the surplus earnings of the corporation. It appears that in the administration of this trust a difference of opinion arose between the two trustees with respect to their duties, and with respect to the distribution of certain items claimed by the one to be income, and by the other to be capital. It was for the purpose of adjusting this dispute in an amicable spirit that this action was brought to obtain a construction of the will, and a direction to the trustees with respect to their duties and obligations. The trustees are the sole plaintiffs, and the three grandchildren named in the trust provisions the only defendants. The defendants answered the complaint, setting forth what they claimed to be their rights under the will, and the duties

of the trustees with respect to the trust estate. The action being at issue, it was referred to a referee for trial; and, as an incident of the litigation, a full accounting on the part of the trustees was had, which shows the sums paid out under the directions of the trust, and the fund which still remains in their hands.

It will be seen from the terms of the will creating the trust in question that there is a contingent remainder in favor of descendants or great grandchildren born before the grandchildren arrived at the age of thirty-five years, but, in case the latter arrived at that age without children, then they are to take the whole *corpus* of the estate. The grandchildren are now all living without children, and one of them is within a few months of the age specified. The other two will arrive at that age within the next four years. So that the only practical importance of this controversy, aside from the interesting nature of the questions involved, arises from the possibility that children may be born to some of them before they have reached the age designated in the will for the final termination of the trust and the distribution of the fund. The grandchildren, as the immediate beneficiaries of the trust, are entirely satisfied with the decision of the questions as rendered by the courts below and none of them have appealed from the judgment. In case the grandchildren had now arrived at the age designated in the will, without issue, when they are to become the absolute owners of the whole fund, the case would present little more than an academical question, in which the trustees had no legal interest sufficient to warrant an appeal to this court. *Bryant v. Thompson*, 128 N. Y. 426. But as there is still a possibility that the contingencies contemplated by the will, upon which the remainders to the immediate beneficiaries may be defeated, will happen, the questions raised must be met and decided. In discussing these questions, it will be more convenient to consider the grandchildren, before reaching the age of thirty-five, as life tenants, and after arriving at that age as remaindermen, although such a classification may not be strictly accurate. The case is obviously governed by the same rules and principles that prevail in the determination of legal questions between the owner of an estate for life and the owner of an estate in the same property in remainder; and the analogy is so perfect that we may adopt it, in order to avoid confusion of terms, and to bring the discussion within the language of the authorities cited, and which are conceded to have more or less application to the case. We have seen that the controversy is wholly between the plaintiffs themselves, as trustees. Their respective claims and contentions are as follows: Mr. Sexton, one of the trustees, contends: (1) That in the administration and distribution of the trust estate the life tenants are not entitled to the full interest on the United States bonds, but that there should be deducted therefrom, and retained by the trustees for investment, a progressively increasing sum in each year, to meet what is called the "wearing away of the premium," to the end that the remaindermen may receive them at the termination of the trust intact, without diminution in value in consequence

of the fact that they have matured, or are approaching maturity, when of course, the premium must disappear altogether; in other words, that the expense of the premiums on the United States bonds must be borne by the life tenants, and not by the tenants in remainder. (2) That the stock dividends upon the Western Union stock were not income payable to the life tenants, but an accession to the capital which goes to the remaindermen. Mr. McLouth, one of the trustees, and the three grandchildren defendants, on the other hand, insist upon just the contrary of these two propositions, and in their contention they have been sustained by the courts below.

At least one, if not both, of these questions, has been the subject of discussion in the courts of this country and England for a century. The decisions, though numerous, are singularly conflicting and unsatisfactory. It is not necessary, in the disposition of this case, to review them, or to attempt to reconcile the conflict, even if that were possible. The whole subject has been in recent years carefully examined and elaborately discussed in the courts of this country; and, while the conflict still exists, it is possible, from a study of the decisions, and a careful consideration of the peculiar facts and circumstances of this case, to arrive at a conclusion which will be equitable and just, and will have the support, substantially, of the more recent authorities upon the questions, as expressed in judicial decisions and by textwriters. Notwithstanding the conflict of authority to which I have just referred, there is one principle or rule applicable to this case, with respect to which the parties are all at agreement; and that is that the questions are not to be determined by any arbitrary rule, but by ascertaining, when that can be done, the meaning and intention of the testatrix, to be derived from the language employed in the creation of the trust, from the relations of the parties to each other, their condition, and all the surrounding facts and circumstances of the case. With respect to the question as to which estate the premium upon the bonds is to be charged, the courts below have disposed of that by an application of this rule; and in reviewing their decision it is important to keep in view some facts as to which there is no dispute, *viz.*: (1) That the bonds in question, except \$5,000, were purchased by the testatrix during her lifetime, or came to her by will and were transmitted as she held them to the plaintiffs; (2) that the direction in the will is that the life tenants shall receive the full income; (3) that the trustees placed and retained these bonds in the trust as a part of the capital of the fund by the direction of the surrogate who had jurisdiction,—a direction which they were not at liberty to disobey, any more than if the testatrix herself had specifically designated them as a part of the trust fund. Upon a consideration of all the circumstances of the case the learned referee held that it was the intention of the testatrix, in making the trust provision, that the decrease in the value of the securities by the lessening or wearing away of premiums on account of the bonds reaching maturity should be borne by the *corpus* of the estate, and not presently by the defendants,

and that the defendants were entitled to receive the whole of the current annual income of the estate, less expenses and commissions, as provided by the surrogate's decree under which the trust was erected. It is said that the intention of the testatrix with respect to the amounts which the beneficiaries were to receive as income from the earnings of the fund, and expressed by the words "full income," was a question of fact, to be determined, not only from the language employed, but from the conditions and relations of the parties, and all the circumstances of the case. Whether that is so or not, we think that when the testatrix directed that her grandchildren should receive the whole income of these securities, she must have intended the full interest payable thereon, without diminution by reserving a considerable portion of it for the purpose of meeting any depreciation in the market value of the bonds, due to the fact that they were approaching maturity. Whatever meaning the words "full income" may convey to the mind of a trained expert in finance, it cannot, we think, be doubted that the common mind must always understand such a direction in a will as meaning the annual interest upon securities. To give to her words now an artificial meaning, based even upon scientific theories, would be to subvert her intentions, and to take from the objects of her bounty a considerable portion of the money which she intended that they should receive. The thought that was in the mind of the testatrix with respect to her grandchildren, and the provision necessary for their support and maintenance, should be carried out. There seems to be no reason to believe that she intended that they should receive any less than the interest. But, quite apart from these considerations, it is said that, upon principle and the great weight of authority, the decision of the learned referee was right. Since the investment must be unquestionably safe, in order to preserve the capital as well as to secure income, the premium is paid for the benefit of the remainderman as well as the life tenant. The absolute security of government bonds, both to the life tenant and the remainderman must always be kept in view. They may be purchased at a premium, and sold at a still higher one, in which case, if there is a deduction made from the interest, and added to the principal, to balance the premium, the remainderman will be doubly benefited. Some investments will increase while others will diminish in value. When all things are considered, the better rule, it is urged, is to allow these matters to balance themselves, as, on the whole, they are quite likely to in the end. The arguments against charging the life tenant in such cases with the premiums have thus been elaborated at great length in many of the adjudged cases. *Hite v. Hite*, 98 Ky. 257, 19 L. R. A. 175; *Peckham v. Newton*, 15 R. I. 322, 83 Alb. L. J. 424; *Bergen v. Valentine*, 68 How. Pr. 221; *Re Potlock*, 2 Redf. 100, 118; *Shaw v. Cordis*, 143 Mass. 443; *Hemenway v. Hemenway*, 184 Mass. 446; *Whittemore v. Beekman*, 2 Dem. 276; *Furness's Estate*, 12 Phila. 180; *Meyer v. Simonsen*, 5 De G. & S. 728. The authorities cited in support of the appeal on this point, and 39 L. R. A.

which it is claimed establish the contrary rule, are *Farnell v. Tweddle*, 10 Abb. N. C. 94; *People, Cornell University, v. Davenport*, 30 Hun, 177, Reversed 117 N. Y. 549; *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493; *Reynal v. Thebaud*, 3 Misc. 187; *New York L. Ins. & T. Co. v. Kane*, 17 App. Div. 542. We think the court below properly held that the premium upon the bonds could not be charged to the life tenants. Without attempting to show upon which side of the controversy the weight of reason and authority is, the intention of the testatrix, as expressed in the will, must prevail. There were \$5,000 of the United States bonds purchased by the trustees, after the erection of the trust, at the same premium. There may be reasons for charging the life tenants with the premium on these bonds that do not apply to the others. But that item is so insignificant that it does not play any part in the controversy. All questions as to the premiums on these bonds were virtually waived on the argument, and we decide nothing as to which party (the life tenant or remainderman) should bear the loss occasioned by the wearing away of the premium. It was admitted at the argument that the parties themselves could adjust that part of the controversy.

With respect to the stock dividends upon the stock of the Western Union Telegraph Company embraced in the trust, it is important to notice the finding of the referee. For the purposes of the case the parties stipulated, and the referee found, that in the fall of 1892 the Western Union Telegraph Company, by a capitalization of accumulated earnings made and retained in its hands, from time to time, increased its capital stock from \$86,200,000 to \$100,000,000, and, predicated thereon, made a stock dividend of 10 per cent to its stockholders, under which the plaintiffs received in December of that year from the corporation a certificate for 25.4 additional shares of stock; making, with the 254 shares previously held by them, 279.4 shares. There is doubtless much stronger and more weighty authority to support the contention of the appellant with respect to this question than the one just considered. We will not attempt any extended or critical analysis of the numerous cases in which the question whether such a dividend is to be treated as capital or income has been discussed and decided. It would enlarge the scope of the discussion beyond all reasonable limits, and in the end answer no useful purpose. It is quite sufficient to say that they are in hopeless conflict, though, as it seems to us, the general trend of the more recent ones, as well as the weight of argument and reason, sustain the decision in this case. With respect to this question the appeal is sought to be sustained first by a class of cases in England, founded upon *Brander v. Brander*, 4 Ves. Jr. 800, and followed by *Ireing v. Houstoun*, 4 Pat. App. 521; *Paris v. Paris*, 10 Ves. Jr. 184; and *Re Barton*, L. R. 5 Eq. 238. Apart from the evident inclination of the judicial mind at that day, in that country, to favor entails, perpetuities, and accumulations of property, it can hardly be said that these cases were well considered. Lord Chancellor Eldon admitted this in *Paris v. Paris*, 10 Ves. Jr. 184, where he said: "I confess

I do not think I can safely rest upon any distinction between this case and those that have been determined. I have had great difficulty in stating the principle that led to them. But in the case from Scotland great inquiry was made as to the length to which practice had carried the decisions here, and at the rolls; and, as it appeared that it had gone to great length, the House of Lords did not think it proper to disturb that." Then proceeding to notice the argument now made in this case, that there is a distinction between stock and cash dividends, he disposed of that contention with a homely but expressive remark. He said: "As to the distinction between stock and money, that is too thin: and if the law is that this extraordinary profit, if given in the shape of stock, shall be considered capital, it must be capital, if given as money." The rule as thus established in England was followed in Massachusetts, more as one of convenience than of justice, in a line of cases that are not quite consistent with each other. *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Daland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Heard v. Eldredge*, 109 Mass. 258, 12 Am. Rep. 687; *Rand v. Hubbell*, 115 Mass. 461, 15 Am. Rep. 121; *Davis v. Jackson*, 152 Mass. 58. The rule was adopted there mainly upon the authority of the early English cases to which reference has been made. The Supreme Court of the United States laid down the same rule in *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, evidently following the doctrine of the English and Massachusetts cases. Mr. Justice Gray, who delivered the opinion, was a member of the supreme court of Massachusetts when the rule was established in that state. It cannot be doubted that these cases are authority in support of the appellant's contention, and yet, notwithstanding the exalted character of the courts from which they proceed, they are not binding upon us, except in so far as they appear to be founded upon reason and justice. We have recently had occasion to declare the extent to which we are bound by the decisions of even such a great tribunal as the Supreme Court of the United States, and the weight to be given to its judgments upon such questions of general law as we are now considering. *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664. Moreover, it is by no means clear that the decision in this case is in conflict with the case of *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525. The rule for the determination of the question, whether stock dividends were to be treated as income, or an apportionment of capital, was stated by the learned justice in the following language: "When a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation, as manifested by its vote or resolution." In this case the resolution recites that the earnings of the corporation had been withheld from the shareholders for almost ten years, that they had accumulated, and that it was the intention of the directors in taking such action, and the shareholders in consenting to it, to distribute such accumulated earnings to the share-

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holders in the form of stock certificates instead of money. It was therefore the substance and intent of the corporate action to distribute earnings, rather than apportion additional capital. There was in fact no additional capital added. The capital of a corporation is the money or property that it has after deducting its debts. The Western Union Telegraph Company had no more property after passing this resolution than it had before, and hence no more capital. When the resolution was carried out, it had, indeed, more capital stock outstanding, as represented by certificates, but not a single dollar had been added to its capital. It had nothing after passing the resolution that it did not have before. So that, within the rule stated by the learned justice, what the shareholder got in this case represented income, and was income. When the substance of the transaction is analyzed, it will be seen that what the corporation really did was to issue to the shareholders its own obligations, in the form of stock certificates against the accumulated earnings which it had on hand; and these certificates, having a market value, could readily be converted into money by the shareholders. So that the transaction was, in substance, a distribution of profits.

In *Riggs v. Cragg*, 89 N. Y. 487, it was said by Chief Judge Andrews: "The right to stock dividends as between tenant for life and remainderman, has not been considered by the court of last resort in this state. The decisions upon the subject in other states and in England are conflicting, and it will be the duty of this court, when occasion arises, to seek to settle the question upon principle, and establish a practical rule for the guidance of trustees and others, which shall be just and equitable as between the beneficiaries of the two estates." This statement with respect to the attitude of this court upon the question was doubtless correct. But, since this utterance was made, cases have been decided in this court which it will be found exceedingly difficult to reconcile with the doctrine of the early English cases and those of Massachusetts. *Re Kernochan*, 104 N. Y. 618; *Re Gerry*, 103 N. Y. 451; *Monson v. New York Security & T. Co.* 140 N. Y. 498; *Re Devey*, 158 N. Y. 63. In so far as this court has touched the question at all since the decision in *Riggs v. Cragg*, nothing certainly can be found in the cases to sustain the contention of the appellant. The question had, however, been passed upon in the supreme court, upon full consideration, and the doctrine of the English cases and those of Massachusetts had been repudiated. *Clarkson v. Clarkson*, 18 Barb. 646; *Riggs v. Cragg*, 26 Hun, 90; *Simpson v. Moore*, 30 Barb. 637; *Goldsmith v. Swift*, 25 Hun, 201. The same may be said with respect to the action of the supreme court of Pennsylvania, where it has been held that a stock dividend represented income, and belonged to the life tenant. *Earp's Appeal*, 23 Pa. 368; *Moss's Appeal*, 83 Pa. 264, 24 Am. Rep. 164. In the latter case it was said: "Where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the

substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits." The same rule was declared in New Jersey and New Hampshire. *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650; *Lord v. Brooks*, 52 N. H. 72. There are other cases in these states to the same effect, but it is not necessary to refer to them. It is sufficient to say that in all of them the court refused to follow what is called the "English and Massachusetts doctrine," for reasons that are stated at length, and which seem to be of great, if not convincing, force.

There are three very recent cases where the whole question has been carefully examined, and the leading authorities critically reviewed, by the highest courts in other states. These cases are *Hite v. Hite* (1892) 93 Ky. 257, 19 L. R. A. 175; *Thomas v. Gregg* (1894) 78 Md. 545; *Fritchitt v. Nashville Trust Co.* (1896) 96 Tenn. 472, 33 L. R. A. 856. In each of these cases the court was entirely unembarrassed by any previous impressions or decisions. The question was new, and, from the conflict of authority in other jurisdictions, the courts, with admirable judgment and discrimination, proceeded to determine the question upon principle. It was held in each case that stock dividends, such as the one now under consideration, represented income, and in justice and equity properly belonged to the life tenant. The reasoning of these cases seems to us far more cogent and persuasive than anything to be found in the cases which favor the contrary rule, that a stock dividend, such as was made to the trustees in this case, is an apportionment of capital and not income. It is impossible to read the English cases without being impressed with the statement of the judges, so often repeated, that they found great difficulty in formulating any principle upon which the decisions rested. An attempt to give a reason for the rule was made in one of the more recent cases, but without much success. *Sproule v. Bouch*, L. R. 29 Ch. Div. 638-653. It was all summed up in the end by the court in a single sentence, "What the company says is income shall be income, and what it says is capital shall be capital." This is but another way of saying that whether accumulated earnings belong to the life tenant or the remainderman depends upon the action of the corporation, and that the property rights of such parties under the will are governed by the mere form of capitalization; that the majority of a board of directors may give them to one or the other at their will. While such a rule might have the merit of simplicity and convenience, it ought not to determine the property rights of parties interested in the corporate property. That a testamentary provision of this character, for the benefit of both the life tenant and the remainderman, who are generally the nearest and dearest objects of the testator's bounty, can in this way be voted up or down, increased or diminished, as the corporation may elect, and that such action precludes the courts from looking into the real nature and substance of the transaction, and adjusting the rights of the parties according to justice and equity, is a proposition that cannot be accepted. The mere adoption by the corporation of a resolution cannot change accumulated earnings into capital, as between the life tenant and remain-

derman. When questions arise under a will, between parties standing in such relations to each other, with respect to the right to accumulated earnings upon capital stock, the courts must determine the questions for themselves, according to the nature and substance of the thing which the corporation has assumed to transfer from the one to the other, and they are not concluded by mere names or forms. For all corporate purposes the corporation may doubtless convert earnings into capital, when such power is conferred by its charter; but, when a question arises between life tenants and remaindermen concerning the ownership of the earnings thus converted, the action of the corporation will not conclude the courts.

The decision of the learned referee in awarding the stock dividend to the life tenants as earnings or income, and in refusing to charge them with the premium upon the bonds, or that part of it that has disappeared by the lapse of time, it is equitable and just, and, we think, is supported by reason and authority.

The judgment should therefore be affirmed, with costs to all parties payable out of the income of the fund.

All concur.

PEOPLE of the State of New York, *ex rel.* DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, *Appt.*,

v.

William H. CLAPP *et al.*, *Respts.*

(152 N. Y. 490.)

The cost of reproduction is the proper basis for local taxation of a railroad under a system by which the franchise and personal property are assessable at the principal office of the corporation, so that the real estate alone is subject to assessment by the local authorities.

(*Vann, J., dissents.*)

(April 20, 1897.)

A PPEAL by relator from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Livingston County dismissing an application for a writ of certiorari to review an assessment of relator's property for taxation. *Reversed.*

The facts are stated in the opinion.

Messrs. Rogers, Locke, & Milburn, for appellant:

The assessment was excessive. The method adopted by the assessors in arriving at the value of the real estate was incorrect, and the results were necessarily erroneous.

Real property should be assessed upon estimates directly made as to its value, and not upon presumptions figured upon intricate theories.

People, Manhattan R. Co., v. Barker, 146 N. Y. 813.

NOTE.—As to the mode of assessment of railroad property, see also *State v. Virginia & T. R. Co.* (Nev.) 35 L. R. A. 759.

As to assessment of intangible values, see *Wells, F. & Co.'s Express v. Crawford County* (Ark.) 37 L. R. A. 371, and other cases cited in footnote thereto.

The rental is an indivisible thing—not so much from franchises, and so much from rolling stock and plant, and so much for land.

Any apportionment which either the assessors or the court might make must necessarily be mere guess work.

People, Panama R. Co., v. New York Tax Comrs. 104 N. Y. 240; *People, Manhattan R. Co., v. Barker*, 146 N. Y. 304.

When earnings are taxed already under a separate act it cannot be supposed that the legislature intended to tax them again proportionately in every tax locality in the state.

People, Western U. Teleg. Co., v. Dolan, 126 N. Y. 177, 12 L. R. A. 251.

In the taxation of real property our statutes do not seem to draw any distinction between the lands of natural persons and those owned by corporations.

The corporation's personal property is reached by the assessment of the capital stock, which is to be assessed at its actual value and taxed in the same manner as other personal estate of the town.

People, Manhattan R. Co., v. Barker, 146 N. Y. 304.

These lands were illegally assessed to the relator. They should have been assessed to the owner, the New York, Lackawanna, & Western Railroad Company. That company is a New York corporation.

People, Dunkirk & F. R. Co., v. Cassity, 46 N. Y. 46; *Buffalo & S. L. R. Co. v. Erie County Supers.* 48 N. Y. 101.

Messrs. J. B. Adams and G. B. Adams, for respondent:

The assessment in question was properly made, to the proper party, and was not excessive or disproportionate.

People, Delaware & W. R. Co., v. Reid, 64 Hun, 553; *People, Buffalo & S. L. R. Co., v. Fredericks*, 48 Barb. 173, Affirmed in 48 N. Y. 70; *People, New York Elev. R. Co., v. New York Tax & A. Comrs.* 19 Hun, 460, Affirmed 82 N. Y. 459; *People, Buffalo & S. L. R. Co., v. Barker*, 48 N. Y. 70; *People, Walkkill Valley R. Co., v. Keator*, 36 Hun, 592; *People, Fitchburg R. Co., v. Haren*, 19 N. Y. S. R. 818; *People, Rome, W. & O. R. Co., v. Hicks*, 40 Hun, 598, Affirmed 105 N. Y. 198; *People, Panama R. Co., v. New York Tax Comrs* 104 N. Y. 246; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 429, 38 L. ed. 1037; *People, Western U. Teleg. Co., v. Dolan*, 126 N. Y. 178, 12 L. R. A. 251.

The compromise upon an assessment of \$300,000 upon the offer of relator should be treated as conclusive upon relator on the question of value.

People, Warren, v. Carter, 119 N. Y. 557.

The conclusions of the assessors upon conflicting evidence as to value of property assessed are not reviewable in this court.

People, Rome, W. & O. R. Co., v. Haupt, 104 N. Y. 877; *People, Rome, W. & O. R. Co., v. Hicks*, 105 N. Y. 198.

The assessment in question does not include the franchise of relator's railroad, and does not involve any double taxation, as is claimed by the appellant.

People, Buffalo & S. L. R. Co., v. Barker, 48 N. Y. 70; *People v. Home Ins. Co.* 92 N. Y. 328; *Home Ins. Co. v. People*, 134 U. S. 594, 33 L. ed. 1025; *People, Pennsylvania R. Co., v.* 39 L. R. A.

Wemple, 198 N. Y. 1, 19 L. R. A. 694; *People, Panama R. Co., v. New York Tax Comrs.* 104 N. Y. 240.

O'Brien, J., delivered the opinion of the court:

The court below dismissed the writ of certiorari granted to review the assessment of the relator's real estate in the town of York for the year 1894. The property assessed was about $7\frac{1}{2}$ miles off the main line of the relator's railroad running from Binghamton to Buffalo, consisting of a double track, with about three miles of side track, with three stations, water tanks, and 112 acres of land. The property was assessed at \$300,000. A reference was ordered at the special term to take evidence in regard to the value of the property and the correctness of the assessment. The special term confirmed the action of the assessors, and the order was affirmed by the appellate division.

The only question involved in this appeal is whether the assessors adopted a legal method or rule for ascertaining the value of the property assessed. It is claimed that they adopted an illegal and erroneous principle of valuation, and the assessment made is the result of such rule, and should, therefore, be set aside. It must be borne in mind that all the assessors had to deal with is the real estate already described. They had nothing to do with the personal property, which is assessed at the place where the principal office of the corporation is. Laws 1857, chap. 456, § 3. They have nothing to do with the value of the franchises of a corporation, since they are now taxed under another law. Laws 1881, chap. 861, § 3. The method of arriving at the value of the real estate of the relator for the purpose of taxation which was adopted by the assessors is thus stated by them in their return to the writ of certiorari: "In fixing upon the sum at which the real property was assessed, we considered the same, not as a separate piece of real estate standing alone, but as a part of the extensive and valuable system of railroads leased and occupied by said relator, extending from the city of Binghamton to the city of Buffalo, and as a part of the extensive and valuable system of railroads operated by the relator, and based our said assessment thereof upon the cost, rentals, and earnings of said railroad as shown by the annual report of said relator to the board of railroad commissioners of the state of New York." The valuation was based upon the "cost, rentals, and earnings of said railroad." The relator gave proof, which is uncontradicted, with respect to the cost of reproducing these $7\frac{1}{2}$ miles of railroad with the tracks, roadbed, tanks, and buildings; and their total cost is materially less than the sum at which the assessors fixed the value. It is difficult to formulate from the adjudged cases any general rule or principle applicable in all cases to the valuation of the real estate of a railroad for the purpose of taxation. Cases may be found in the Federal courts containing strong expressions of opinion in favor of the rule adopted by the assessors. But these were cases involving the validity of state laws providing for the assessment of all the property of railroads within the state, real, personal, and mixed, including franchises, and

the statute pointed out in terms the mode of assessment, which in some respects included the methods adopted in this case. *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1081; *Western U. Teleg. Co. v. Taggart*, 168 U. S. 1, 41 L. ed. 49. Where the assessors have jurisdiction over all the property of the corporation within the state, whether it be real estate, capital stock, or franchises, they may deal with every element of value that constitutes property of the corporation, or enters into its earning or producing capacity. But in most cases in this state the assessors have jurisdiction only over a part of the corporate property; that is, the real estate. The cost of a railroad twenty-five years ago must be largely increased at the present time by betterments and repairs, and the sum which represents such cost and repairs may not indicate the present value of the property. The earnings of a railroad include the earnings of the personal property as well as the real estate. It includes the use of its franchises; and the profits of operation may, in many cases, be attributed to the skill or ability of the management. The rentals grow out of all real and personal estate and franchises. It is simply impossible to apportion the rentals or earnings, and credit the just proportion to real estate, to personal property, and to franchises. To ascertain the rental per mile, and then capitalize that sum at 6 per cent in order to ascertain the value per mile, as seems to have been done in this case, would include the use of real and personal property and corporate franchises, and such a rule for the assessment of real estate alone is misleading and wholly unreliable. The cost of reproducing these 7 miles of railroad seems to us to be the just and reasonable rule of valuation. There is no reason that we can perceive for assessing this property at a greater sum than the cost of replacement. It may not in every case be worth what it would cost to reproduce it. That would depend upon the income or earning capacity of the road after it is built. But this is the case of a paying railroad, and, when valued at what it would cost to procure the land, construct the roadbed, put down the ties and rails, and erect the buildings and other structures, all new, it is difficult to see any ground for assessing it at a larger sum. The intricate theory of valuation upon which the assessors proceeded included so many elements foreign to the value of the real estate that it cannot be approved. The assessors are not bound by the estimate of the cost of reproduction given by the railroad or its agents. They may inquire into that question themselves, and in their own way, but they have no right to disregard uncontradicted proof. It may, in any case, be competent to consider all the elements of value that they have considered in this case, but in the end, when they come to make their decision as to value, for the purpose of taxation, it may properly be much less, but can never exceed the actual cost of producing the property in the condition in which it is found by the assessors at the time of making the assessment. Such a rule of valuation is reasonable and possible. But to ascertain the value of a few miles of railroad in a country town upon a complex theory based upon the income or rentals of 200 miles in this

state of an intricate railroad system extending into other states, is impracticable, and, if permitted, would, in many cases, result in injustice. An assessment based upon the cost of reproduction eliminates from the question all extraneous elements, and at the same time subjects railroad property to its just share of the public burdens. *People, Manhattan R. Co., v. Barker*, 146 N. Y. 818; *People, Panama R. Co., v. New York Tax Comrs.* 104 N. Y. 240.

An assessment of the portion of the real estate of a railroad which is within the town, and subject to the jurisdiction of the assessors, upon the basis of the income or profits of the whole system of which it is a part, must necessarily include the use of franchises and personal property which are otherwise assessed, and hence such a principle of valuation must, in some measure at least, impose double taxation. It is doubtless within the power of the state to authorize such a method of assessment, but it has not attempted to exercise such a power. The real estate, the personal property, and the business and franchises are taxable under different statutes, and these three elements into which the corporate property is divided should not be commingled when it is reasonably possible to avoid it. When there is no question before the assessors save the value of that part of the real estate of a railroad which is within the town, the cost of replacing it will ordinarily furnish a just measure of valuation. The principle of assessing a few miles of railroad in a town according to the relations which it is supposed to bear to the whole of a vast and intricate system, or to the income or earning power of the entire system, draws into the calculation so many elements that the process becomes too complex and difficult for even an expert. It is no disparagement of the capacity and intelligence of the average assessor to say that it would present to him a problem incapable of accurate solution, and a rule of action in the performance of his official duty impossible in practice. The process virtually requires the assessors to assign to each mile of railroad its proportionate share of the income of the entire system, and estimate the value of the real estate upon that basis. That such a principle of valuation is misleading and impossible of application with any approach to justice or accuracy is sufficiently shown by what appears in this record. The learned referee, upon whose report the assessment was confirmed, resorted in his opinion to a calculation to show the annual rental of the whole road per mile, and then capitalized that sum at 6 per cent, which produced a result much larger even than that found by the assessors. He then suggests that an allowance should be made for a portion of that rental, since it was to be credited to the use of terminal and other property not embraced in the specific $7\frac{1}{2}$ miles of railroad, and he then proceeds to reduce his figures to correspond with those of the assessors. This shows that the theory adopted, in order to work at all, had to be supplemented in the end by an arbitrary allowance for income that the particular property in question had no share in producing. It is supposed that certain cases in this court, of which the case of *People, Buffalo & S. L. R. Co., v. Barker*, 48 N. Y. 70,

is a leading one, sanctioned this rule of valuation. We think not. Many of these decisions were made before the passage of the act of 1881, imposing taxes on the franchises and business of a corporation, and they doubtless contain some remarks in regard to the earnings and profits of the corporate business as the basis for the valuation of the real estate that would not be strictly accurate if made now. In so far as they hold that the real estate of a railroad in a town is not to be assessed as an isolated piece of land, but with reference to its position as part of a line of railroad with all its incidents, including the business and profits to be derived therefrom, they are doubtless correct. The property in question would be worth practically nothing except for its position as part of a railroad system. It has a value as part of the whole property, and practically no value when detached or severed from it. But the question still remains. What is the reasonable and practical method of estimating that value? Is it by an intricate calculation of the rentals, earnings, or profits per mile capitalized, and then followed by arbitrary deductions on account of the greater earning capacity of some parts of the property over other parts, or is it the cost of reproducing the same part of the railroad? The assessors have to deal with actual, visible, tangible property. A railroad may possess things intangible, as privileges or franchises of great value, and that are very important elements in its earning capacity; but the assessors have no power to include them in the valuation of real estate, and any method of valuation which includes them as a part of the real estate is erroneous. The assessment of the real estate upon a basis of profits or income of the whole railroad must necessarily attribute to the real estate a value which should be shared with the personal property and franchises. This objection is obviated when the real estate is assessed as such, and at a valuation not to exceed the sum at which it could then be produced in its existing condition. Of course, the valuation will vary in each locality according to circumstances, as the cost will vary. In some localities the property may have increased in value from natural causes, and in others it may have depreciated; but these inequalities are practically eliminated when in each locality the real estate is valued according to the cost of reproduction. Where the real estate alone is to be valued without reference to the personal property or franchises, this method will secure the nearest approach to justice, and it can be applied with something like substantial accuracy. When all the property and every element of value may be included in the assessment, as was contemplated by the statutes which were considered in the cases referred to in the Federal court, the assessment may require the application of a different principle.

The order of the Appellate Division and of the Special Term should be reversed, and the proceedings remanded to the assessors for further action.

All concur, except **Vann, J.**, dissenting, and **Andrews, Ch. J.**, taking no part.
39 L. R. A.

Louis E. BOMEISLER, *Exr.*, etc., of Salvatore Cantoni, Deceased, *Appt.*,

Elsa FORSTER, *Respnt.*

(154 N. Y. 229.)

1. An available legal defense to a pending action at law which is furnished by a valid release will not prevent equitable relief in favor of the defendant when the trial of the action at law might affect his reputation and character in the community by reason of charges and revelations as to his past conduct, whether real or fabricated, on which the action was based.
2. An injunction against actions on claims for which a valid release has been made may be granted when the trial at law might affect the reputation and character of the defendant in the community because of charges and revelations as to his past conduct, whether real or fabricated, on which the claims were based.
3. Specific performance of an agreement not to harass a person by suits upon claims which are thereby released may be enforced when a defense of the actions at law would not be an adequate remedy, because the actions, although unsuccessful, might damage his reputation by the charges on which they were based.
4. Evidence of the conduct constituting plaintiff's cause of action is not admissible in a suit by defendant to enforce specific performance of a contract of plaintiff to release the cause of action and refrain from bringing suit upon it.

(November 23, 1897.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term of the Superior Court of the City of New York in favor of plaintiff in an action brought to enjoin defendant from violating a contract not to bring suit on an alleged claim against plaintiff's testator. *Reversed.*

The facts are stated in the opinion.

Messrs. William B. Hornblower and Louis E. Bomeisler, for appellant:

The order of the appellate division reversing the judgment and the judgment entered thereon do not state that the reversal is made upon the facts.

In order to sustain the reversal, therefore, it must be shown that an error of law was committed by the trial judge, and the disputed facts as found by him must be taken as correct.

N. Y. Code Civ. Proc. § 1388; *Cudahy v. Rhinehart*, 133 N. Y. 248; *Re Laudy*, 148 N. Y. 408.

The appellate division erred in holding that there was an adequate remedy at law, and that the plaintiff was not entitled to equitable relief.

NOTE.—As to the power of a court of equity to protect personal rights, see *note to Chappell v. Stewart* (Md.) 37 L. R. A. 782.

A party who has twice bought his peace, and has obtained a general release, and a subsequent ratification of the release, is entitled to protect himself from further harassing and annoying litigation by an agreement; and if he is entitled to protect himself by an agreement, he must certainly be entitled to a specific performance of that agreement in equity, and to an injunction, or else the agreement becomes nugatory.

Cantoni v. Forster, 146 N. Y. 405.

An agreement not to sue will be specifically enforced by injunction.

Wilson v. Wilson, 1 H. L. Cas. 588; *Sanders v. Rodway*, 23 L. J. Ch. N. S. 230; *Phillips v. Berger*, 2 Barb. 608. Affirmed 8 Barb. 527; *Sampson v. Wood*, 10 Abb. Pr. N. S. 223, note; *Carpenter v. Keating*, 10 Abb. Pr. N. S. 223; *Beach, Inj.* 1895 ed. § 567; *Baker v. Hawkins*, 14 R. I. 359; *Wright v. Fleming*, 76 N. Y. 517; *Deen v. Milne*, 113 N. Y. 303; *Waterman, Spec. Perf.* § 107 and cases cited.

In general, a negative covenant or agreement will be enforced by injunction.

Waterman, Spec. Perf. § 109; *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 60 Am. Rep. 464; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 848; *Pom. Spec. Perf.* 2d ed. § 25.

Remedy by specific performance will always be granted, not only as to contracts relating to real property, but as to contracts relating to personal property or choses in action, where the injury caused by a breach cannot adequately be compensated by damages in an action at law.

Withy v. Cottle, 1 Sim. & Stu. 174; *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Wright v. Bell*, Dan. Exch. Rep. 95; *Buxton v. Lister*, 3 Atk. 363; *Ball v. Coggs*, 1 Bro. P. C. 140; *Diamond Match Co. v. Roeder*, 106 N. Y. 473, 60 Am. Rep. 464; *Johnson v. Brooks*, 93 N. Y. 337; *Williams v. Montgomery*, 148 N. Y. 519; *Castoriano v. Dupe*, 145 N. Y. 250.

Equity will restrain a vexatious and harassing law suit brought in bad faith.

2 Story, Eq. Jur. 13th ed. 211; *Dawkins v. Prince Edward*, L. R. 1 Q. B. Div. 499; *Castro v. Murray*, L. R. 10 Exch. 213; *Norfolk & N. B. Hosiery Co. v. Arnold*, 148 N. Y. 265; *Jacobs v. Raven*, 80 L. T. N. S. 386; *Bushby v. Munday*, 5 Madd. 297; *Carron Iron Co. v. MacLaren*, 5 H. L. Cas. 437; *Edmunds v. Atty. Gen.* 47 L. J. Ch. N. S. 345; *Vail v. Knapp*, 49 Barb. 800; *Kittle v. Kittle*, 8 Daly, 72; *Clapin v. Hamlin*, 62 How. Pr. 284; *Fild v. Holbrook*, 3 Abb. Pr. 377; *White v. Caxton Bookbinding Co.* 10 N. Y. Civ. Proc. Rep. 150; *Keyser v. Rice*, 47 Md. 208, 28 Am. Rep. 448; *Dehon v. Foster*, 4 Allen, 545; *Dinsmore v. Neresheimer*, 32 Hun, 204.

Defendant ratified her said agreement and release by retaining the \$6,000 consideration therefor. Having elected to affirm the same, she is now estopped from attacking it.

Crans v. Hunter, 28 N. Y. 389; *Pullman v. Alley*, 53 N. Y. 638; *Cobb v. Hatfield*, 46 N. Y. 533; *Landsley v. Ferguson*, 49 N. Y. 623; *Schiffor v. Dietz*, 83 N. Y. 807; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 82; *Allerton v. Allerton*, 50 N. Y. 670; *Baird v. New York*, 96 N. Y. 596; *Strong v. Strong*, 102 N. Y. 69; *Ore-*

gon P. R. Co. v. Forrest, 128 N. Y. 91; *Pryor v. Foster*, 130 N. Y. 171; *Tallinger v. Mandeville*, 113 N. Y. 427.

Equity favors compromise agreements, and will enforce them whenever possible.

Munro v. Alaire, 2 Cal. 327; *Sellick v. Adams*, 15 Johns. 197; *Shepard v. Ryers*, 15 Johns. 497; *Jackson, Edson, v. Gager*, 5 Cow. 387; *Davis v. Townsend*, 10 Barb. 333; *Vosburgh v. Teator*, 32 N. Y. 561; *Crans v. Hunter*, 28 N. Y. 389; *Champlin v. Laytin*, 18 Wend. 407, 31 Am. Dec. 382; *Jacobs v. Morange*, 47 N. Y. 57; *Wehrum v. Kuhn*, 61 N. Y. 623; *Zane v. Zane*, 6 Munf. 406; *Taylor v. Patrick*, 1 Bibb, 168; *Carode v. M'Kelvey*, Addison (Pa.) 56; *Okeson v. Barclay*, 2 Penr. & W. 581; *Chamberlain v. M'Clurg*, 3 Watts & S. 31; *Norfolk & N. B. Hosiery Co. v. Arnold*, 148 N. Y. 269.

The defendant in a court of record is not bound to avail himself, by way of counterclaim, of an independent cause of action existing in his favor against plaintiff. The rule in this respect was not changed by the Code.

Brown v. Gallaudet, 80 N. Y. 417; *Davidson v. Alfaro*, 80 N. Y. 663.

It is no defense here that an action is pending by defendant against plaintiff, and that he could set up his claim as a counterclaim in such action.

Gillespie v. Torrance, 25 N. Y. 806, 82 Am. Dec. 355; *Siemon v. Schurck*, 29 N. Y. 598; *Brown v. Gallaudet*, 80 N. Y. 418; *Ruppert v. Haug*, 87 N. Y. 141; *Lignot v. Redding*, 4 E. D. Smith, 285; *Barth v. Burt*, 17 Abb. Pr. 849; *Halsey v. Carter*, 1 Duer, 667; *Welch v. Hazelton*, 14 How. Pr. 97; *Ins'ee v. Hampton*, 8 Hun, 230.

Mr. Samuel H. Randall, for respondent:

The appellate division, "reviewing all questions of fact and law," determined that the plaintiff did not establish a cause of action entitling him to the relief that he demanded.

It had ample power to either award a new trial or grant judgment absolute, dismissing the complaint upon the merits with costs. And its action and judgment were not erroneous.

Code Civ. Proc. § 1022, as amended by Laws 1894, chap. 688; *Billings v. Russell*, 101 N. Y. 226; *Cudahy v. Rhinehart*, 133 N. Y. 248.

The court will not restrain an action at law when the question is the same at law and in equity.

McHenry v. Jewett, 90 N. Y. 58; *Wallack v. Society for Reformation of Juvenile Delinquents*, 67 N. Y. 23; *People v. Wason*, 64 N. Y. 170; *Wolfe v. Burke*, 56 N. Y. 115; *Savage v. Allen*, 54 N. Y. 453; *Stull v. Westfall*, 25 Hun, 1; *Blaine v. Brady*, 64 Md. 878; *Pullman Palace Car Co. v. Central Transp. Co.* 84 Fed. Rep. 357; *Freeman v. Carpenter*, 147 Mass. 23; *George Woods Co. v. Storer*, 144 Mass. 399; *Merchants' Nat. Bank v. Moulton*, 143 Mass. 543; *Onkville Co. v. Double-Pointed Tack Co.* 105 N. Y. 658; *Jackson v. Bunnell*, 113 N. Y. 316; *Denny v. Denny*, 113 Ind. 22; *Travis v. Lowry* (Pa.) 7 Cent. Rep. 553; *Willard, Eq. Jur.* ed. 1889, p. 49, note 1; *Knox v. Smith*, 45 U. S. 4 How. 298, 11 L. ed. 983.

The appellate division did not err in determining the plaintiff was not entitled to any judgment in this action.

This court may not review the discretion of the appellate division in reversing the judgment with judgment absolute for defendant. Such a decree is not a matter of right even though the contract be proved.

Willard, Eq. Jur. ed. 1889, p. 263, notes 8, B. C. and cases cited; *Stevens v. Comstock*, 109 N. Y. 655; *Tiffin v. Shawhan*, 43 Ohio St. 178; *Herren v. Rich*, 95 N. C. 500; *Seymour v. Delancey*, 6 Johns. Ch. 222; *Pennsylvania Coal Co. v. Delaware & H. Canal Co.* 31 N. Y. 91; *Peters v. Delaplaine*, 49 N. Y. 862; *Hamilton v. Harvey*, 121 Ill. 469; *McComas v. Easley*, 21 Gratt. 23; *Murdfeldt v. New York, W. S. & B. R. Co.* 103 N. Y. 703; *Eckstein v. Downing*, 64 N. H. 248.

A decree for a specific performance will not be granted upon uncorroborated evidence of the complainant, or of a single witness, when a defendant denies the making of the agreement sought to be enforced.

McMonigle v. McMonigle, 42 N. J. Eq. 64; *Stem v. Nysonger*, 69 Iowa, 512; *Magee v. McManus*, 70 Cal. 558; *Byrne v. Romaine*, 2 Edw. Ch. 445; *Harris v. Knickerbocker*, 5 Wend. 638; *Loose v. Morey*, 57 Barb. 561; *Hinckley v. Smith*, 51 N. Y. 21; *Veth v. Gierth*, 92 Mo. 97; *Holthouse v. Rynd* (Pa.) 11 Cent. Rep. 157.

Where it is impossible for the court to make out what the contract was this is a very good reason for not undertaking to enforce such an agreement.

Repetti v. Maisak, 6 Mackey, 366.

Equity will withhold its aid if the agreement is unfair, unreasonable, or unduly obtained or unconscionable, and where the consideration is grossly inadequate; and the probabilities must be taken into consideration in determining whether specific performance of an alleged contract will be decreed.

Harrison v. Polar Star Lodge, No. 652, 116 Ill. 279; *Throckmorton v. Davidson*, 68 Iowa, 648; *Warren v. Halk*, 41 Hun, 486; *Kelly v. Kendall*, 118 Ill. 650; *Higgins v. Butler*, 78 Me. 524; *Green v. Begole*, 70 Mich. 602; *Jones v. Babbitt*, 68 Barb. 611; *King v. Knapp*, 59 N. Y. 462; *Shakespeare v. Markham*, 72 N. Y. 400; *Livingston v. Peru Iron Co.*, 2 Paige, 390.

The injunction was obtained by plaintiff's counsel imposing on the court statements which had no foundation in truth, and which they didn't dare to attempt to prove upon the trial.

Banks v. American Tract Soc. 4 Sandf. Ch. 488; Code Civ. Proc. §§ 603, 604; *Morgan v. Binghamton*, 102 N. Y. 500; *Tift v. Dougherty County*, 74 Ga. 340; *Blaine v. Brady*, 64 Md. 373; *Troxell v. Haynes*, 5 Daly, 389.

Gray, J., delivered the opinion of the court:

The plaintiff's testator sought in this action to obtain a decree which should restrain the defendant from prosecuting an action at law then pending in the superior court of the city of New York, wherein she was the plaintiff and he was the defendant, or from bringing any other action for the same cause, and which should compel her specifically to perform her agreement not to harass the plaintiff by suits upon any claims of the nature of those described in her complaint. It appears that prior to May 21, 1892, the defendant had charged that Cantoni was the father of certain of her chil-

dren; that he had promised to marry her, and that they had lived together as man and wife; that he had promised to pay her sums of money, and to make a substantial provision for her in case of his death; and also, that she had rendered services to him as his housekeeper for the period of about seven years. Upon claims of this nature, she had threatened to sue him. On the date above mentioned, she executed an instrument whereby she released Cantoni from all claims and demands that she had or might have against him, and particularly from claims based upon her charge that he was the father of her children. A few days later, however, an action was commenced in her name against Cantoni, to recover the sum of \$250,000, on substantially the same claims. Thereupon, and on June 2, 1892, a further settlement was made between them; and at that time, after swearing, in the form of an affidavit, to the effect that her previous release was freely and consciously made, that her charges against Cantoni were false, and that she had no claims against him, she orally agreed, in consideration of \$6,000, to discontinue the then pending action, to relinquish all claims she might have, and that she would "not thereafter in any manner communicate with, harass, or annoy the plaintiff by suing him at law or in equity, in person, by procurement, or otherwise, by virtue of any claims she might have," etc. Two years later the action which is now sought to be enjoined was commenced by her, upon substantially the old claims, to recover damages in the sum of \$175,000. The making of the release of May 21, 1892, and of the agreement of June 2, 1892, above mentioned, were decided to be proved by the trial judge. His decision was in the form of a concise statement of the grounds upon which the issues were decided (§ 1022 of the Code); and, upon the issue made as to the validity of the release and agreement, he decided that they were upon a valuable consideration voluntarily and intelligently entered into, and not the result of any fraudulent practices or coercion. The decree of the court, at special term awarded to the plaintiff the equitable relief demanded; but, upon appeal, the appellate division ordered its reversal, and that judgment should be entered for the defendant, dismissing the complaint upon the merits.

The order is silent as to the grounds for the reversal or upon which judgment is given for the defendant. Authority is conferred by § 1022 of the Code of Civil Procedure upon the appellate division to review all questions of fact and of law upon an appeal from a judgment upon a decision which does not state separately the facts found, and to grant to either party the judgment which the facts warrant. Where the appellate division, as here, upon reversing a judgment, grants a judgment upon the merits to the appealing party, it might seem as though the case came before this court, upon an appeal, upon its questions of fact as well as of law, despite the absence of any statement in the body of the order that the reversal and direction for judgment were upon the facts. But we are not disposed to believe that the legislature intended any exception to the provisions of § 1388, which require the pre-

sumption at our hands that a reversal was not upon a question of fact, unless the contrary clearly appears in the body of the judgment or order appealed from. That contains the only explicit authority for the review by this court of the questions of fact in such a case. That section and § 1838 have reference to trials before the court or before a referee, and we do not think that we should enlarge our province of review beyond the limits set by § 1838. The grounds of the decision of the issues, which § 1023 authorizes to be concisely stated, as a substitute for separate findings of fact, must be regarded as containing statements of those facts which the trial judge or referee deems to be established by the evidence, and his decision has the support of the same presumptions which go to the support of a general verdict. *Amherst College v. Ritch*, 151 N. Y. 282, 37 L. R. A. 305. A general exception to the decision imposes upon the appellate division the duty to review all the questions of fact and of law; but whether they reverse and order a new trial, or grant a final judgment to either party, their order, to warrant us in reviewing the questions of fact, should state that it was made upon the facts. Our review is therefore confined to the consideration of whether, upon the decision made by the trial court upon the facts, the legal conclusion followed that the plaintiff was entitled to the equitable relief awarded him, and, if there was no error in that respect, whether there were errors of law committed in the rulings upon the trial, which would, in any event, have justified a reversal of the judgment, and rendered a new trial necessary.

Upon reference to the opinion of the appellate division, it appears that the learned justices thought that as there was a perfect defense to the pending action at law, in the release which the defendant had executed to the plaintiff, that general rule in equity should control which forbids the interference by the court to enjoin a pending suit at law, to which there exists a perfect legal defense, or where the ground for relief is as equally available at law as in equity. In our judgment, however, this case presents those exceptional features which make the interference of a court of equity necessary in order that the plaintiff may have the full benefit of the contract which, as the court has decided, was made between him and this defendant. Every case must necessarily be governed in its disposition by its facts and circumstances, and the discretion of the court must be influenced in its exercise by a consideration of the relative injury and convenience which may result from granting or refusing equitable relief by way of injunction. In the remedial exercise of its great power a court of equity proceeds with a discretion which is controlled by legal principles; and if, as in the present case, it is asked to stay an action at law, it must address itself to the consideration of whether, if it be a case where a legal defense to the action in fact exists, the plaintiff should be left to that as an adequate remedy, and whether any appreciable injury can result in denying him the right to establish the existence of some bar to the action at law, and thereupon to have the same enjoined. The difference to the plaintiff between a trial of the action at law, in which all the scandalous mat-

ters would be made public, and his reputation more or less affected, according as credence might be given to the statements and charges of the plaintiff therein, and a trial of the action in equity, where the issue would be confined to the question of whether there had been a release and settlement of all claims against him, which formed the basis of the complaint in the pending action, and an agreement not to sue further upon them, is quite perceptible and substantial. The fact of a release would not prevent, in the former case, the ventilation of all the matters of complaint, real or fabricated; whereas, in the latter case, if it should be found that it was validly made, and that there was an agreement not to harass by suits upon claims which had been settled and released, this plaintiff would be spared a public discussion of charges which the settlement between him and the defendant had disposed of. The specific performance of the contract which is found to have been made by the defendant with the plaintiff seems essential to justice, if the latter is to be assured of the benefits of the former's agreement with him. The rule of specific performance will be extended to personal contracts where the party wants the thing *in specie*, and he cannot otherwise be compensated (*Phillips v. Berger*, 2 Barb. 608; Story, Eq. Jur. § 716); that is to say, the extension of the rule to such cases is justified where there would not be a complete and satisfactory remedy by compensation in damages, or where the benefits of the contract would not inure fully to the party in whose favor it was made without it was specifically performed.

It must be borne in mind that we are not concerned here with the nature or the weight of the evidence. It was sufficient to support the decision of the trial court as to the matters of fact therein referred to, and the province of this court is limited to the field of inquiry into the disposition made of the principal legal question of the right to any equitable relief, and of any other legal questions, which arose during the proceedings to judgment. Presented in that way, this case appears to us as one where, while there may have been an available legal defense to the pending action at law, that remedy was not adequate to the plaintiff's necessities, and where there could be no adequate remedy short of the enforcement of this defendant's agreement. A specific performance of that agreement is indispensable to the security of the plaintiff against defendant's charges and revelations as to his past conduct, whether real or fabricated, which might affect his reputation and character in the community. This security he must be deemed to have obtained by his contract. It is not upon the principle that equitable relief is due to this plaintiff to protect him from oppressive or vexatious litigation that we think that the decree of the trial court must rest for its correctness; but it is upon the principle that a specific performance of the defendant's agreement with the plaintiff is essential if he is to receive its benefits; and, if he was entitled to specific performance, then the remedy of an injunction, restraining the defendant from doing the act which she has contracted not to do, was proper to be granted. The case of *Money v. Jordan*, 2 DeG. M. & G. 318, may be referred

to as showing how a court of equity will be moved to interfere with proceedings at law on finding that they would be in breach of an oral agreement. There the legal proceedings were to enforce a bond debt, and they were enjoined, upon the ground that the bond creditor had declared that payment would never be enforced. The court found that he had agreed to that effect, and would not suffer him to proceed at law. In our judgment, the equities of this case were apparent, and strong enough to warrant the trial court in exercising its jurisdiction to restrain the pending action at law. Having reached this conclusion, we think that the order of the appellate division reversing the judgment of the special term and directing a judgment for the defendant, was erroneous.

There were numerous exceptions taken upon the trial. The greater part of them related to rulings which excluded evidence bearing upon the charges made in the complaint in the action at law. The objections to such questions were properly sustained. The issues to be tried were whether the defendant executed the release of May 21, 1892, and made the agreement of June 2, 1892, and whether they were invalidated by reason of any fraudulent practices, misrepresentations, or duress in their procurement. Evidence which bore upon these issues was admissible; but it was not competent to go into outside matters, or to try what was in issue between the parties in the other action. The truth or falsity of the charges in the complaint of this defendant, the nature of the relations between the parties, and the promises and conduct of this plaintiff, prior to their settlements, and upon which this defendant predicated her complaint, were wholly immaterial to the issues which were being tried.

But a few of the other rulings need to be noticed. The witness Durant, head clerk for Howe & Hummel, who had appeared as the defendant's attorneys in the earlier action at law, was asked, on behalf of the plaintiff, "What were the statements or promises which she made and authorized you to communicate, as part of the agreement with the plaintiff, to his attorney, and that you did communicate?" This was objected to upon the ground that it was "wholly outside of any agreement that they alleged in their papers, and which they rely upon as part of this settlement," and that it was outside of any instruments which were set forth in the complaint, and formed no part of the agreement or contract relied upon. The objection was overruled, and the witness answered, stating what propositions of settlement he communicated to Cantoni's lawyer at the request of the defendant, and which formed 89 L. R. A.

the basis of the settlement reached. There was no error in admitting the evidence. The complaint did not set up any contract in writing, but merely alleged that, in consideration of the sum of \$6,000 paid to the defendant, she contracted and agreed not to harass the plaintiff by suits. To prove that as a fact, Durant, through whom this defendant had acted, according to his testimony, was called as a witness. His evidence did not trench upon the rule which forbids the alteration or variation of a written contract by parol evidence. It simply went to establish the making of the particular agreement not to sue, and to induce which Cantoni paid the money demanded. It was that distinct and independent part of the general transaction leading to a settlement upon which Cantoni might rely for his protection, and of which he would be entitled to compel the specific performance.

Certain evidence was excluded, which bore upon the payment by Cantoni of the expenses and counsel fees of Howe & Hummel. It is difficult to see why the evidence was excluded; but, assuming that it was properly admissible, its exclusion cannot be regarded as an error of any importance. It was not material what the amount paid to Howe & Hummel was, in the absence of anything going to show that they had acted collusively with Cantoni to defraud or deceive the defendant, in settling with the plaintiff.

The defendant was asked whether she had ever released or discharged the plaintiff from the obligations of the contract set forth in her complaint, meaning the complaint in the action at law. The objection to this question was properly sustained. The question at issue was whether she had, for a consideration, agreed not to harass the plaintiff by suits, and whether she had executed the release, as alleged in this complaint. As to that, she had given her evidence, and the question asked assumed the fact that there were obligations resting upon this plaintiff by reason of matters set up in the complaint in the action at law. Those matters, as it has above been mentioned, were not upon trial here.

We have carefully considered all of the other rulings which are not mentioned here, but we fail to find that any material error was committed which rendered it proper to order a new trial.

The order and judgment of the Appellate Division should be reversed, and the judgment of the special term should be affirmed, with costs to the appellant at the appellate division and in this court.

All concur.

NORTH CAROLINA SUPREME COURT.

C. W. BROADFOOT

City of FAYETTEVILLE, *Appt.*

(..... N. C.)

Discrimination in favor of nonresidents of a town or city by a statute granting them partial or entire exemption from penalties for allowing stock to run at large in the streets is not unconstitutional as a grant of any "exclusive or separate emoluments or privileges," or as a denial to any person of the equal protection of the laws.

(December 21, 1897.)

A PPEAL by defendant from a judgment of the Superior Court for Cumberland County in favor of plaintiff in an action brought to recover damages for the alleged wrongful impounding of plaintiff's stock. *Affirmed.*

The facts are stated in the opinion.

Mr. H. McD. Robinson for appellant.

Mr. G. M. Rose for appellee.

Clark, J., delivered the opinion of the court:

It was admitted by both parties that the result of this appeal depended upon the constitutionality of chapters 141 and 154 of the Acts of 1895. These two acts are substantially identical, save that the first applies to the whole state, while the latter is applicable to Cumberland county only. The 1st section is aimed at the offense of driving live stock into a city, town, or other territory in which stock is forbidden to run at large, with intent to secure the penalty, or to injure the owner, or for hire or reward. Violation of this statute is made a misdemeanor. The 2d section—presumably with the object of discouraging the perpetration of the offense denounced in the 1st section—provides that the poundage or penalty upon the stock of nonresidents of a town or city, which is authorized to impound stock running at large therein, shall not be more than one fourth that levied upon residents, and, further, that when nonresident owners of cattle taken up in said town live more than a mile from said city limits, there shall be no poundage charged. Chapter 141 differs from chapter 154 in that it exempts such last named owners of stock, not altogether, but only for the first three times that the same cattle are impounded. But chapter 154, which applies to Cumberland county only, governs in this case, as it was ratified later. It was seriously argued to us that these acts are unconstitutional, because in violation of article 1, § 7, of the Constitution of North Carolina, which forbids exclusive privileges and emoluments to be granted to any set of men. Then it was further urged that the acts were obnoxious to the inhibition of the 14th Amendment to the

Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of its laws. We find in the statute, however, no violation by the legislature of the organic law of the state or the United States, but simply a police regulation. The act is based upon the idea that residents of the town, who know that stock are not allowed to run at large therein, are more blamable for permitting them to do so than nonresidents whose stock (turned out where it is permissible) by chance, or perhaps driven by someone who wishes to make a profit thereby or injure the owner (as is indicated by the 1st section of the act), get into the town limits and violate the majesty of its ordinances. The statute further takes cognizance of the ordinary things of life in proceeding upon the assumption that the stock of owners living more than a mile from town are so little disposed to leave their native meadows and ranges in order to tramp the barren streets and sidewalks of the distant town, that their doing so is not attributable to negligence in their owners, and is more likely to be caused by designing persons. Hence, in the county of Cumberland, such distant owners are not punishable at all, and, under the general act (chap. 141), only when the same stock have developed such fondness for the town as to have been caught parading its streets three times before. In these provisions we see no "exclusive or separate emoluments or privileges" to any set of men. It was once contended that nonresidents, not being subject to town regulations, were not liable at all when their stock invaded the town limits. But it was held that they were, as legislation then stood, *State v. Tweedy*, 115 N. C. 704; *Rose v. Hardie*, 98 N. C. 44; *Whitfield v. Longest*, 6 Ired. L. 268; *Hellen v. Noe*, 3 Ired. L. 493. But in this there was no denial of the power of the legislature to provide that owners of cattle which should stray a mile or more to get into the town limits (which they were so little likely to do of their own volition, or by that of their owners) should be exempt from the penalty visited upon residents of the town, who should negligently or intentionally let their cattle roam the streets, and that those living outside the town limit, but within a mile, should be punished less than residents of the town. The latter knew that their stock must roam the town if turned out at all. Nonresidents do not. It has never been held that the special privileges and advantages given the residents of towns by town charters come within the constitutional inhibition against special privileges, and neither can it be justly contended that an exemption, partial or entire, of nonresidents from the penalty for violation of a town ordinance by their stock is unconstitutional. Residents in the county receive none

NOTE.—As to discrimination by a municipality between its own residents and other residents of the same state, see *Sayre v. Phillips* (Pa.) 16 L. R. A. 49, and *note*.

As to equal privileges and protection of citizens, see generally *note* to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 573.

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For later cases respecting discrimination between nonresidents, see also *Ottumwa v. Zekind* (Iowa) 29 L. R. A. 734; *State v. Conlon* (Conn.) 81 L. R. A. 55; *Com. v. Myers* (Va.) 81 L. R. A. 379; *State, Hoadley, v. Board of Insurance Comrs.* (Fla.) 33 L. R. A. 288.

of the benefits, and, if they are made exempt from some of the burdens of the town, which depends upon them for existence and support, the grievance, if any results, must be removed by the legislature. Still less is this legislation obnoxious to the 14th Amendment, which is now invoked on all occasions, and, if given the scope which has been claimed for it, would swallow up the jurisdiction of the state courts as to every matter. It would be like the old fiction of *quo minus*, by which, in England, the exchequer court, which had jurisdiction only over matters touching taxation, drew into itself both common law and equity jurisdiction of all other actions (which it was not intended to have) upon the fiction that by committing any injury or damage upon the plaintiff, or failing to pay a debt due him, *quo minus sufficiens existit*, he is less able to pay his taxes. 3 Bl. Com. 45. But this attempt to make a modern *quo minus* and an Aaron's rod of a constitutional amendment which was enacted to protect a recently emancipated race from inequality before the law, has been so often rebuked by the Supreme Court of the United States that it is only necessary to cite a very few cases. *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 188, 81 L. ed. 658, 2 Inters. Com. Rep. 24; *Re Kemmler*, 136 U. S. 448, 34 L. ed. 524. "Legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." *Barbier v. Connolly*, 118 U. S. 32, 28 L. ed. 925. It "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions." *Hayes v. Missouri*, 120 U. S. 71, 30 L. ed. 580. In *Missouri P. R. Co. v. Mackey*, 127 U. S. 207, 32 L. ed. 108, the court held that a statute of Kansas making railroads responsible for injuries sustained by their em-

ployees when caused by the negligence of fellow servants was valid, and not forbidden by the 14th Amendment, although the act did not apply to any other corporations than railroads, nor to other employers. The same ruling was made as to a similar statute in Iowa, in *Minneapolis & St. L. R. Co. v. Her- rick*, 127 U. S. 210, 32 L. ed. 109, and has been cited and approved in *St. Louis & S. F. R. Co. v. Matthews*, 165 U. S. 1, 41 L. ed. 611, which reviews the whole subject, and holds, citing many decisions, that, as a rule, statutes making classifications are not forbidden by the 14th Amendment, when they bear equally upon all within each class. Accordingly, it has been often held in this court that a public local act, making that an offense in one district which is not so in another, is a constitutional exercise of the police power, if the act bears alike on all persons within a defined locality, and is within the discretion of the legislature, —as local prohibition acts (*State v. Joyner*, 81 N. C. 534; *State v. Storall*, 103 N. C. 416; *State v. Barringer*, 110 N. C. 525; *State v. Snow*, 117 N. C. 774); or restricting the sale of seed cotton in certain localities (*State v. Moore*, 104 N. C. 714). Here, three districts are created, *i. e.*, the town limits, the territory within 1 mile of the town limits, and the territory beyond the 1 mile. The law is uniform, and bears alike upon the residents within each of the designated districts. It is not a discrimination between persons, but a statute applying differently to different districts. A somewhat similar instance is the dividing a city into small districts for local assessments for improvements, those in each district being taxed at a different rate from those in others. *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 380; *Hilliard v. Ashville*, 118 N. C. 845; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544.

While not exactly analogous, the decisions on this point demonstrate that such and similar matters are not withdrawn from legislative action by any prohibition in the state or Federal Constitution.

No error.

RHODE ISLAND SUPREME COURT.

Helen A. RAILTON

v.

Ransom C. TAYLOR *et al.*

(..... R. I.)

1. The lessor's own negligence in the management and use of that part of the premises remaining in his control, including the heating apparatus, is not within a stipulation that he shall not be liable for any loss to property on the premises if "destroyed or damaged by fire, water, or otherwise, or by the use or abuse of the Cochituate water, or by the

leakage or bursting of water pipes, or in any other way or manner."

2. The improper construction of a building or steam-heating apparatus therein does not give a tenant any right of action for negligence on account of damages caused thereby, when the condition has not changed during the tenancy.

3. The use of a defective appliance in a building, by the landlord to the damage of a tenant, may constitute actionable negligence on his part.

(November 22, 1897.)

NOTE.—As to landlord's liability for injury to tenant from defects in premises, see *Hines v. Willcox* (Tenn.) 34 L. R. A. 824.

As to liability of landlord for condition of part

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of premises not controlled by tenant, see *note* to *Jones v. Millsaps* (Miss.) 23 L. R. A. 156; also *note* to *Dollard v. Roberts* (N. Y.) 14 L. R. A. 238.

ACTION to recover damages against plaintiff's landlord for injury to her property by reason of the alleged negligence of the defendant in managing the heating apparatus. On demurrer to special plea in bar. *Sustained.*

The facts are stated in the opinion.

Messrs. James C. Collins and James C. Collins, Jr., for plaintiff:

In the construction of contracts, general words following particulars or specific terms are restricted in meaning to those things or matters which are of the same kind with those first mentioned.

Torrance v. McDougald, 12 Ga. 526; *Vaughan v. Porter*, 16 Vt. 266; *Harris v. Corties*, 40 Minn. 106, 2 L. R. A. 349; *Gage v. Tirrell*, 9 Allen, 299; *Lawson, Contr.* 389; *Wald's Pollock, Contr.* 454, note g, 455.

General expressions will be restricted by particular descriptions or additions appended to them.

Jones, Commercial & Trade Contracts, § 220; *Lawson, Contr.* 389; *Leake, Contr.* 278; *Metcalf, Contr.* 278, 230, 283; *Harris v. Corties*, 40 Minn. 106, 2 L. R. A. 349; *Hoffman v. Ethna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 387; *Lyman v. Clark*, 9 Mass. 235; *Payler v. Homersham*, 4 Maule & S. 423.

General and unlimited terms are restrained and limited by particular recitals when used in connection with them.

Torrance v. McDougald, 12 Ga. 526; *Taylor, Land. & T.* 376, note; *Gage v. Tirrell*, 9 Mass. 299; *Hatch v. Stamper*, 42 Conn. 28; *Hawkins v. Great Western R. Co.* 17 Mich. 57, 97 Am. Dec. 179; *Lawson, Contr.* 389; *Vaughan v. Porter*, 16 Vt. 266; *Harris v. Corties*, 40 Minn. 106, 2 L. R. A. 349; *Rich v. Smith*, 121 Mass. 828.

This is a contract depriving the plaintiff of her tort rights; and the policy of the law is very jealous of this form of contract, and will hold the parties to the stricter and narrower constructions.

Cooley, Torts, 2d ed. § 829.

Mr. James L. Jenks for defendants.

Tillinghast, J., delivered the opinion of the court:

This is an action of trespass on the case for negligence. The plaintiff is a tenant of the defendant Taylor under a written lease. The declaration alleges, in the first count thereof, that the plaintiff entered into possession of the store in question, which consisted of a portion only of the building owned and controlled by the defendant Taylor; that a portion only of the cellar under said store is occupied by plaintiff; that the remainder of said cellar is occupied by said Taylor, and contains steam-heating apparatus, planned for and used by said defendant in the heating of the stores and rooms in said building; that said heating apparatus was put in by defendant, and is under his control and management; that said store was let to the plaintiff for the purpose of a dry-goods store; and that the defendant Taylor has so negligently managed his part of the premises, including the heating apparatus, and all appliances connected therewith, as to cause large amounts of smoke, dirt, ashes, gases, and an excessive amount of heat to arise into the plaintiff's store, and render the same unfit

for the purposes of trade, thereby greatly damaging the stock of goods of the plaintiff; and, furthermore, that said defendant has persisted in said negligence, though often warned by the plaintiff of the damage he was thereby doing. The second count alleges that the plaintiff's store was let to her by said defendant for, and used by her in, the sale of dry goods, fancy goods, etc.; that said defendant kept and used a portion of the cellar under the store for the heating of the building, having furnished the same with steam-heating apparatus; that there were means supplied for the receiving of coal into said cellar and for the removal of ashes therefrom, all of which were put in and constructed in an unsafe and unsuitable condition for the use they were intended for, and to which they were afterwards put; that said cellar was let to and used by one Bliss for the heating of said building, he being a tenant of the upper portions of said building; that said Bliss entered into possession and used said apparatus and the appurtenances thereunto connected, as was intended by said defendant that they should be used, and as a result thereof large quantities of smoke, dust, coal, dirt, ashes, gases, and an excessive amount of heat were caused to arise into the store of the plaintiff; that said defendant was frequently warned of these defects, but neglected to remedy the same; and that by reason thereof the plaintiff has suffered damage by reason of the loss of trade, etc. The third and fourth counts are substantially like the second. After the commencement of the action, the plaintiff, by leave of court, summoned in Harlan P. Bliss as a defendant, and in sundry additional counts charges him with negligence in the management of said heating apparatus, which plaintiff alleges was under his control. Other counts were also added, charging the defendants jointly with negligence in the control and management of said heating apparatus, and also charging that said heating apparatus was improperly constructed as aforesaid, whereby plaintiff suffered damage. To this declaration the defendant Taylor has filed a special plea in bar, setting up that by the terms of the lease entered into between him and the plaintiff it was agreed that he should not be liable for any loss or damage suffered by the plaintiff from any cause or reason whatsoever; wherefore he prays judgment, etc. The provision in the lease relied on in bar of the action is as follows: "And it is also hereby understood and expressly agreed by the parties to this indenture that all merchandise, furniture, and property of any kind which may be on the premises during the continuance of this lease is to be at the sole risk and hazard of the lessee, and that, if the whole or any part thereof shall be destroyed or damaged by fire, water, or otherwise, or by the use or abuse of the Cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner, no part of said loss or damage is to be charged to or borne by the lessor in any case whatever. And the lessee further promises that she will keep whole and in good condition all the window and other glass on the premises, and also the pipes, faucets, and water fixtures, and that she will leave the same whole, and in good condition, at the termination of this lease."

The plaintiff contends that this provision cannot properly be so construed as to exempt the lessor from liability for his own negligence or for that of his servants and agents. We agree to this contention. The exemption clause of the provision above quoted includes two classes of causes of injury which might be sustained by plaintiff, *viz.*, damage by fire and damage by water, and the other and more general terms used in connection therewith are evidently but different forms of these two possible causes of injury, and there is nothing to show that they were intended to embrace matters outside of those specifically named. In other words, the general expression, "or in any other way or manner," does not stand alone, but immediately follows, and is clearly a part of, the specification relating to damage by water, and should be construed as relating to the same subject-matter. Moreover, it appears, by examination of the original lease on file in the case, that the entire provision in question, like all of the other provisions therein, is in print, and that the form used was evidently intended for the city of Boston, as it refers to Cochituate water; and we think it is evident that what the parties had in mind when using the language, "by the use or abuse of Cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner," was such damage only as might result from the use or abuse of public water in said building. If it had been understood or agreed by the parties that the exemption was to extend beyond this, and include another and distinct cause of injury, *viz.*, the lessor's own negligence in the management and use of that part of the premises remaining in his control, including the heating apparatus, they would doubtless have stipulated to that effect, and not have left so important a matter in any doubt. Of course, we do not wish to be understood by what we have thus said as intimating what the legal effect of such a stipulation would be had it been incorporated in the lease. It is a familiar rule in the construction of contracts that general terms are restricted and limited by particular recitals, when used in connection with them. *Lawson. Contr. § 389; Vaughan v. Porter*, 16 Vt. 270; *Gage v. Tirrell*, 9 Allen, 805; *Harris v. Corties*, 40 Minn. 106, 2 L. R. A. 849; *Torrance v. McDougald*, 12 Ga. 526; *Payler v. Homersham*, 4 Maule & S. 423, 427; *Jones, Commercial & Trade Contracts*, § 220. "All words," says Lord Bacon, "whether they be in deeds, or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person." Bacon, *Law Maxims*, Reg. 10; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 413, 89 Am. Dec. 337. In *Saner v. Hilton*, L. R. 7 Ch. Div. 815, which was an action on a covenant to rebate rent in case of "inevitable accident," it was held that the words imported something *ejusdem generis* with what had been mentioned previously, and did not apply to that which, though not avoidable so far as the lessee was concerned, was not in its nature inevitable. We therefore decide that the exemption clause in question does not 89 L. R. A.

release the defendant Taylor from liability for his own negligence.

As to the defendant's contention that the rule of *caveat emptor* applies as to the fitness of the leased premises for the use to which the tenant puts them,—that is, that there is no implied warranty in the lease of a store or warehouse that the building is well built, or fit for any particular use,—we reply that, admitting this to be the law (and the cases are substantially to that effect. See *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *McGlashan v. Tallmadge*, 37 Barb. 313; *Libbey v. Telford*, 48 Me. 316, 77 Am. Dec. 229; *Lucas v. Coulter*, 104 Ind. 81; Taylor, Land. & T. § 822; Wood, Land. & T. pp. 517, 518), yet it is not controlling in this case, for the very obvious reason that here the plaintiff is not claiming that the store in question is not suitable for the purpose for which she hired it, but that the defendant by the negligent and improper management of a certain part of the building and the appurtenances connected therewith other than and outside of that leased by her, has thereby rendered it unsuitable, and caused her damage and injury.

As the defendant's counsel has called our attention to certain defects in the declaration, and as the demurrer reaches back, in effect, through the whole record, and attaches ultimately upon the first substantial defect in the pleadings (Gould, Pl. chap. 9, §§ 36-39; Stephen, Pl. Heard's ed. *144; 6 Enc. Pl. & Pr. 331; *Ward v. Sackrider*, 3 Cal. 263; *Peoria & O. R. Co. v. Neill*, 16 Ill. 271; *Baldwin v. Cross*, 5 Ark. 510; *Carlock v. Spencer*, 7 Ark. 22; *Smith v. State*, 66 Md. 219; *Ellis v. Ellis*, 4 R. I. 122), it becomes necessary to determine as to the sufficiency of the plaintiff's declaration. We think the first count thereof sufficiently states a cause of action for negligence. We think the second, third, and fourth counts are bad in that the plaintiff thereunder seeks to recover damages by reason of the faulty construction of certain parts of the building, and also of the steam-heating apparatus connected therewith. The mere fact that the building, together with said apparatus, was not properly constructed, gives the plaintiff no cause of action, as the defendant had the right to construct his building as he saw fit, so long as he violated no one's rights; and she does not allege that the condition of the premises has been changed since the commencement of the tenancy. See *Henson v. Beckwith*, 20 R. I. pt. 1, p. 169, 88 L. R. A. 716. If, however, he used a defective appliance in said building, to the plaintiff's damage as tenant, that might constitute actionable negligence on his part. Said second, third, and fourth counts are therefore quashed. We think the counts contained in the amendment to the declaration sufficiently state a case of negligence in the management and use of that part of the premises, including the heating apparatus, which is alleged to have been under the control of the defendants, either jointly or severally, and these counts are therefore sustained. *The demurrer is sustained*, and the special plea in bar overruled. Case remitted to the common pleas division for further proceedings.

TENNESSEE SUPREME COURT.

William T. MURRAY

v.

James A. ALLARD, *Appt.*

(.....Tenn.....)

1. **Petroleum oil is a mineral** within a reservation by deed of "all mines, minerals, and metals in and under the land."
2. **Possession of land is not adverse** to the owner of minerals therein when the land is used merely for agricultural purposes without any denial of the right to the minerals or any assertion of claim inconsistent therewith.
3. **Natural gas is a mineral** within a reservation of minerals by deed.

(November 23, 1897.)

A PPEAL by defendant from a decree of the Court of Chancery Appeals reversing a decree of the Chancery Court for Fentress County in favor of defendant. In a proceeding brought to determine the title to petroleum under land which had been granted to defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. L. T. Smith and W. T. Murray for appellee.

Wilkes, J., delivered the opinion of the court:

This cause was decided for defendant by the chancellor, and his decree was reversed by the court of chancery appeals, and the cause is now before us on appeal of defendant and assignment of errors.

The very interesting question is presented whether petroleum oil is a mineral or not. It arises upon the construction of a deed which conveyed certain lands, reserving to the grantor "all mines, minerals, and metals in and under the land." Subsequent conveyances were made to third persons without reservation, and the present owners hold under a deed conveying in fee simple, and making no reservation and no reference to "mines, minerals, and metals in and under the land." The chancellor was of opinion that petroleum was not embraced in the term "minerals." The court of chancery appeals reversed this holding in a very exhaustive, elaborate, learned, and able opinion, and cite the dictionaries, legal and otherwise, the encyclopedias, and many works of science, and a large array of legal authorities holding to the same effect, and they state that, after a most exhaustive search, they have been able to find but one case holding a contrary doctrine. We can neither elaborate nor improve upon the holding of the court of chancery appeals, and are content to affirm their holding and adopt their opinion as our own.

It is next said that the present owners are protected in their fee simple title to the land by the statute of limitations of seven years. The cause was heard upon an agreed statement of facts, and the agreement upon this feature of the case is that defendants, and those under

whom they claim, have had the adverse possession of the land for more than seven years. Inasmuch as the complainant's vendor, Rodgers, is one of the parties through whom defendants claim, and the agreed statement of facts does not show how long the land has been held since complainant parted with the title, the facts necessary to sustain the plea are not made out. In addition, it is well settled that one person may own the surface or soil, and another the minerals and mines and metals, and even the water, and there may be different owners for the several different strata under the earth. In order to make a holding adverse to one who has reserved or had granted to him the "mines, minerals, and metals," there must appear to have been some denial of his right or assertion of claim inconsistent with his right. This does not necessarily appear when a party uses the land merely for agricultural purposes,—a use entirely consistent with the right to mine under the soil by another. Upon all the points raised we are of opinion that the court of chancery appeals is correct, and their decree is affirmed, and the opinion of that court, delivered by Judge M. M. Neil, is appended, and made the opinion also of this court:

"The questions in this case arise from the following agreed state of facts: 'We, William T. Murray, as complainant, and James A. Allard, as defendant, have a controversy over certain rights in the tract of land hereinafter described, which we desire to settle by an agreed case made upon the following agreed state of facts, which case we agree to submit to the chancery court at Jamestown for a decision. In this case the following facts are agreed, to wit: (1) It is agreed that John B. Rodgers, on the 24th day of October, 1853, sold and conveyed to Mathias Wright a certain tract of land in the 13th civil district of Fentress county, Tenn., bounded and described as follows: [Here described]—in which deed said John B. Rodgers reserved to himself, his heirs and assigns, all mines, minerals, and metals in and under said land. Said Wright conveyed said land by general warranty deed without any reservation of said mines, minerals, and metals, and whatever title said deed communicated, under the facts hereinafter set out, pass to the defendant, James A. Allard, to the portion claimed by him, by regular chain of conveyances from Rodgers through Wright and others, which purported to convey an estate in fee, except the deed from Rodgers to said Wright, which reserves the mineral interest as above stated. And said Allard, and those through whom he claims, have been in the actual, open, and notorious possession of said land, under color of title, for more than seven years, claiming adversely to the world to the extent of their title papers which definitely identify the land intended to be conveyed; but had not been operating, or intending to operate, in any mining business on said land since the date of the deed from John B. Rodgers to Wright; neither has any of his ven

NOTE.—As to nature of property in mineral oil, see *Williamson v. Jones* (W. Va.) 25 L. R. A. 222, and note; *Marshall v. Mellon* (Pa.) 35 L. R. A. 816; 89 L. R. A.

Koen v. Bartlett (W. Va.) 81 L. R. A. 128; *Williamson v. Jones* (W. Va.) 33 L. R. A. 604.

dors attempted to mine on said land or drill for petroleum oil or natural gas. There is no mineral in, under, or on said land, unless petroleum oil or natural gas is held to be such. That petroleum oil had been discovered in White county, Tenn., and in Wayne county, Ky., or Scott county, Tenn., at what is known as the Martin Beaty well, prior to the deed from John B. Rodgers to Mathias Wright, above referred to. And there are petroleum oil springs in the vicinity of this land which had been discovered at the date of said deed from Rodgers to Wright. (2) That said John B. Rodgers, during his life, and his heirs after his death, have claimed said mines and minerals and metals, including petroleum oil and natural gas, until the same passed out of them, and passed into William T. Murray by judicial sale, who now owns whatever title they owned in said land before said sale. (3) The said William T. Murray, by his agent, went onto said portion of the land last mentioned in said Rodgers' deed, claimed by said Allard, and proposed to drill for petroleum oil and natural gas, and was refused the right to do so by said Allard, who conveyed the same to one Lewis Choate, and warranted the title, the said Allard contending that complainant had no interest in said land—First, because the words "mines, minerals, and metals" do not include petroleum oil and natural gas; second, if they did, the title of said mines, minerals, and metals has long since been barred by the adverse holding under said deeds. (4) Complainant, Murray, contends that petroleum oil and natural gas are included in the words "mines, minerals, and metals," and especially so as there is nothing else for the reservation to operate upon, and that the possession of said Allard, and those through whom he claims, does not extinguish the title of the said mines, minerals, and metals (1) because the facts stated, which are relied upon to effect the bar of the statute of seven years, are not sufficient to establish the character of adverse holding that would effect a bar of his rights or perfect the title of defendants; (2) because their possession was consistent with the complainant's title; (3) the said Murray contends that no cause of action would accrue in such case until the adverse holder invaded mineral rights, and that the cultivation of the soil was not such invasion, and therefore no statute of limitations runs as to said reservation. And it is further agreed that the Honorable T. J. Fisher, chancellor of the 5th chancery division of the state of Tennessee, may pass upon said facts, and render such decree as the law and the facts may warrant. The chancellor and the supreme court, in case of appeal, will consult any and all scientific works and definitions of the words "petroleum oil" and "natural gas," as well as such legal authorities as are found, to aid them in the determination of the question upon the state of facts submitted.' Proper affidavit was attached.

"Upon this state of facts the chancellor decreed as follows: 'That the words "mines, minerals, and metals" did not include oil and gas; also that there had been seven years' adverse holding under the deeds purporting to convey an estate in fee, and this vested the defendant with a perfect title in fee, includ-

ing the title to oil and gas, and that the adverse holding of James A. Allard, and those under whom he claimed, had extinguished the title of John B. Rodgers, claiming under the adverse reservation as to the mines, minerals, and metals. He thereupon dismissed complainant's case, and rendered judgment against Murray for the costs. An appeal was prayed and granted, and errors were assigned as follows: First. The chancellor erred because he did not find, as a matter of law, that the deed from Rodgers to Wright expressly reserved to himself all of the petroleum oil interest in the land conveyed, and that by the subsequent judicial sale Rodgers' title in the same vested in complainant. Second. The court erred because he did not hold, as a matter of fact, *viz.*: It not appearing at what time Wright sold the land, and consequently it not appearing how much of the time that the land was adversely held was by Wright under his deed from Rodgers, which deed made the reservation, therefore it does not appear as a fact of record that the defendant has held possession of the land for seven years next before this suit was brought, under deed purporting to convey the entire estate in the land. This fact not affirmatively appearing, the defense of the statute of limitations must fail. Third. The court erred because it does not hold that, as a matter of law, the possession of the defendants was consistent with complainant's title, and that there being a double ownership in the land, no cause of action could accrue in his favor so long as the owner of the surface only exercised his legal rights. The statute of limitations does not begin to run until the mineral rights in the land were invaded.'

'The first question to be determined is whether petroleum oil is included within the language of the reservation of 'mines, minerals, and metals.' In the Century Dictionary 'petroleum' is defined: 'An oily substance of great economical importance, especially as a source of light, occurring naturally oozing from crevices in rocks, or floating on the surface of water, and also obtained in very large quantity in various parts of the world by boring into the rock; rock-oil.' 'Various opinions have been expressed concerning the origin of petroleum,' says Prof. S. F. Peckham in the American Encyclopedia. 'Until quite recently all of these theories were based upon the assumption that it had been derived from vegetable or animal organisms. Some have supposed that it is the product of the decomposition of woody fiber, by which more of the carbon and less of the hydrogen has been evolved than by the decomposition which has produced coal. Again, it has been supposed to be the product of the natural distillation of pyrrbituminous shales and coals. Lesquereux attributes its origin to the partial decomposition of low forms of marine vegetation. Berthulot has advanced the theory that, by the complex chemical changes at present taking place in the interior of the earth, petroleum is continually set free. It may be assumed that petroleum is a normal or primary production of the decomposition of marine or vegetable organisms, chiefly the former, and that nearly all other varieties of bitumen are products of a subsequent decomposition of petroleum, differing both in kind and degree.

The occurrence of petroleum in the lower paleozoic rocks of Pennsylvania and Canada, which contain no traces of land plants, shows that it has not in all cases been derived from terrestrial vegetation, but may have been formed from marine plants or animals,—an opinion further strengthened when we find in the rocks of the tertiary age, in which fossil remains in the higher marine animals occur in abundance, a petroleum comparatively rich in nitrogen.' It is shown, also, in the same authority, that petroleum is procured by a process of mining; that is, by the sinking of wells. It is said that productive wells vary greatly in depth. In some, large supplies have been afforded at 60 and 70 feet, and in others at greater depths to over 1,000 feet. It is said that most of the oil is obtained from wells over 180 feet deep; that shallow wells, exhausted by pumping, are successfully made to yield again by sinking them deeper; that the oil is found at several zones or oil-producing depths; that the pumps are sunk deeper into the well as the supply goes down. And he continues: 'It is observed that, if the pumping is interrupted for a day, the product obtained when it is renewed will be water which is more or less salt. At some wells the flow of water has continued during several days' pumping before the oil is recovered. This never seems to fail entirely, unless it be from some obstruction arresting the flow, and then recourse is had to sinking deeper or enlarging the bore of the hole. Salt water commonly comes up with the oil, and is separated from it by standing in the vats into which the products are received. The proportion of this oil is very variable, and the quantity of the oil pumped from a single well is far from being regular. Sometimes the oil, when first struck, rushes up with great violence, by reason of the carbureted hydrogen gas that accompanies it. This produces a spouting or flowing well, from some of which the yield has been more than 1,000 barrels a day for a long time; but the quantity gradually diminishes until they cease to be flowing wells, and they are then pumped. In a few instances the oil has leaped forth with such violence as to be beyond control, and immense quantities have been lost. These fountains of oil have sometimes taken fire, producing terrific conflagrations and presenting scenes of appalling grandeur.'

"Clearly, from this description of the substance, it could not in any sense fall under the terms 'metal' or 'metallic.' The question, then, to be determined, is, Does it fall within the term 'mines and minerals?' In 2 *Rapalje & L. Law Dict.* p. 821, it is said: 'In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term therefore includes coal, metal ores of all kind, clay, stone, slate, and coprolites. "Surface" means that part of the land which is capable of being used for agricultural purposes. *Midland E. Co. v. Checkley*, L. R. 4 Eq. 19; *Hext v. Gill*, L. R. 7 Ch. 699; *Atty. Gen. v. Tomline*, L. R. 5 Ch. Div. 762. A mine is a work for the excavation of minerals by means of pits, shafts, levels, tunnels, etc., as opposed to a quarry, where the whole excavation is open. While

unsevered, minerals form part of the land, and as such are real estate. When severed they become personal chattels.' In 15 *Am. & Eng. Enc. Law*, at page 500, the following occurs: "'Mineral" originally signified that which is obtained from a mine, from underground workings as distinguished from that which is quarried. The term is not limited to metallic substances, but includes salt, coal, paint-stone and similar substances,"—citing on the last point, *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 *Am. Dec.* 448. In that the question was whether the mineral stone paint passed under the terms 'mines and minerals.' Upon this question the court in that case says: 'The character of the substance; or "stone paint," as the witnesses call it, is given in the bill, and the correctness of the description there given is admitted by the answer and confirmed by the evidence. It is a substance resembling in general appearance red shale, so soft as to be easily cut with a knife when first excavated, but differing in appearance from the surrounding earth. It is found in regular strata or bowlders of different sizes. It hardens when exposed to the air, and when broken up and ground it is used as a paint, and is valuable for that purpose. The manner in which it is procured from the earth, and its particular location below the surface, are particularly described by a witness, who was the foreman in carrying on the works. They commenced working in an old shaft, which had been used for raising copper ore. As they proceeded with the excavation the dip of the paint stone was about 1 foot in 8 or 10, perhaps a little more. At the point of the pit opposite to the side at which the excavation was commenced the paint stone was from 18 to 20 feet from the surface of the earth. The work was carried on by making regular mine shafts of timber, one of which was extended about 56 feet in length, and penetrated about 12 feet into the mountain beyond the open pit. Other pits were made very similar in character. The stratum of the paint stone in the largest pit was found to vary from 6 to 15 feet in thickness. The stratum was uniform, increasing in thickness as progress was made into the mountain. It does not crumble like red shale but goes off in square pieces. It is ground in a mill, and is then fit for use, as a paint, by mixing it with oil. Its value is from \$20 to \$30 per ton. Professor Doremus is the only scientific witness examined. He says: "It may be called an argillaceous sandstone, alumina and silica being the prominent ingredients—it is not an ore of iron. This comes under the head of argillaceous rocks. I wish to distinguish these classes from ores or metalliferous rocks. The position of this paint material, as it lies in the mountain, is not in veins, but in strata. The extracting of this material as I saw it there would not be called mining." The analysis," the court continues, "only establishes the fact that this is not a metalliferous ore. If the terms "mines and minerals," used in the deed, could, by any fair construction, be confined to metallic substances, the question involved would be of easy solution; for the metallic property found in this paint stone is so small that, for the purpose of extracting the metal, it is of no value. But I do not think the

terms should be confined to the metals or to metallic ores. I cannot doubt, if a strata of salt, or even a bed of coal, had been found, they would have passed under this grant. Can this stone paint, then, be fairly and naturally embraced in the term "mineral?" It is a body which is destitute of organization, and which naturally exists within the earth. It is below the surface, distinct from the ordinary earth. It is in strata, and is worked by the ordinary means of mining. And although Professor Doremus says that it is not in veins, but in strata, and that he would not call the mode of extracting it mining, yet this test of his would exclude salt from the class of minerals; for salt, too, is found in strata, and not in veins, and is obtained by shafts, and by the same mode of operation by which this matter is extracted from the earth. It is valuable for its mineral properties, and, by a cheap and easy process of grinding, is converted into a merchantable article adapted to the mechanical and ornamental arts. It is embraced in the definition given by men of science to the term "mineral." In Bakewell's Mineralogy, p. 7, it is said: "The term 'mineral,' in common life, is generally applied to denote substance dug out of the earth or obtained from mines." In Cleveland's Mineralogy, p. 1, the definition is given thus: "Minerals are those bodies which are destitute of organization and which naturally exist within the earth or at its surface." My conclusion is, that this paint stone passed by the grant, and that the defendants have the right to excavate and remove it, and to convert it to their own use.

"In a note in the case of *Dunham v. Kirkpatrick*, appearing on page 698, 47 Am. Rep., the following appears: 'Freestone is a "mineral," within a reservation in a deed. *Bell v. Wilson*, L. R. 1 Ch. 303. Coal oil is a "mineral product." *Thompson v. Noble*, 8 Pittsb. 201. Petroleum is a "mineral and part of the realty." *Stoughton's Appeal*, 88 Pa. 198. Coal is a "mineral." *Henry v. Lowe*, 73 Mo. 96. In *Tucker v. Linger*, 46 L. T. N. S. 894, it was held that flint stones, turned up by the plow in the course of husbandry, were "minerals," within a reservation to the lessor of "mines and minerals, sand, quarries of stone, brick-earth, and gravel pits." This holding was affirmed by the House of Lords. L. R. 8 App. Cas. 508. In *Earl Rosse v. Wainman*, 14 Mees. & W. 859, the court said that the word, "though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines;" and in *Darvill v. Roper*, 3 Drew. 294, it was restricted to such products "as are worked by means of mines." More recently, however, in *Hext v. Gill*, L. R. 7 Ch. 699, the natural meaning of the term was said to be: "Every substance which can be got from underneath the surface of the earth, for the purpose of profit." Again, it has been held to include beds of china clay, while, on the other hand, freestone, quarries of limestone and clay and sand, respectively, have been decided not to be "minerals." In *Re Dudley's Settled Estates*, Ch. Div. it was held that a lease of salt works, where the brine was pumped from the earth and made into salt, was not a lease of "minerals."

39 L. R. A.

"In the case of *Williamson v. Jones*, 39 W. Va. 231, 25 L. R. A. 222, the following language is used by Mr. Justice Holt: 'The authorities now very generally—universally, as far as I have examined them—hold petroleum to be a mineral, and as much a part of the realty as timber, coal, or iron ore, except that in proper cases its mobility as a subterranean liquid must be taken into consideration, as in the case of salt water, etc. The courts of the state of Pennsylvania have had many cases, some involving property rights, of great value, in which the point arose, and have examined the question thoroughly, considered it with great care with reference to its being property where it is found, and its character and nature as property in general. "Oil is a mineral, and, being a mineral, is part of the realty." *Funk v. Haldeman* (1866) 53 Pa. 329, 249. In the case of *Westmoreland & C. Natural Gas Co. v. De Witt*, 180 Pa. 285, 5 L. R. A. 731, the master said: 'Gas is a mineral, and while *in situ* is a part of the land, and therefore possession of the land is possession of the gas.' After quoting this, the court said: 'This deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water also is a mineral; but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their "fugitive and wandering existence within the limits of a particular tract is uncertain," as said by Chief Justice Agnew in *Brown v. Vandergrijs*, 80 Pa. 147, 148. They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control: but when they escape, and go into other land, or come under another's control, the title of the former owner is gone.'

"We have found only one authority opposed to the conclusion that petroleum is a mineral, that is the case before referred to, of *Dunham v. Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696. The great weight of authority is not only opposed to that case, but it seems to us to proceed upon false principles. The ground of the decision, as stated in the opinion, is that by the bulk of mankind nothing is considered as mineral except such things as be of metallic nature, such as gold, silver, copper, lead, etc.; that, in the popular estimation, petroleum is not regarded as a mineral substance any more than is animal or vegetable oil; and that it would only be classified as such in the most general and scientific sense. So, in the light of this assumed general view of the bulk of mankind petroleum was held not to fall within a reservation as to minerals. We think, however, that the true meaning of the word 'mineral,' as well as its meaning among the bulk of mankind, must be determined from

dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word 'mineral' applied only to metals. This case seems to be opposed in principle by the later case of *Gill v. Weston*, 110 Pa. 313, where petroleum was held to be a mineral substance in construing the Pennsylvania act of 1855 concerning the mortgaging of terms on mining lands. The court said in that case: 'It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands.' In the light of these authorities, we are bound to hold that petroleum is a mineral, and that it falls within the terms of the reservation in the deed referred to in the foregoing case. The same is true of natural gas. We are of the opinion that the first assignment of error, therefore, is well taken.

We are of the opinion, also, that the second assignment of error is well taken. To resolve the point raised by this assignment of error, we must construe the agreed state of facts. From this state of facts it appears that Rodgers conveyed the land, with the mineral reservation, on the 24th day of October, 1853, to Mathias Wright, and that Wright conveyed the land by general warranty deed, without any reservation, to some third party, and then it passed through a series of conveyances to James A. Allard; but the date of the deed made by Wright is not given, nor the date of any other deed, nor how long Allard held after Wright's deed. It thus does not appear from the agreement that there was seven years' adverse possession from the date of the deed of Mathias Wright. The agreement is that Allard and those under whom he claims have been in actual, open, and notorious possession of the land under color of title for more than seven years, claiming adversely to the world to the extent of their title papers, which definitely identify the land intended to be conveyed. Within the expression, 'those under whom he claims,' is not only included Wright, but Rodgers. Therefore it is impossible to say that there was seven years of adverse possession from the deed made by Wright to the third person forward.

'We are of the opinion, also, that the third assignment of error is well taken. In mineral lands the surface, as adapted to cultivation, may be separated from the right to dig under its surface for ore, and one person may hold one of these rights while another holds the other. *Stewart v. Chadwick*, 8 Iowa, 448; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760. So the possession of the soil by the owner for the purpose of tillage gives him no possession of the gas under the surface or of the

other minerals. *Westmoreland & C. Natural Gas Co. v. De Witt*, 130 Pa. 235, 5 L. R. A. 781; *Chartiers Block Coal Co. v. Mellon*, 153 Pa. 286, 18 L. R. A. 702. In this case it is said: 'The mining of coal and other minerals is constantly developing new questions. Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata. *Lilli-bridge v. Lackawanna Coal Co.* 143 Pa. 298, 13 L. R. A. 627.'

In the earlier days of the common law the attention of buyers and sellers, and, therefore, the attention of the court, was fixed upon the surface. He who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended to the clouds and downward to the earth's center. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income derived from it was the result of agriculture. The comparatively recent development of the sciences of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed, the uses and the values of lands. Tracts that were absolutely valueless, so far as the surface was concerned, have come to be worth many times as much per acre as the best farming lands in the commonwealth, because of the rich deposits of coal, or iron, or oil, or gas known to underlie them at various depths. These deposits are sometimes found, however, beneath well-cultivated farms, so that the surface has a large market value apart from the value of the deposits of coal or other minerals under it. In such cases the owner is rarely able to utilize the lower stores of wealth to which he has title, by mining operations conducted by himself, and for this reason he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron, or oil, or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for settlement and cultivation precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or strata becomes a subject of taxation, of encumbrance, levy, and sale, precisely like the surface.'

The result is that the decree of the chancellor must be reversed, with costs, and a decree entered here affirming the decree of the Court of Chancery Appeals for the complainant in accordance with this opinion.

TEXAS SUPREME COURT.

J. B. FOWLER, *Plff. in Err.*,

v.

Mary E. BELL *et al.*

(90 Tex. 150.)

1. **The validity of a chattel mortgage** executed by an insolvent foreign corporation in the state which created it, to secure a creditor residing in that state, must be determined by the laws of the state in which the property is situated.
2. **The invalidity of an attachment of property** of an insolvent corporation will not preclude a purchaser of the property from defending against one claiming it under a mortgage which constitutes an invalid preference.

(November 16, 1896.)

ERROR to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming a judgment of the District Court for Wichita County in favor of plaintiffs in a proceeding brought to foreclose a mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. Mathis & Mathis and Herring & Kelley, for plaintiff in error:

The court erred in rendering judgment for plaintiff foreclosing said chattel mortgage for the reason that the evidence shows that at the time said mortgage was given by the McLeod Artesian Well Company it was an insolvent corporation and had ceased to do business, and such a mortgage was a preference in favor of plaintiff over its other creditors under whom this appellant Fowler holds title to a portion of its property under attachment proceedings.

The laws of the state of Texas do not permit an insolvent corporation to prefer one creditor above another, and the chattel mortgage in question was void for the reason that it attempted to create a preference in plaintiff's favor over other creditors of the corporation.

Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. 86 Tex. 148, 22 L. R. A. 802.

The chattel mortgage having been given upon property which was at the time situated in the state of Texas, the parties then intending that any foreclosure thereof that might become necessary should be in the state of Texas, was controlled and governed by the laws of the state of Texas in determining the rights of the parties thereunder. In such cases the *lex fori* controls. The validity of a chattel mortgage is a question of local law.

Hall v. Harris, 11 Tex. 809; 7 Lawson, Rights, Rem. & Pr. §§ 3715, 3716; Burrill, Assignments, §§ 805, 306; *Queen Ins. Co. v. Jefferson Ice Co.* 64 Tex. 582; 2 Morawetz, Priv. Corp. §§ 959, 960, 964, 965, 967, 968, 970; Jones, Chat. Mortg. §§ 805-307, and note 1; *Etheridge v. Sperry*, 139 U. S. 276, 277, 35 L. ed. 176; *George T. Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 241, 34 L. ed. 348; 3 Am. & Eng. Enc. Law, pp. 578-578, and notes.

The laws of the state of Texas control the remedies for the enforcement of said chattel mortgage as between appellant Fowler, a citizen of the state of Texas, claiming title to property acquired under judicial process issued by one of the courts of Texas, on the one hand, and appellee, a citizen of another state, claiming a preference given by an insolvent corporation, which act contravenes the policy of the state of Texas, which forbids preferences by insolvent corporations.

Barnett v. Kinney, 147 U. S. 476, 37 L. ed. 247; Story, Confli. Laws, §§ 7, 20, 23, 98, 280, 326, 327, 525; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 150, 19 L. ed. 113.

When the plaintiff found that the property of the insolvent corporation, upon which she had a chattel mortgage, had been seized under attachments by local creditors, if she was not satisfied with the disposition thus about to be made of the property, she should have taken steps to have the property administered by a receiver.

Lang v. Dougherty, 74 Tex. 232; *Harrigan v. Quay* (Tex. Civ. App.) 27 S. W. 897; 2 Morawetz, Priv. Corp. § 864.

Messrs. Corrigan & Hughes, for defendants in error:

A party cannot claim that the property of an insolvent corporation is "a trust fund" for the benefit of all the creditors, and for this reason seek to avoid a chattel mortgage, executed by said corporation for the benefit of certain other creditors, and at the same time appropriate all of said property to himself, by legal proceedings, to wit, an attachment.

Lang v. Dougherty, 74 Tex. 232.

The chattel mortgage in controversy being made in the state of Iowa, by a corporation created by and domiciled in that state, being valid and legal by the laws of Iowa, and being executed in the manner and form as required by the laws of this state, and filed and registered as required by the laws of this state, will constitute a valid lien upon the property situated in this state in the absence of any law in force here prohibiting such a transfer.

Barnett v. Kinney, 147 U. S. 477, 37 L. ed. 248; *Weider v. Maddox*, 66 Tex. 372, 59 Am. Rep. 617; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589; *Cantu v. Bennett*, 39 Tex. 306; *Hall v. Harris*, 11 Tex. 809; *Butler v. Wendell*, 57 Mich. 62, 58 Am. Rep. 329; *Chafee v. Fourth Nat. Bank*, 71 Me. 514, 36 Am. Rep. 345; *Thurston v. Rosenfield*, 42 Mo. 474, 97 Am. Dec. 351; *Gautier v. Franklin*, 1 Tex. 732; 2 Morawetz, Priv. Corp. § 968; Cobbey, Chat. Mort. § 64, pp. 475, 477; Story, Confli. L. 263; 2 Kent, Com. p. 454; Iowa Code 1873, § 1058; *Manhattan L. Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 280; *Rue v. Missouri P. R. Co.* 74 Tex. 475.

A corporation carries its charter powers with it wherever it goes, whether it be chartered by a special act or by the general laws of the state creating it, and every person who deals

NOTE.—As to lawfulness of preference of creditors by insolvent corporations, see *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex.) 22 89 L. R. A.

L. A. 802, and note; also *Adams & W. Co. v. Deyette* (S. D.) 81 L. R. A. 497, and other cases cited in footnote thereto.

with such corporation is bound to take notice of the law of its creation, which was made for the control of its affairs.

Life Assn. of America v. Rundle (Relfe v. Rundle), 108 U. S. 222, 26 L. ed. 337; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020; *Ryan v. Missouri, K. & T. R. Co.*, 65 Tex. 13, 57 Am. Rep. 589; 2 Morawetz, Priv. Corp. §§ 963, 965; *Manhattan L. Ins. Co. v. Fields* (Tex. Civ. App.) 26 S. W. 380.

A corporation created under the General Laws of Texas after it has become insolvent and ceased to do business never to resume, has no right to prefer one creditor by mortgage of its property to the exclusion of others. This is not because there is any law in Texas that prohibits such preference, but because the law of Texas creating the corporation does not clothe it with authority to thus appropriate property. The McLeod Artesian Well Company, being incorporated under the laws of Iowa, and being granted such powers by its charter, its mortgage made in pursuance thereof, and conveying property in Texas to certain creditors, will be upheld.

Ibid.; *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 86 Tex. 143, 22 L. R. A. 802.

The court did not err in holding that the rights of appellee under said chattel mortgage were governed by the laws of Iowa instead of the laws of Texas.

Weider v. Maddox, 66 Tex. 372, 59 Am. Rep. 617; 2 Morawetz, Priv. Corp. § 962.

It does not rest with the discretion of the court to give or deny effect to this mortgage according as it may appear or not appear injurious to the rights of the citizenship of this state. Such matters should be a subject of legislative and not judicial discretion. This mortgage is valid here by the comity of the nation and not by the comity of the court.

Weider v. Maddox, 66 Tex. 377, 59 Am. Rep. 617; *Story*, Conf. L. 890; *Guillander v. Howell*, 85 N. Y. 659; 2 Morawetz, Priv. Corp. § 962.

Brown, J., delivered the opinion of the court:

The court of civil appeals made the following statement of the case and conclusions of fact: "On the 1st day of March, 1892, the McLeod Artesian Well Company, a private corporation created by the laws of Iowa, and domiciled there, executed to Mary E. Bell its note for \$1,000 for money loaned it by her, payable one year after date thereof. On the 3d day of June, 1893, the McLeod Artesian Well Company executed to Mary E. Bell a chattel mortgage, dated June 3, 1893, conveying to her certain property situated in Wichita Falls, Texas, belonging to said company, for the purpose of securing said debt. The mortgage was signed and acknowledged by John E. Craig, the president of said company, on the 3d day of June, 1893, in Iowa, and was sent by him to Rice B. Bell, secretary and treasurer of the said company, who was then temporarily stopping at Wichita Falls, Texas, who also signed and acknowledged said mortgage on the 21st day of June, 1893, at Wichita Falls, and deposited and filed the same on that day with the county clerk of Wichita county, Texas, to be registered as a chattel mortgage.

89 L. R. A.

At the date of the execution of this mortgage, the McLeod Artesian Well Company, by its same officers, executed two other mortgages, conveying this property and all its other property in Texas, except a few articles at Ft. Worth, Texas, of nominal value,—one to secure Mrs. Craig in the sum of \$2,000, and one to secure Mrs. Sanford in the sum of \$1,000. The McLeod Artesian Well Company is a corporation incorporated by the laws of Iowa in 1891, its stockholders all being residents of Iowa. It has always maintained its principal office at Keokuk, in the state of Iowa, and its president and its officers all reside in said state. Said mortgage was executed in the state of Iowa for the purpose of securing Iowa creditors. At the time of the execution of said mortgage the McLeod Artesian Well Company was insolvent, and had ceased to do business. The laws of Iowa allow an insolvent corporation that has ceased to do business to prefer its creditors. Such power is granted to it by the laws constituting its charter. Said mortgage in favor of Mary E. Bell was given on property situated in Wichita county, Texas, and the same was properly filed and registered by the clerk of said county on the 22d day of July, 1893; and after said mortgage had been properly filed, W. R. Kent brought suit in the county court of Wichita county, Texas, against the McLeod Artesian Well Company for \$972, and in said suit procured a writ of attachment, and caused it to be levied upon the property described in said mortgage, and after said judgment in said cause in his favor foreclosing said attachment had said property sold under an order of sale issued from said court on the 4th day of October, 1893, at which sale W. R. Kent bought in all of said property for the sum of \$300. Afterwards, to wit, on or about the 1st day of February, 1898, he sold said property, which was then situated in Wichita Falls, Texas, to J. W. Sparger, and Sparger sold it to J. B. Fowler, and delivered the same to him in Hill county, Texas. That at the time of said attachment and sales the mortgage of Mary E. Bell was on file in the office of the county clerk of Wichita county, Texas, and the property was also in said county. On the 6th day of October, 1893, the appellee Mary E. Bell brought this suit in the district court of Wichita county, Texas, against the McLeod Artesian Well Company, on said note for \$1,000, interest, and attorney's fees, and to foreclose said chattel mortgage given to secure said note. W. R. Kent was made a party defendant in this suit. On the 27th day of March, 1894, the appellees filed an amended original petition in this suit, in which they made J. B. Fowler a party defendant, alleging that he had converted a portion of said property for which Mary E. Bell had a mortgage, and asked for a judgment against said Fowler for the value thereof. On the 24th day of November, 1894, the case was tried before the district judge without a jury, wherein he rendered a judgment in favor of the appellee against said Artesian Well Company, for the amount of her debt, interest, and attorney's fees; also foreclosing her said mortgage lien as against all defendants; also rendered judgment in favor of appellees against defendant J. B. Fowler for the value of the property taken by

him. J. B. Fowler alone prosecutes this appeal."

The only question which we find it necessary to consider is, Was the mortgage given by the McLeod Artesian Well Company in favor of Mrs. Bell valid? If it was not, she cannot maintain this suit to foreclose it, whether the defendant acquired title or not under the judgment foreclosing the attachment lien. The question involved is this: Could the McLeod Artesian Well Company, a corporation doing business in this state, but created under the laws of the state of Iowa, being insolvent, and having ceased to do business, make a mortgage upon its property in this state, giving a preference to one or more creditors over others, which mortgage a corporation created under the laws of this state could not have made under similar conditions? In other words, do the general laws of another state govern in the interpretation of a contract made by a corporation of such state with reference to its property situated in this state, when such contract is in violation of the laws or public policy of this state? Mr. Thompson, in his recent work on Corporations (vol. 6, § 7885), states the rule, which we believe to be correct, as follows: "Without attempting to enumerate, in a single section, all the cases to which this comity does not extend, it may be observed, in the first place, that it does not extend so far as to concede to foreign corporations the powers which their own charters do not permit them to exercise; nor so far as to permit a foreign corporation to exercise powers within the state which a domestic corporation of the same kind is not permitted to exercise under the Constitution and policy of the state." This rule is well sustained by the authorities, of which we cite the following: *Falls v. United States Sav. Loan & Bldg. Co.* 97 Ala. 417, 24 L. R. A. 174; *Gulford v. Western U. Telg. Co.* 59 Minn. 332; *Hutchins v. New England Coal Min. Co.* 4 Allen, 580; *Milnor v. New York & N. H. R. Co.* 53 N. Y. 863; *Rorer, Interstate Law*, 288. Morawetz on Private Corporations (§ 967, vol. 2) states the proposition thus: "It is the charter alone which is recognized by the law of comity, and not the general legislation of the state in which the corporation was formed. The word 'charter' is here used to signify the agreement between the shareholders of the corporation, whether this agreement be contained in a special act of the legislature, or in articles of association, or in either of these taken in connection with certain general laws of the state. The law of comity merely enables the corporators to exercise the franchise of acting in a corporate capacity in foreign states, and the extent of this franchise is determined by the agreement entered into when the charter was accepted. The laws of the state where the corporation was formed by the agreement of the corporators are regarded only so far as they determine the scope and validity of this agreement itself. . . . The general laws and regulations of a state are intended to govern only within the limits of the state enacting them, and the state would have no power to give them extraterritorial force. . . . It follows, therefore, that if a statute enacted by a state,—whether as a general law, or as a special provision in the charter of a corpora-

tion,—was enacted for the enforcement of a local policy only, it will not be presumed that such statutory provision was intended by the state, or by the shareholders forming the corporation, to enter into the charter contract, and to regulate the company in its transactions outside of the state; and such enactment will, therefore, not affect the validity of the dealings of the company in foreign states." Applying these principles of law to the facts of this case, it follows that, if the mortgage in question was made contrary to the laws of this state, or to its public policy, it is void, and conferred no rights upon the mortgagee. A corporation created in this state, which has become insolvent, and has ceased to carry on its business, cannot make any disposition of its property which gives a preference to one or more creditors over others, for the reason that upon insolvency and cessation of the business the assets of the corporation by operation of the law become a trust fund in the hands of its directors, to be disposed of for the benefit of its creditors; and any disposition which discriminates between such creditors is a violation of that trust. *Lang v. Dougherty*, 74 Tex. 226; *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* 86 Tenn. 143, 22 L. R. A. 802. If the McLeod Artesian Well Company had been a domestic corporation, and had made the mortgage in question under the same conditions, it would be void, because contrary to the laws and public policy of this state, as declared in the decision of its court, as above cited; and it must be so held in this case, unless its validity can be supported upon the ground that it is sustained by the laws of the state of Iowa.

Counsel for the defendants in error claim that the mortgage in question in this case is valid for the following reasons: (1) That there is no law in Texas which renders such transaction invalid, but that the decisions of our courts, and especially that of *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* rest upon the ground that the statutes of this state do not confer upon corporations power to make such instruments. (2) Because the transaction is to be governed by the laws of Iowa, where the contract was made, and in which state it would be valid, and not by the laws of Texas. In the case of *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* cited above, Judge Stayton reviewed the authorities exhaustively to show that an insolvent corporation which had ceased to do business could not make a mortgage giving preference to some creditors over others, for the reason which we have before stated, that upon the happening of such conditions the directors of the corporation by operation of law become trustees charged with the distribution of its assets among all of its creditors, and, thus being constituted trustees, they could not deprive the beneficiaries of that trust of their proportionate part of the assets of the corporation by means of conveyances of the property so held to one or more of the creditors in preference to the others. The decision is not placed upon the ground that the authority is not conferred upon the corporation by the laws of this state, as is insisted by counsel for the defendants in error, but in that case it was insisted that a corporation had the inherent right at common law to make such

a conveyance. Judge Stayton conclusively showed from the best-considered authorities that the rule claimed applied only to common-law corporations, and not to those created by statute; and then, in order to conclusively show that the rule announced as applicable to insolvent corporations applied in this state under such circumstances, he examined our statutes, from which examination it appeared that no such authority had been either directly or by implication conferred upon corporations in this state. That case clearly settled the law upon this question in Texas, and it is no longer open to controversy that an insolvent corporation cannot, in this state, when it has ceased to perform the business for which it was created, dispose of its assets so as to deprive its creditors of a fair and just distribution of the same.

In support of the second proposition above stated, it is claimed that, this mortgage having been executed in Iowa, where the law permitted such disposition of the property, it is to be governed in its construction and enforcement by the laws of that state. We will remark, however, that it was made with a view to its enforcement in Texas, and embraced alone property situated in Texas. In support of the position taken by counsel, above stated, the following cases are cited: *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589; *Weider v. Maddox*, 66 Tex. 372, 59 Am. Rep. 617; *Rue v. Missouri P. R. Co.* 74 Tex. 479. We will briefly review some of the cases cited by the defendants in error, which, in our opinion, are not in point as authority upon the question here involved. In the case of *Ryan v. Missouri, K. & T. R. Co.* the question was whether the law of Missouri or the law of Texas should govern in the construction of a contract for the shipment of goods from St. Louis into Texas over the Missouri, Kansas, & Texas Railroad. It was a case in which performance of the contract began in Missouri and terminated in Texas, and the court held that under such circumstances the law of the place of making the contract would be applicable. In *Weider v. Maddox* an assignment made in the state of Missouri in accordance with the laws of that state, which embraced personal property situated in Texas, was upheld against the lien of an attachment levied in this state after the assignment was executed and recorded; but it was expressly shown by the opinion that the terms of the assignment did not in any way conflict with the assignment law of this state. *Rue v. Missouri P. R. Co.* involved the validity of a contract made under these circumstances: Talmage, the general manager of the railroad company, entered into a contract with Rue, by which the latter was appointed stock agent for the railroad company in Texas at a salary of \$2,000 a year, and, in addition thereto, the stock yards and feeding pens at several points in Texas and the Indian territory were leased to Rue for a number of years, and he given the exclusive right to feed cattle shipped over that railroad. By the terms of the contract, the profits of this business were to be divided between Rue and Talmage, which was in violation of the Constitution and laws of the state of Missouri, in which state the contract was made, and in which state likewise the railroad company was chartered. There

was no law in Texas which would uphold such a contract as that made between these parties. The contract was so obviously contrary to good morals, fair dealing, and honesty towards the railroad company on the part of its officer, participated in by Rue, that it would seem to have been contrary to the public policy of this state, and therefore there was no conflict between the law of Missouri and the laws of public policy of Texas upon this question. We are not called upon in this case to approve or dissent from the opinion delivered in that case. It is not authority in the case now before the court, and cannot be held to control or influence a decision of the question now under consideration.

Defendants in error's counsel cite *Re Prime*, 136 N. Y. 347, 18 L. R. A. 718, as relevant to the questions under discussion. The only point in that case which could be considered as in the remotest degree akin to this is thus expressed in the syllabus of the case: "A state statute granting powers and privileges to corporations, in the absence of plain indications to the contrary appearing on the face of the act, applies only to corporations created by the state." Manifestly that case has no relevancy to any question now before the court. In *Barth v. Backus*, 140 N. Y. 230, 28 L. R. A. 47, cited by counsel, the court refused to sustain an assignment, made by a Wisconsin corporation doing business in the city of New York, of personal property in that state, because the law of Wisconsin upon the subject of assignments required creditors to accept the assignment and discharge the assignor, and was considered by the New York court to be in the nature of a bankrupt or insolvent law. If at all applicable, that case does not sustain the contention of the defendants in error. We deem it unnecessary to review the case at greater length. We are earnestly asked to carefully examine *Vanderpool v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, which, upon careful examination, we find to be a case in which a corporation created under the laws of New Jersey, doing business in the state of New York, made a general assignment for the benefit of all of its creditors without preferences. An attachment was levied in the state of New York upon the property assigned, and the assignee brought suit to recover damages for the levy upon and sale of the property. The defendant in that suit claimed that the assignment was void on account of the provisions of a statute of the state, which, among other things, provided, "that no corporation shall make any transfer or assignment to any person whatever in contemplation of its insolvency, and every such assignment is declared to be void." It was claimed that the foreign corporation was embraced in the general language of this statute. The court held that the law above quoted did not apply to foreign corporations. That court also held that the right to make such an assignment as was made in that case was inherent in all corporations unless prohibited, and, not being prohibited to the foreign corporation by the terms of the statute, the assignment was not violative of any law in the state of New York. There are two marked distinctions between that case and this: First. The instru-

ment in that case was of a character which the laws of New York permitted to be made, and which the courts of that state held all corporations had the inherent power to make, unless restrained therefrom. In this case the instrument is one which the courts of this state held that no corporation has the power to make unless authorized by statute of this state. Second. In that case the instrument was a general assignment distributing all of the assets of the corporation equally among the creditors, which is not denounced by any decision in this state; while the instrument in this suit is one which is not approved by the New York case, but is directly and emphatically denounced by the laws of this state as embodied in the decision of its courts. The two cases are so dissimilar that the one is not authority in the consideration of the other.

It is also claimed by the defendants in error that, since the plaintiff in error is not seeking to have the property equally distributed among all the creditors of the corporation, he cannot prevail in this suit, and *Lang v. Dougherty*, 74 Tex. 226, is cited in support of that proposition. The defendants in error were plaintiffs in the lower court, in which they did not seek an equal distribution of the proceeds of the property among the creditors of the corporation, but sought to apply it all to the satisfaction of their debt. The doctrine announced in the case last cited applies with great force to the rights of the defendants in error, and effectually denies to them any right to recover in this case, the mortgage which they are seeking to foreclose being held invalid. The fact that the plaintiff in the attachment suit proceeded contrary to law, and appropriated to his exclusive use a part of the trust fund, will not justify the courts in taking from the purchaser that which was unlawfully appropriated, and, with no greater legal right in them, turning the property over to the defendants in error, to be by them applied to their exclusive benefit. If the power claimed for the artesian well company had been explicitly expressed in its charter, it could not have been exercised in this state by that corporation, because in direct conflict with the laws and policy of this state; and in such conflict the law of this state must prevail over the foreign law. *Falls v. United States Sav. Loan & Bldg. Co.* 97 Ala. 417, 24 L. R. A. 174. We hold that the mortgage executed by the McLeod Artesian Well Company to Mrs. Bell was null and void, and that the district court erred in foreclosing it upon the property embraced therein, and in giving judgment against the defendant Fowler for the said property, or the value of any part thereof, and that the court of civil appeals erred in affirming the said judgment.

It is therefore ordered that the judgments of the District Court and the Court of Civil Appeals be reversed as between the plaintiff in error and the defendants in error, and the judgment be here rendered that no foreclosure of the said mortgage be had upon the said property, and that the said J. B. Fowler, the plaintiff in error, go hence without day, and that he recover of the defendants in error Mary E. Bell and Rice H. Bell all costs in this behalf expended in all of the courts.

39 L. R. A.

City of SHERMAN, *Plff. in Err.*,

v.
R. LANGHAM *et al.*

(.....Tex.....)

1. The validity of the original cause of action cannot be questioned in a mandamus proceeding to enforce performance of a judgment.
2. A judgment upon a tort is not a contract within the meaning of the constitutional provision against impairing the obligation of contracts.
3. A statute reducing the power of a city to levy taxes to pay a judgment does not deprive the owner of the judgment of his property therein without due process of law.

(March 29, 1897.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Grayson County in favor of plaintiffs in a proceeding brought to enforce a judgment which had been recovered by plaintiff against defendant. *Reversed.*

The facts are stated in the opinion.

Messrs. G. P. Webb and Sidney Wilson for plaintiff in error.

Messrs. R. R. Haslewood and Wilkins & Vinson for defendants in error.

Denman, J., delivered the opinion of the court:

Langham et al., being the owners of a judgment for \$1,164, rendered against the city of Sherman in the district court of Grayson county, on the 29th day of March, 1889, in an action to recover damages for an injury inflicted in 1888, instituted this proceeding September 6, 1894, to revive said judgment, and seeking an order of court compelling the city to pay same, "and, if necessary, to levy a special tax in an amount sufficient to pay said judgment, interest and costs, and apply the proceeds of such levy to the payment of said judgment," and for general relief. From the pleadings and agreed statement, it appears that Sherman was incorporated as a city of 1,000 inhabitants or more, under the general law, but the date of its incorporation is not given; that in 1894 acting under the assumption that it contained less than 10,000 inhabitants, its officers levied, for various purposes, taxes aggregating \$1.25 on the \$100 valuation; that at the date of the trial of this cause in the court below, on the 29th day of April, 1895, it contained more than 10,000 inhabitants, and no tax for any purpose had been levied for the year 1895; that the revenues derived from said tax of 1894 and other sources were sufficient to meet the current expenses of the city for that year, as it was then maintained, said city then acting under the general law for cities of less than 10,000 inhabitants; that the value of the property within the corporate limits is \$4,600,000. There is no evidence in the record

NOTE.—As to the impairment of obligation of a judgment, see also note to *Rockwell v. Butler* (Colo.) 17 L. R. A. 611.

as to what the expenses of the city would be for the year 1895 or any subsequent year. The trial court entered a judgment for the plaintiffs against the city reviving the original judgment, and directing a peremptory writ of mandamus to issue, commanding the officers of the city and their successors "to levy and collect a sufficient *ad valorem* tax upon the property situated within the corporate limits of said city of Sherman, and subject to taxation by said city of Sherman, to pay said judgment, interest, and costs, and the costs of this suit;" said levy to be made at the same time that the other taxes imposed by said city are levied for the year 1895. On appeal by the city to the court of civil appeals, that court affirmed the judgment of the trial court, and ordered that the officers of said city "do proceed at once to levy and collect a sufficient *ad valorem* tax upon the property situated within the corporate limits of said city of Sherman to pay said judgment, interest and costs, and the cost of this appeal." The city has brought the case to this court upon writ of error, assigning as error the action of the court of civil appeals "in affirming the judgment of the trial court and granting the writ of mandamus."

That part of article 487, Rev. Stat. 1895, which relates to the question under consideration, is as follows: "Cities having more than 10,000 inhabitants may levy, assess, and collect taxes not exceeding $1\frac{1}{2}$ per cent on the assessed value of real and personal estate and property in the city, not exempt from taxation by the Constitution and laws of the state . . . and such cities are hereby authorized to levy, assess, and collect a further tax of 25 cents on the \$100 worth of property for the purpose of paying the debts of such city lawfully contracted prior to the 1st day of January, 1880, not to include any bonded debt." In awarding the mandamus the trial court and court of civil appeals proceeded upon the theory that, since the city did not show that it would be necessary to exhaust its entire general taxing power of $1\frac{1}{2}$ per cent in order to raise sufficient funds to defray its current expenses, it has not met the prima facie case made by the plaintiffs by showing their judgment unpaid and unprovided for, and the right of the city to levy said tax. Where the city council, in good faith, in the exercise of the discretion conferred upon them by law, fix the current expenses of the city at such a sum that it becomes necessary to exhaust its taxing power, not appropriated to other purposes, to raise same, a general creditor cannot compel the appropriation of a portion of such taxing power, or the proceeds thereof, to the payment of his claim, to the exclusion of such expenses. All persons who deal or come in contact with the city, without securing the setting aside, in the manner provided by law, of a portion of its taxing power, for the satisfaction of their claims, are charged with notice that the very law which renders the city liable to them, and which might have denied all liability whatever, fixes the current expenses of each year as a first charge on its general revenues for that year. To adopt any other rule "would be to destroy the city." In such case the creditor would have to wait until a surplus should accrue, just as any other creditor has to wait upon an impecunious debtor.

And every creditor is presumed to know the extent of the power to tax, and the means to pay on the part of the city at the time of the contract." *Tucker v. Raleigh*, 75 N. C. 267. If he be not willing to take the only chance of payment held out to him by the very law to which he must look for the city's liability he has the privilege of not so dealing or coming in contact with the city as to render it liable to him either by contract or tort. If, in this case, the council had in good faith, at the date of the trial below, determined the various sums necessary for the various items of current expenses, so as to aggregate such an amount that it would require a tax of $1\frac{1}{2}$ per cent to raise same, and had levied such tax therefor, it is clear that the court could not have compelled them to set aside any portion of said levy or fund to be derived therefrom for the payment of this judgment, to the exclusion of any part of such current expenses; for the court has no power, even at the suit of a creditor, to control or review the honest discretion of the council in determining whether they will in a given year expend a portion of its revenues for a given thing properly classed as current expenses or the amount they will pay therefor. *Denison v. Foster* (Tex. Civ. App.) 37 S. W. 167, in which this court refused an application for writ of error; *Tucker v. Raleigh*, 75 N. C. 267; *Cromartie v. Bladen Comrs.* 87 N. C. 184; *East St. Louis v. United States*, *Zebble*, 110 U. S. 321, 28 L. ed. 162.

It follows that the trial court could not forestall the action of the council, by ordering it in advance to levy a portion of said $1\frac{1}{2}$ per cent to pay this judgment; for such order, if valid, would be, in effect, a judicial determination either that the current expenses were not a preference claim on the funds to be derived from such taxing power, or that the council to be assembled for that purpose could not, in the exercise of their honest discretion, fix the amount to be expended for current expenses at such a sum as to require a tax of $1\frac{1}{2}$ per cent to raise same. The court, by entering the peremptory order to levy out of its $1\frac{1}{2}$ per cent taxing power a sufficient tax to pay the judgment, necessarily to that extent forbade and attempted to control the council in the exercise of its discretion in determining the amount to be raised and expended for current expenses. This, we have seen, it has no power to do. It is no answer to say that it had only levied $1\frac{1}{2}$ per cent for 1894, and therefrom had realized sufficient to meet the expenses incurred as the city was then administered, for, in the discretion of the council, such expenses, both as to items and amounts, may vary from year to year. If this were not true, a past year could be made to govern all future ones, and the court could virtually destroy the discretion of the council by ordering the appropriation for a series of years of all that part of the taxing power not exercised in such past year to the payment of such judgments as this. Upon this view of the law, the writ of error was granted. We are of opinion, however, that the court might have awarded its writ, directing the levy of the full $1\frac{1}{2}$ per cent each year, and the payment of the judgment each year of such of the sums realized from such tax as might not be necessary to pay such claims as were already a charge on

said taxing power, such as interest and sinking fund on bonds, and such current expenses as the council, in its discretion, might incur; or might have ordered the exercise, each year, to pay the judgment, of such portion of said 1½ per cent taxing power as might be left after the council had annually made therefrom such levy as, in its discretion, was necessary to raise funds for current expenses, and such levies as were already provided for out of said taxing power, such as provision made for interest and sinking fund on bonds. Therefore, if the city had no other taxing power applicable to this judgment than the 1½ per cent, as seems to be conceded by counsel on both sides, and assumed by both of said courts in the disposition of the case, we would be constrained to reform the judgment awarding the mandamus in accordance with the views above expressed.

Since the submission of the cause, we have reached the conclusion that the judgment of the court of civil appeals must be affirmed upon the ground that the latter portion of the statute above quoted, authorizing the city "to levy, assess, and collect a further tax of 25 cents on the \$100 worth of property, for the purpose of paying the debts of such city lawfully contracted, prior to the 1st day of January, 1889, not to include any bonded debt," affords ample warrant for same. The sum necessary to pay this judgment can be raised within the limits of such taxing power. The record does not show that any portion of it has been appropriated to any other claim, and the council have no discretion or power to levy any portion thereof for any purpose other than the payment of "debts lawfully contracted prior to the 1st day of January, 1889, not to include any bonded debt." The only question that can arise is whether this judgment is a "debt lawfully contracted prior to the 1st day of January, 1889," within the meaning of said statute. The broad and just purpose of the statute, which was enacted in 1889, was to enable the cities becoming subject to its terms to pay off their lawful obligations incurred prior to January 1 of that year, out of funds to be raised by the exercise of this special taxing power, without being compelled to resort to their general and permanent taxing power of 1½ per cent, intended to meet their fixed charges such as current yearly expenses and bonded debts. It being incorporated into the Revised Statutes, which, in its "Final Title," declares that "the provisions thereof shall be liberally construed, with a view to effect their objects and to promote justice," we are not at liberty to adopt a narrow construction of same, which would either deprive the city of the power of paying a judgment the justness of which is not questioned without resorting to its general revenues, which it alleges are all needed for current expenses and other fixed charges, or force plaintiffs below to rely upon the precarious remedy above suggested, as the only one open to them for the collection of their claim.

Applying a liberal rule of construction to the statute to effect its purpose, we are of opinion that the liability of the city to plaintiffs began at the date of the accrual of the cause of action in 1888, and not at the date of the judicial ascertainment thereof, by the rendition of the judgment in 1889; that the word

"debts," as used in the statute, is broad enough to include a liability arising out of either tort or contract (*Barber v. East Dallas*, 83 Tex. 147); that the word "contracted" is used in the statute in the sense of "incurred" (*Smith v. Omans*, 17 Wis. 395); and that the legality of the obligation was settled by the rendition of the judgment. It results that the judgment in this case is a debt of the city "lawfully contracted prior to the 1st day of January, 1889," and that the council has no discretion but to levy, under said special power of taxation, a tax sufficient to pay same; and therefore the judgment of the court of civil appeals must be affirmed, though we base our conclusion upon different grounds from those presented to and relied upon by that court as justifying the award of the writ.

Brown, J., not sitting.

A petition for rehearing having been filed, **Denman, J.,** on November 22, 1897, handed down the following response:

We only deem it necessary to notice two of the grounds for rehearing. The first seeks to question the validity of the original cause of action. This was settled adversely to the city by the rendition of the original judgment, and the question cannot be raised collaterally in this proceeding to enforce such judgment by mandamus. *United States, Ranger, v. New Orleans*, 98 U. S. 381, 25 L. ed. 225. The second raises the question—not heretofore presented—that pending this appeal the legislature, by special act, of which, by its terms, the courts are required to take judicial notice (*Special Laws 1897*, p. 41), granted to the city of Sherman a special charter, which declares that it shall levy no tax in excess of 1½ per cent of the taxable property, and distributes such total taxing power among various objects, allowing not to exceed 30 cents on the \$100 assessed taxable values "for general purposes and current expense" (§§ 97-102), and that since this act removes the city from the operation of the provision of the Revised Statutes under which we held in the original opinion that the city was authorized to levy a special tax of 25 cents to pay off indebtedness contracted prior to the 1st day of January, 1889, therefore we were in error in affirming the judgment of the court of civil appeals, ordering the levy of a sufficient tax to pay the judgment. To this it is objected (1) that the judgment is a contract, and that the special charter reducing the power of the city to levy taxes to pay the same impairs its obligation, and is therefore prohibited by the Constitution of the United States; and (2) that such charter deprives the owner of the judgment of his property therein, without due process of law. It has been settled by the Supreme Court of the United States that a judgment founded upon a tort is not a contract, within the meaning of the constitutional provision invoked. *Louisiana, Folsom Bros., v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, cited in *Louisiana, Nelson, v. Police Jury*, 111 U. S. 716, 28 L. ed. 574. And hence the first objection is not well taken, even if it should be held that a person contracting a debt with a city of less than 10,000 acquires a contract right in

the increased taxing power conferred by the charter when such city reaches a population of 10,000. We also understand the decision of that learned court in the case cited to be adverse to the second objection urged above, for it was there said: "The clause of the 14th Amendment cited is equally inoperative to restrain the action of the state. Conceding that the judgments, though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property in the sense that they are capable of ownership and may have a pecuniary value, the relators cannot be said to be deprived of them so long as they continue an existing liability against the city. Although the present limitation of the taxing power of the city may prevent the receipt of sufficient funds to pay the judgments, the legislature of the state may, upon proper appeal, make other provision for their satisfaction. The judgments may also perhaps be used by the relators or their assignees as offsets to demands of the city; at least it is possible that they may be available in various ways. Be this as it may, the relators have no such vested right in the taxing power of the city as to render its diminution by the state, to a degree affecting the present collection of their judgments, a deprivation of their property in the sense of the constitutional prohibition. A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it. The cases in which we have held that the taxing power of a municipality continues, notwithstanding a legislative act of limitation or repeal, are founded upon contracts; and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts, existing when they were made, have been by such legislation impaired. The usual mode in which municipal bodies meet their pecuniary contracts is by taxation. And when, upon the faith that such taxation will be levied, contracts have been made, the constitutional inhibition has been held to restrain the state from repealing or diminishing the power of the corporation so as to deprive the holder of the contract of all adequate and efficacious remedy. As we have often said, the power of taxation belongs exclusively to the legislative department of the government, and the extent to which it shall be delegated to a municipal body is a matter of discretion, and may be limited or revoked at the pleasure of the legislature. But, as we held in *United States, Wolff, v. New Orleans*, at October term, 1880, 103 U. S. 858, 26 L. ed. 395, and repeated in *Louisiana, Southern Bank, v. Pilsbury*, at October term, 1881, 105 U. S. 278, 26 L. ed. 1090, in both cases by the unanimous judgment of the court, the legislation in that respect is subject to this qualification, which attends all state legislation, that it shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly as a consequence of legitimate measures taken, as will

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sometimes happen, but directly by operating upon those means, is prohibited by the Constitution and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. . . . However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts." It is true that the court withheld the expression of any opinion as to "the effect of legislation upon the means of enforcing an ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured;" but we do not understand such reservation to affect cities like those of this state, which have no property, and against which no execution can issue, and whose only means of payment is the levy and collection of taxes upon property of others within its limits. In such cases the judgments are virtually against the mass of taxable property within the city; and thereby a legislative policy of compelling the election of proper officers, and securing the vigilant performance of their duties, is sought to be made effective by imposing upon such property, which is assumed to be owned by their constituents, liability for the tortious acts of such officers. This would seem to be, in principle, the same policy that imposed such liability for damages done by a mob. It is very questionable if such policy is founded in real justice, for it is not certain that in actual practice the officers are elected by the owners of the property, a majority of whom may have voted for others. However this may be, it is a mere matter of governmental policy whether it is deemed wise to impose upon such property liability for torts, for the commission of which the owners thereof are not responsible; and, if such policy be changed, the injured party has no legal cause of complaint. It matters not in what shape his claim be, when such change is made it falls with the policy. His judgment can be of no higher dignity than his cause of action, for the judgment is a mere determination of its existence and extent. If the claim can be destroyed by legislation, its collection can be impeded by reducing the taxing power of the city.

We are therefore of opinion that we erred in affirming the judgment, upon the ground that the city had the power to levy the special tax referred to above, and that according to the reasoning of the first portion of our former opinion herein, and the views above expressed, *the motion for rehearing must be granted, and the judgments of the Trial Court and Court of Civil Appeals be set aside*, and judgment here rendered directing the officers of the city to levy the full 80 cents on the \$100 referred to above, as allowed by its special charter, each year, until the judgment is paid, and to pay over on such judgment each year such of the sums realized from such tax as may not be necessary to defray current expenses.

Brown, J., not sitting.

Clarence EDWARDS, Appt.,

v.

STATE of Texas.

(..... Tex.)

Conviction for assault with intent to murder cannot be had in case the accused was at the time of committing the deed insane because of the recent voluntary use of cocaine, morphine, and whisky, although the statute provides that insanity from the voluntary recent use of intoxicating liquor shall be no defense.

(December 1, 1897.)

A PPEAL by defendant from a judgment of the District Court for Harrison County convicting him of an assault with intent to murder. *Reversed.*

NOTE.—*Morphine and other additions as affecting responsibility and capacity.*

- I. *Scope and general view of the subject.*
- II. *Effect on criminal responsibility.*
- III. *Effect on capacity to contract.*
- IV. *Effect on testamentary capacity.*
- V. *As a ground for divorce.*
- VI. *As affecting insurance.*
- VII. *As affecting competency of witness.*

I. Scope and general view of the subject.

This note is limited to additions other than alcoholic. Addition to the use of drugs producing exhilaration, excitement, or stupor is not drunkenness or intoxication within the legal meaning of those terms.

Thus, the voluntary use of chloroform, habitually indulged in, and habitual intoxication therefrom, do not make a person a common drunkard, and expose him to the penalties prescribed by law therefor, or for disorderly conduct. *Com. v. Whitney*, 11 Cush. 477.

And addition to the use of opium or morphine is not drunkenness which will authorize divorce under a provision for divorce for drunkenness. See *infra*, V.

But such additions are closely analogous to drunkenness or intoxication, and appear to have been deemed subject to the same rules with relation to their effect upon responsibility and capacity, and with relation to the evidence by which they may be established.

Thus, one who has seen a person many times in a certain condition resulting from the use of a drug may give his opinion, where he finds the same condition existing, that it was caused by the same drug, whether he be an expert or not. *Burt v. Burt*, 168 Mass. 204.

And medical or other witnesses who have been with a person for a long period of time, and are familiar with her habits as to the use of morphine and its effect upon her, may be allowed to state their opinions as to whether at the various times when they saw her she was under its influence. *Burt v. Burt*, 168 Mass. 204.

So, the incapacity arising from the use of morphine by one who did not have the habit fixed upon him is but temporary, and there is no presumption in favor of a continuance of such incapacity. *Camp v. Shaw*, 52 Ill. App. 241.

But when a will is made upon a death bed and shortly before death, and delirium or stupor from drugs is shown, there is no presumption that it was made during a lucid interval, though such intervals are shown to have existed. *Elliott v. Welby*, 13 Mo. App. 19.

As to rules with relation to responsibility and

The facts are stated in the opinion.

Messrs. Webster Blocker and Pope & Lane for appellant.

Mr. John B. Carter, for the State:

Temporary insanity produced by the recent voluntary use of the drugs cocaine and morphine is no defense to crime, but such temporary insanity may be considered by the jury in mitigation of the punishment to be assessed for the act committed.

Wilcox v. State, 94 Tenn. 106.

The excessive recent use of intoxicating liquors producing temporary insanity will not reduce an assault with intent to murder to an aggravated assault.

The habitual use of morphine and cocaine, or either of them, and the recent use of intoxicating liquors combined, producing temporary insanity, will not reduce an assault with intent to murder to an aggravated assault.

capacity with reference to particular subjects, see following subdivisions of this note.

II. Effect on criminal responsibility.

The fact that a person committing a homicide was in a frenzy produced by an overdose of morphine administered to him as a medicine is a complete defense on a prosecution therefor. *State v. Rippey*, 104 N. C. 752.

And evidence as to what effect deprivation of an accustomed supply of opium would have upon the mind of the accused is admissible in a prosecution for larceny, where it appeared that he was addicted to the habitual and excessive use of opium in some of its forms, and there was evidence from which it might be inferred that at the time of the larceny he had been deprived of his accustomed supply. *Rogers v. State*, 33 Ind. 543.

Refusal to give an instruction in a prosecution for murder, in which it was claimed that the defendant was insane, and that his insanity was caused by the use of morphine, referring to morphine as a cause for such supposed insanity, is not error, however, where ample instructions with regard to insanity and diseases of the mind were given, though without mentioning any specific drug or liquor as the cause. *State v. Mahn*, 25 Kan. 182.

But a general charge in a criminal prosecution on the question of insanity, mentioning only the theory of delirium tremens, is not proper where there was testimony to show hereditary insanity, permanent insanity produced by the long and continuous use of alcoholic spirits, delirium tremens, and temporary insanity or frenzy caused by an overdose of morphine administered as a medicine. Equal prominence should have been given to all of the theories of defense legitimately arising on the testimony. *State v. Rippey*, 104 N. C. 752.

And refusal to instruct the jury in a criminal prosecution in which there was evidence of temporary insanity or frenzy caused by an overdose of morphine, that if the prisoner at the time of the homicide was in a state of mind that rendered him incapable of comprehending the criminal character of his act, and his incapacity was the result of an overdose of a drug he had taken, he should be acquitted, is error, though the court did instruct that insanity is a complete defense to all criminal acts committed under its influence, whether permanent or temporary, and from whatever cause produced. *State v. Rippey*, 104 N. C. 752.

III. Effect on capacity to contract.

A release given by the plaintiff in an action for damages for a personal injury when he was so much under the influence of opiates taken to allevi-

Penal Code, art. 41, and notes 1-4; Willson's Crim. Forms, 4th ed. art. 41; *Wilcox v. State*, 94 Tenn. 106.

No stage of insanity produced by the voluntary recent use of cocaine, morphine, or intoxicating liquors, either or all combined, will excuse one for the commission of crime.

Willson's Crim. Forms, 4th ed. art. 41, and notes thereunder; *Wilcox v. State*, 94 Tenn. 106; *United States v. Drew*, 5 Mason, 28; 4 Bl. Com. pp. 25, 26; 1 Hale, P. C. p. 30.

Mr. Mann Trice also for the State.

Henderson, J., delivered the opinion of the court:

Appellant was convicted of an assault with intent to murder, and his punishment assessed at three years in the penitentiary; hence this appeal.

Appellant's principal defense was insanity.

ate his pain caused by his injury that he was mentally incapacitated to contract, is voidable, and not a defense in such action. *Chicago, R. I. & P. R. Co. v. Doyle*, 18 Kan. 58.

And where he was thereby mentally incapacitated to contract he is not bound to offer to pay back the money received at the time of giving the release as a condition precedent to his right to recover. *Chicago, R. I. & P. R. Co. v. Doyle*, 18 Kan. 58.

So, a deed will be set aside where the grantor when he made it had taken large quantities of anodynes consisting of spirituous liquors and morphine administered under medical prescriptions to allay pain, and was in a weak mental and physical condition and incapacitated from doing business, and the grantee took advantage of such condition through fraud and undue influence, while the grantor had no legal advice, and the only consideration was the assumption of a mortgage on the premises conveyed and a debt owed by the grantor. *Nielson v. Laffin*, 50 N. Y. S. R. 277.

IV. Effect on testamentary capacity.

Proof that a testatrix was addicted to the use of morphia, though useful in ascertaining the cause of actual mental unsoundness, is of no avail to establish its existence unless the other proof in the case clearly shows that it was really present. *Miller v. Oestrich*, 157 Pa. 264; *McCullough's Will*, 35 Pittsb. L. J. 169.

And proof that, during a protracted illness of the testator, opium in moderate doses was administered under directions of her attending physician, to alleviate her pain, will not invalidate her will made during such illness, in the absence of proof that the drug did affect her mental powers further than to cause sleepiness or that she was at all affected by it at the time. *Re Glockner*, 17 N. Y. S. R. 798.

And evidence that a testatrix was addicted to the use of morphia, taking it in moderate quantities for the purpose of obtaining relief from excessive pain resulting from severe and long-continued chronic rheumatism, and at times to quiet restlessness and obtain sleep, and that in a few instances she had delusions as to seeing objects about her that had no existence, which might be accounted for as resulting from the use of morphia, and that she made frequent gifts of money and specific articles to those about her, in two instances giving away valuable real estate, does not show testamentary incapacity. *Miller v. Oestrich*, 157 Pa. 264.

So, the will of a testator is not invalidated by the fact that morphia and atropia were given him, and that quinine was occasionally administered to allay pain, and that at times they would produce a stupor incapacitating him from performing intelligent

He offered testimony tending to show that at the time of the alleged offense he was insane. The evidence shows that for a considerable length of time—perhaps several years—he had been addicted to the use of morphine, and for the last eighteen months to the use of cocaine; and he was also addicted to the use of whisky. Some three or four days prior to the assault he had been confined to his home under the attention of a physician; had been taking morphine and cocaine, and also drinking whisky. On the same day, prior to the assault, which occurred about 4 o'clock in the afternoon, defendant had taken four or five doses of cocaine, several doses of morphine, and some whisky. Some time in the evening of the 25th of December (the day of the assault) he left his home, going to a saloon,—the prosecutor, Tyler, and his brother, and another party accompanying him. At the saloon they took a

gently any important act, where this would pass away in an hour or two, leaving him in his normal condition, except, perhaps, that there was a gradual and general weakening of the vital forces and the will was executed when he was free from pain and the effect of the drug administered the night before had passed away, and the three or four witnesses present testified to the soundness of his mind and memory. *Epling v. Hutton*, 121 Ill. 555.

And that a testatrix was addicted to the use of morphine, and that she appeared old and weak-minded, will not invalidate her will where her oddities and apparent weakness of mind were probably due to the use of that drug, if she fully understood what she was doing at the time, and possessed sufficient memory and intelligence to dispose of her property, and was not then under its influence. *Frost v. Wheeler*, 43 N. J. Eq. 577.

So, evidence that a testator's mind was greatly impaired by the use of opium and ardent spirits, and that in consequence thereof he was frequently incapable of transacting business, is not sufficient to repel the presumption of sanity arising from the fact that he wrote his will himself without proving that he was incapable of transacting business at the very time the will was executed. *Temple v. Temple*, 1 Hen. & M. 476.

And evidence that a testator who died at the age of seventy-eight years had been subject to occasional fits of epilepsy for some years previous to the execution of his will, which had produced great prostration and enfeebled his mental energies and impaired his memory, and that for many years he had been in the habit of taking large doses of laudanum to relieve his sufferings, and at times was childish and incapable of much effort of any kind, and failed to recognize intimate acquaintances, is not sufficient to invalidate his will as against evidence by several witnesses that he gave directions in regard to his affairs, made bargains, transacted business, and was consulted by his neighbors, and was esteemed a man of sound judgment and good business capacity, and that of the attorney who drew the will that he was apparently in perfect possession of his faculties, and fully apprehended the nature of the business he was transacting. *Brown v. Torrey*, 24 Barb. 583.

Mental incapacity at the time will invalidate a will, however, though it was caused by morphine or other drugs taken for medicinal purposes. *Stedham v. Stedham*, 32 Ala. 525.

And proof that a testator was addicted to the continued and excessive use of cocaine, and that he was under its influence at the time of the execution of his will, and that he labored under hallucinations that persons were pursuing him and in-

number of drinks, the party drinking about a pint of whisky. The defendant and prosecutor immediately thereafter walked out on the porch in front of the saloon, and the defendant took hold of the gallery post, and immediately, without any warning, stabbed the prosecutor with a knife. There had been no previous grudge between the parties, nor did any quarrel or altercation precede the stabbing. An officer immediately came up, and carried the defendant to jail. He asked him what he stabbed the boy for, and he said because he had been after him all morning to go home. (There was no evidence of this fact.) On this state of facts, among other things, the court instructed the jury as follows: "If the defendant, by the voluntary and recent use of cocaine and morphine or intoxicating liquors, or all of them, put himself in a condition that he was incapable of distinguish-

ing between right and wrong as to the particular act charged against him, and he voluntarily took said cocaine and morphine or intoxicating liquors knowing that it would produce such state of mind in him, then, although, at the time of the commission of the act, he might not have known what he was doing, or was incapable of distinguishing between right and wrong as to the particular act charged against him, he would not be excusable for the act, if the act was otherwise criminal. If the normal condition of the defendant was that of a sane person, and his mind was not diseased, but was only temporarily dethroned by the recent use of said medicines, or intoxicating liquors, or all of them, and the defendant voluntarily took them, knowing at the time he did so that it would dethrone his mind, then no state of insanity so produced would be a defense to crime. If, however,

tended to do him bodily harm and to incarcerate him in an asylum, and of an illusion that he had bacteria present in his body which were creeping through his skin,—is sufficient to invalidate his will though at times he would talk rationally upon other subjects and his mind would seem to be clear. *Re Underhill*, 21 Ohio L. J. 279.

And a finding against a will upon the ground of mental incapacity where the testator disinherited a daughter because of her desire to marry a man whom he did not like at a time when he was a bed-ridden invalid subsisting mostly upon whisky and morphine, being drowsy, but not taking the latter in quantities sufficient to affect him mentally, will not be disturbed on appeal, though a majority of the witnesses testified that he was competent. *Carlin v. Baird*, 11 Ky. L. Rep. 332.

So, the fact that the ordinary effect of morphine is to weaken the power of the will is immaterial in an action to set aside a will on the ground of undue influence where the evidence shows that there was in fact no weakening of the will power and no effort to control the testator. *Bush v. Lisle*, 30 Ky. 333.

But it may be presumed from the use of opium and ardent spirits to which a testatrix had been addicted for many years, and from great age, that her mental faculties had become so enfeebled and impaired that she would not be very ready to apprehend and understand the provisions of a complicated will as it was read to her without explanation. *Rutland v. Gleaves*, 1 Swan, 198.

And an instruction in a will contest, that if the jury believe that the will was read to the testatrix correctly, and that she was of sound mind, the legal presumption would be that she understood its contents, is not proper without stating that the presumption was disputable and could be rebutted, where it appears that for several years she had been addicted to the excessive use of opium and ardent spirits, and the will was executed on a bed of sickness a few days before she died, when there were other circumstances calculated to excite suspicion that she was not well advised as to its contents. *Rutland v. Gleaves*, 1 Swan, 198.

And where the testatrix was a person whose mental faculties had been seriously impaired by the use of strong drink and opiates, and it appears that she had nothing to do with the preparation of her will, or that she ever read or heard it read, or that its contents had been stated to her, proof that she knew what was in it when she signed it is imperatively demanded before it can be admitted to probate. *Burritt v. Stillman*, 16 Barb. 193.

Costs will not be imposed upon the contestant of a will where the fact is established that the testatrix was addicted to the use of morphine, but will

be charged to the estate, as it is proper that full inquiry should be made as to the effect which the habitual use of morphine had produced upon her mind. *Frost v. Wheeler*, 48 N. J. Eq. 573.

V. As a ground for divorce.

Mass. Pub. Stat. chap. 8, § 1, authorizes a divorce from the bonds of matrimony for gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs. *Burt v. Burt*, 138 Mass. 204.

To warrant a divorce under that statute the use must be excessive, and must cause gross and confirmed drunkenness. *Burt v. Burt*, 138 Mass. 204.

And a divorce is not authorized where the habit was not gross and confirmed at the time of the filing of the libel though it had been so at times previous thereto. *Burt v. Burt*, 138 Mass. 204.

And the use of morphine by a wife, which became a confirmed habit after her marriage, going to the extent of causing her to lie in bed at times until 4 o'clock in the afternoon, and causing her to act in a stupid irrational way for long periods of time, will not warrant a divorce after the gross character of her use of morphine had become modified or had been terminated, at the time of the filing of the libel, though she had not entirely abandoned its use. *Burt v. Burt*, 138 Mass. 204.

Excessive indulgence in the morphine habit is not a ground for divorce, however, under a statute which permits a divorce on the ground of habitual drunkenness. *Youngs v. Youngs*, 130 Ill. 230, 6 L. R. A. 543, 33 Ill. App. 223; *Barber v. Barber* (Conn.), 14 Law Rep. 375.

And that a wife was a confirmed consumer of opium in its various forms, and that she continued such habits during the entire period of her cohabitation with her husband, will not warrant a divorce upon the ground of habitual drunkenness. *Dawson v. Dawson*, 23 Mo. App. 169.

The question in an action for divorce upon the ground of habitual drunkenness in which intoxication by opiates is alleged, is not whether such intoxication is not fully as baneful in its results as alcoholic intoxication, but in what sense the legislature had used the word "drunkenness," and the meaning of the word "drunkenness" in its plain, ordinary, and usual sense cannot be considered as including anything but alcoholic drunkenness. *Dawson v. Dawson*, 23 Mo. App. 169.

So, the habitual use of opium by a wife to the neglect of her household duties is not cruelty which will warrant a divorce in favor of the husband. *Holland v. Holland*, 4 Legal Gaz. 572; *Bean v. Bean*, 11 Lanc. Bar. 138.

And acts of violence committed by a husband toward his wife, provoked by and consisting mainly

the defendant, prior to that time, had been affected with disease or bodily suffering, and to cure the disease and allay the suffering he had contracted the use of cocaine and morphine or intoxicating liquors, and that by reason thereof his mind had become, and was, at the time of the commission of the act charged against him, diseased to the extent that he had lost control of his mind, and did not know what he was doing, or, if he did know what he was doing, if he did not have mind sufficient to distinguish between right and wrong as to the particular act charged against him, then his condition of mind was such as the law would excuse him for any act done in such state of mind so produced." These charges were excepted to by appellant in the motion for a new trial. It will be seen from these charges that the court made no discrimination between insanity, whether produced by the voluntary recent use of cocaine and morphine or intoxicating liquors, or if insanity was pro-

duced by the combined use of all these. We understand our statute to regulate insanity produced by the recent voluntary use of intoxicating liquors, but it does not undertake to prescribe the rule with reference to insanity produced by cocaine or morphine. And, in our opinion, the court committed an error in instructing the jury that, if they believed that appellant was insane from the voluntary recent use of cocaine and morphine, it would constitute no defense to the crime alleged, and would go only to the mitigation of the penalty. In our opinion, if appellant was rendered insane from the voluntary recent use of cocaine and morphine, and on account of that did not understand the nature and quality of the act he was doing, and was incapable of forming the intent, then he would not be guilty of an assault with intent to murder. And we go further, and hold that, if his mind was rendered insane by the combined recent use of cocaine and morphine and intoxicating liquors, and that on

sistence on his part of attempts by her to take morphine from him while he is in a state of total or partial delirium produced by its use, do not constitute extreme and repeated cruelty, within the meaning of Ill. Rev. Stat. chap. 40, §1, making such cruelty a ground for divorce,—especially where the divorce was originally sought on the ground of habitual drunkenness, and the charge of cruelty was added as an afterthought when it became apparent that the divorce would not be granted on the ground of drunkenness. *Youngs v. Youngs*, 130 Ill. 230, 6 L. R. A. 548.

Proof, however, that a wife was a confirmed consumer of opium in its various forms, using it for the purposes of intoxication, and having fits of excessive hilarity followed by drowsiness, stupor, and occasional complete prostration, and that the habit had become wholly uncontrollable, and that within a period of less than two years she had bought or caused to be bought for her use nearly 200 bottles of opium in its various forms, making reckless efforts to obtain the drug and often leaving the house during the small hours of the night for it, and that she endeavored to hide her purchases from her husband and became untruthful and her moral nature was undermined, and that she disposed of the products of the farm and pawned her jewelry for the purposes of obtaining it, will warrant a divorce on the part of the husband upon the ground of indignities to the person rendering his condition intolerable. *Dawson v. Dawson*, 23 Mo. App. 169.

VI. As affecting insurance.

A representation in an application for life insurance that the applicant had never been addicted to the excessive or intemperate use of alcoholic stimulants or opium, and that he did not use alcoholic stimulants often or daily, refers to an habitual use, and is not a representation that he did not use such stimulants or opium at all. *Etna L. Ins. Co. v. Davey*, 123 U. S. 739, 31 L. ed. 315.

And an application for insurance stating that the insured used no narcotics is a representation and not a warranty, and is not violated by the occasional but not frequent use by the insured shortly before his death of a narcotic as a remedy where such representation was not made with a purpose to deceive, and it is not claimed that such use of narcotics increased the risk. *Continental L. Ins. Co. v. Thoenes*, 23 Ill. App. 495; *Higbie v. Guardian Mut. L. Ins. Co.* 56 Barb. 462.

And this is true when the drug is administered by a physician in the course of medical practice, 39 L. R. A.

though death is thereby caused. *Raimey v. Mutual Ben. L. Ins. Co.* U. S. C. C. 1st. Dist. (Mass.) set forth in May on Insurance, 3d ed. § 302.

And a negative answer in an application for life insurance, to the question whether the applicant had ever been addicted to the excessive or intemperate use of any alcoholic stimulant or opium, or whether he used any of them often or daily, cannot be found to be untrue so as to invalidate the policy unless the insured had been addicted to such use at the time of the application and prior to the issuing of the policy, using some of them often or daily. *Etna L. Ins. Co. v. Davey*, 123 U. S. 739, 31 L. ed. 315.

Such a statement with reference to the use of opium must be construed to refer to the use of opium as a narcotic stimulant when in an ordinary condition of health, and not to a use in good faith as a medical remedy in case of disease. *Higbie v. Guardian Mut. L. Ins. Co.* 66 Barb. 462.

So, in the *Earl of Mar's Case* cited in 2 Taylor's Medical Jurisprudence, 2d ed. 627, the question was raised whether concealment upon the part of the insured person of the habit of taking laudanum, existing for thirty years, at times to the amount of two or three ounces daily, was material or not in an action upon an insurance policy, was raised but not decided, the jury returning a verdict for the plaintiff based upon a technical point.

Neither is death from an overdose of laudanum while in a drunken condition death by his own hand within the meaning of a condition in an insurance policy upon the life of a person so dying. *Equitable L. Assur. Soc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535.

But the death of the insured from laudanum taken with intent to destroy life is dying by his own hand within the meaning of a condition in a life insurance policy against such death, though done while in a drunken condition. *Equitable L. Assur. Soc. v. Paterson*, 41 Ga. 338, 5 Am. Rep. 535.

VII. As affecting competency of witness.

An opium consumer is not incompetent as a witness, though the testimony of such a person is unreliable and the jury should be carefully cautioned as to believing it. *State v. White*, 10 Wash. 611.

And proof that a witness was in the habit of using laudanum is not sufficient to discredit or weaken his testimony unless it also established either that his mind was impaired generally thereby or that he was under the influence of the opiate at the time the testimony was given. *McDowell v. Preston*, 26 Ga. 528. F. H. B.

such account he was not capable of forming the intent necessary to constitute an assault with intent to murder, he would not be guilty of said offense. We believe it is a correct legal principle, where there is insanity produced by other causes in conjunction with the recent use of intoxicating liquor, that an act done in such

a state of mind cannot be attributed solely to the recent use of intoxicating liquors. See 1 McClain, Crim. L. § 159; *Roberts v. People*, 19 Mich. 401; *Terrill v. State*, 74 Wis. 278.

For the error of the court in said charges, the judgment is reversed, and the cause remanded.

ARKANSAS SUPREME COURT.

City of HELENA, Appt.,

v.

William DWYER.

(.....Ark.....)

An ordinance making it unlawful to sell fresh pork or sausage made thereof between June 1 and October 1 is unreasonable and void, since it violates the inalienable right of man to procure food.

(November 13, 1897.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Phillips County in favor of defendant in an action brought to enforce a penalty for violation of an ordinance against selling pork within the city limits. *Affirmed.*

The facts are stated in the opinion.

Mr. R. W. Nicholls, for appellant:

The ordinance recites the fact that the municipal board of health of said city had determined that the sale of that article of food (fresh pork), within the times in which the sale of it was prohibited, was detrimental to the health of the citizens of such city, and such determination and judgment were, and are, conclusive, unless they violated some express provision of the statute or constitutional laws of the state or United States.

1 Dill. Mun. Corp. § 97, and authorities cited in footnote.

The ordinance was intended as a sanitary one, or one for the security or promotion of the public health; and, if so, then it was entirely competent for the city to adopt it.

Harrison v. Baltimore, 1 Gill, 264; *Summerville v. Pressley*, 33 S. C. 56, 8 L. R. A. 854; *Munn v. Illinois*, 94 U. S. 147, 24 L. ed. 91; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Ex parte Shrader*, 38 Cal. 279; *Davis v. Central R. & Bkg. Co.* 17 Ga. 323; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 138, 21 L. ed. 932.

Messrs. Tappan & Porter, for appellee:

This ordinance being in restraint of trade and being in violation of the rights of private property, is inconsistent with the laws and policy of this state, and is therefore illegal.

1 Dill. Mun. Corp. 2d ed. 253, 256, 257; *Caldwell v. Alton*, 33 Ill. 416, 85 Am. Dec. 285.

Beyond the mere general declaration of the board of health that the sale of pork is detri-

mental to the health of the citizens of Helena, which declaration, if fully acted on, would always debar its sale in that city, there is nothing else of any character before the court, to sustain such an opinion; there is nothing to show that said ordinance was necessary or equitable or that it can be sustained upon principle or authority.

St. Paul v. Laidler, 2 Minn. 190, 72 Am. Dec. 94; *Carron v. Den, Martin*, 26 N. J. L. 594, 69 Am. Dec. 588; *Robinson v. Franklin*, 1 Humph. 156, 84 Am. Dec. 627, and notes; *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465.

Battle, J., delivered the opinion of the court:

The city council of Helena enacted the following ordinance:

"Whereas, the municipal board of health of Helena, Arkansas, at a regular meeting, held on the 30th day of April, 1880, declared the sale of fresh pork detrimental to the health of the citizens of Helena; therefore, be it ordained by the mayor and council of the city of Helena:

"Sec. 1. That it shall not be lawful for any person or persons to sell, or offer to sell, within the city any fresh pork or sausage made thereof between the 1st day of June and October in each year.

"Sec. 2. That any person or persons violating this ordinance shall be fined in a sum not less than \$5 nor more than \$25," etc.

Is the ordinance valid?

In determining the extent of the power of a city council to pass ordinances for the protection of the public health much assistance can be derived from what has been held to be the limitations upon such power of the state, for it cannot be truthfully said that this state can grant to a municipal corporation greater power than it possesses.

The police power of the state is very broad and comprehensive, and can be exercised to promote the health, comfort, safety, and welfare of society. Its limits have not been definitely defined. It is not however, without its limitations. In *Re Jacobs*, 98 N. Y. 110, 50 Am. Rep. 686, the court said: "If this were otherwise, the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, the welfare, or the safety of the public, every right of the citizen might be invaded, and every constitutional barrier swept away. Generally it is for the legislature to determine what laws and regula-

NOTE—As to municipal power over nuisances affecting health, see note to *Harrington v. Providence* (R. L.) 38 L. R. A. 305.

89 L. R. A.

tions are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

In *Mugler v. Kansas*, 128 U. S. 661, 81 L. ed. 210, the court said: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." To the same effect other courts have held. *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Powell v. Pennsylvania*, 127 U. S. 686, 32 L. ed. 257.

The Constitution of the state declares that "all men are created free and independent and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Art. 2, § 2. In *Powell v. Pennsylvania*, 127 U. S. 692, 32 L. ed. 259, Mr. Justice Field said: "With the gift of life there necessarily goes to everyone the right to do all such acts and follow all such pursuits, not inconsistent with the equal rights of others, as may support life and add to the happiness of its possessor. The right to pursue one's happiness is placed by the Declaration of Independence among the inalienable rights of man, with which all men are endowed, not by the grace of emperors or kings, or by force of legislative or constitutional enactments, but by their Creator; and to secure them, not to grant them, governments are instituted among men. The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable rights, which, in my judgment, no state can give and no state can take away, except in punishment for crime. It is involved in the right to pursue one's happiness."

In *People v. Marx*, 99 N. Y. 386, 52 Am. 39 L. R. A.

Rep. 84, the court, in speaking of the section of the Constitution which declares, "Nor shall any state deprive any person of life, liberty, or property, without due process of law," said: "These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions which have been reached, bearing upon the question now under consideration. Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. . . . The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the employment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, J., in *Bertholf v. O'Reilly*, 74 N. Y. 515, 80 Am. Rep. 323, the right to liberty embraces the right to man 'to exercise his faculties and to follow a lawful avocation for the support of life.'" Upon this doctrine the court held that the provision of an act prohibiting the manufacture or sale as an article of food of any substitute for butter or cheese produced from pure, unadulterated milk or cream is unconstitutional, inasmuch as the prohibition is not limited to unwholesome or simulated substitutes, but absolutely prohibits the manufacture or sale of any compound designed to be used as a substitute for butter or cheese, however wholesome, valuable, or cheap it may be, and however openly and fairly the character of the substitute may be avowed and published.

In *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, a statute of the state of Pennsylvania was involved. It provided: "No person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her, or their possession with intent to sell, the same as an article of food." The court, sustaining the statute, said: "It [the court] cannot adjudge that the defendant's rights of liberty and property . . . have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. *Mugler v. Kansas*, 128 U. S. 623, 661, 81 L. ed. 205, 210. The court is unable to affirm that this legislation has no real or substantial relation to such objects. . . . Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary in-

quiry, the court, in speaking of the section of the Constitution which declares, "Nor shall any state deprive any person of life, liberty, or property, without due process of law," said: "These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions which have been reached, bearing upon the question now under consideration. Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. . . . The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the employment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, J., in *Bertholf v. O'Reilly*, 74 N. Y. 515, 80 Am. Rep. 323, the right to liberty embraces the right to man 'to exercise his faculties and to follow a lawful avocation for the support of life.'" Upon this doctrine the court held that the provision of an act prohibiting the manufacture or sale as an article of food of any substitute for butter or cheese produced from pure, unadulterated milk or cream is unconstitutional, inasmuch as the prohibition is not limited to unwholesome or simulated substitutes, but absolutely prohibits the manufacture or sale of any compound designed to be used as a substitute for butter or cheese, however wholesome, valuable, or cheap it may be, and however openly and fairly the character of the substitute may be avowed and published.

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spection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts."

But, fortunately the ordinances of municipal corporations are not protected by conclusive presumptions in favor of their validity, as the statute was in *Powell v. Pennsylvania*. The city council is not the sole judge of their necessity, propriety, or reasonableness. Courts may inquire into their reasonableness when passed under powers granted in general or indefinite terms, and when found unreasonable, may set them aside. *Haynes v. Cape May*, 50 N. J. L. 55. Such corporations have none of the elements of sovereignty, and must exercise their powers in a reasonable manner, and, when necessary, evidence may be adduced to show that they are unreasonable or oppressive. *Corrigan v. Gage*, 68 Mo. 541.

The statutes of this state confer upon cities of the first class power "to prevent or regulate the carrying on of any trade, business, or vocation of a tendency dangerous to morals, health, or safety, or calculated to promote dishonesty or crime." *Sandel's & H. Dig.* § 5313. Under this statute the city council of Helena undertook to prevent the sale of fresh pork "between the 1st day of June and October in each year." It obviously intended to prevent the eating of it in Helena during this time by prohibiting the sale of it. Was the ordinance passed for that purpose a reasonable or lawful exercise of the powers granted by the statute?

Fresh pork is an article of food for general consumption, and when sound, and free from disease, is useful and nutritious. Like all other food, it may become unwholesome when eaten to excess. The quantity eaten, under ordinary circumstances, produces the sickness when it proves unwholesome. Any food is calculated to produce that effect when eaten in the same manner. The mere sale of it is not detrimental to the public health. The fact that individuals may be made sick by it when imprudently eaten does not justify a city council in prohibiting the sale of it. For the same reason it could prohibit the sale of any or all other food. The most delicious food—that which is most liable to be eaten to excess—would be subject to interdiction. If it be conceded that the city council may prohibit the sale of any article of food, the wrongful use of which will or may injure the health of the consumer, then they can prescribe what the citizen of the city shall eat by prohibiting the sale of all other food. The legislature or any of its creatures has no such power. The exercise of such power, we have seen, would be a violation of the inalienable right of man to procure healthy and nutritious food, by which life may be preserved and enjoyed. It would

be an interference with the liberty of the citizen, which is not necessary to the protection of others or the public health,—would be an invasion of his personal rights.

Prof. Tiedeman, in his work on the Limitations of Police Powers, in elucidation of this doctrine says: "A still stronger ground for the total prohibition of a trade or business is when the thing offered for sale is in some way injurious or unwholesome. It is not enough that the thing may become harmful, when put to a wrong use. It must be in itself harmful, and incapable of a harmless use. Poisonous drugs are valuable when properly used, but they may work serious injuries by being improperly used, even to the extent of destroying life. . . . Safeguards of every kind can be thrown around the sale of them, so that damage will not be sustained from an improper use of them, but that is the limit of the police control of the trade. Thus, for example, opium is a very harmful drug when improperly used, and it is all the more dangerous because the power of resistance diminishes rapidly in proportion to the growth of the habit of taking it as a stimulant, and a miserable, degraded death is the usual end. . . . But, on the other hand, opium is a very useful and indispensable drug. . . . The sale of it can, of course, be prohibited to minors, and to all who may be suffering from some form of dementia, and to confirmed opium eaters. But it would seem to be taking away the free will of those who are under the law confessedly capable of taking care of themselves if the law were to prohibit the sale of opium to adults in general. But where a thing may be put to a wrongful and injurious use, and yet may serve in some other way a useful purpose, the law may prohibit the sale of such things, in any case where the vendor represents them as fit for a use that is injurious, or merely knows that the purchaser expects to apply them to the injurious purposes. Thus the sale of diseased or spoiled meats, or other food, as food, intending or expecting that the purchaser is to make use of them as food, may be prohibited. So, also, the sale of milk which comes from cows fed in whole or in part upon still slops may be prohibited, if it is true that such milk is unwholesome as human food. In the same manner a law was held to be constitutional which prohibited the sale of illuminating oil which ignited below a certain heat. But it would be unconstitutional to prohibit altogether the sale of either of these things if they could be employed in some other harmless and useful way. For example, the oil which was prohibited for illuminating purposes may be very valuable and more or less harmless when used for lubricating purposes." Pages 294, 295. See also *Des Plaines v. Poyer*, 123 Ill. 348; *Babcock v. Buffalo*, 56 N. Y. 268.

The legislature may enact such laws as may be necessary to protect the public against fraud, imposition, or deception in the sale of food, or any impurities, putridity, disease, or unsoundness in the same renders it unwholesome, and may authorize municipal corporations to do so. The public is entitled to protection against imposition by the sale of impure or adulterated food, or of imitations, as pure and genuine. In this respect it needs

protection, and to this end the legislature may and can authorize city councils to pass laws. It has accordingly been held that an act is constitutional which prohibits the sale of "milk containing more than 88 per centum of water fluids, or less than 12 per centum of milk solids, or less than 2½ per centum of milk fats." In passing upon the validity of this act in *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 844, the court said: "It is equally a fraud on the buyer, whether the milk which he buys was originally good and has been deteriorated by the addition of water, or whether in its natural state it is so poor that it contains the same proportion of water as that which has been adulterated."

If a cow habitually gives milk of a quality so poor as to come within the statute, or, as the defendant puts it in his brief, so poor

that as a commercial commodity it is valuable only for the purpose of irrigation, she is of no value as a milk producer, and can have none as such to her owner, unless he can sell her milk to his unsuspecting neighbor for a price greatly in excess of its value, a species of fraud which ought not to be tolerated. The section is but a slight extension of the provision which prohibits the sale of adulterated milk, and, like that, was designed to protect the public against imposition." *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *People v. Cipperly*, 101 N. Y. 684. Other examples might be given, but this, we think, is sufficient.

The ordinance in question, for the reasons indicated, is unreasonable, invalid, and void, and the judgment of the Circuit Court so holding is affirmed.

GEORGIA SUPREME COURT.

Sarah WILLIAMS

v.

STATE of Georgia.

(.....Ga.....)

*1. There was no error, on the trial of a criminal case, in admitting against the accused evidence showing that she had upon her person and about her premises articles, the possession of which, though not in itself criminal, tended to establish her guilt of the offense with which she was charged, notwithstanding it appeared that the discovery of these articles was made by forcibly entering into her house, and there searching the same and her person, without any warrant or authority of law. Although the search and seizure may have been unlawful, unwarranted, unreasonable, and reprehensible, this did not affect the admissibility of the evidence obtained as a result thereof.

2. The offense of keeping open a tippling-house on the Sabbath day is sufficiently proved by evidence showing that the accused, on at least three different Sundays within the same year, in her dwelling house, sold whiskey by retail to different persons, and on each occasion permitted the same, or a portion thereof, to be drunk on the premises.

(March 12, 1897.)

ERROR to the City Court of Macon to review a judgment convicting defendant of violating the Sunday liquor law. *Affirmed.*

The facts are stated in the opinion.

Mr. Marion W. Harris, for plaintiff in error:

The proof fails to establish a tippling-house; so, the verdict is wrong.

Webster's Dict. word *Tippling-house*; *Hus-*

*Headnotes by LUMPKIN, P. J.

NOTE.—For constitutional protection against being forced to furnish evidence against one's self in a civil case, see note to *Levy v. San Francisco City & County Super. Ct. (Cal.)* 29 L. R. A. 811.

39 L. R. A.

Levy v. State, 69 Ga. 54; *Harmon v. State*, 92 Ga. 455; *Cooper v. State*, 88 Ga. 441.

There must be a habit of selling and consuming on the premises, as in—

Minor v. State, 63 Ga. 818; and in *Thomason v. State*, 92 Ga. 456.

Evidence obtained by the state's officers, in pursuance of an unreasonable and an unlawful search and seizure, violates the constitutional rights of the defendant as a citizen of Georgia; and the evidence is inadmissible.

Ga. Const. Bill of Rights, ¶¶ 6 and 16; Code 1882, 4998, 5008 (Code 1895, 5703, 5713); *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746; *Entick v. Carrington*, 19 How. St. Tr. 1029; *Day v. State*, 63 Ga. 667; *Woolfolk v. State*, 81 Ga. 552.

The admission of such evidence thus obtained likewise violates the constitutional rights of defendant as a citizen of the United States, to which the states are by the Constitution inhibited.

U. S. Const. Amend. 4, 5; Code, 5809, 5810; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746.

The first ten amendments to the United States Constitution, except where in terms relating to Federal affairs, though formerly mere restrictions upon the operation of Federal power, are now become, by virtue of the 14th Amendment, restrictions upon the power of the states to abridge them as to United States citizens.

Re Spies, 123 U. S. 181, 81 L. ed. 80; Landon, Constitutional History, pp. 102, 294-296.

The action of the judiciary department, as well as the legislative or executive, is the action of the state itself. *Ergo*, abridgment by the state courts is abridgment by the state.

Strauder v. West Virginia, 100 U. S. 805, 25 L. ed. 664; *Re Virginia (Virginia v. Rives)*,

As to compelling an accused to exhibit himself for identification, see note to *People v. Gardner* (N. Y.) 28 L. R. A. 699.

100 U. S. 313, 25 L. ed. 687; *Re Virginia*, 100 U. S. 339, 25 L. ed. 676; *Civil Rights Cases*, 109 U. S. 26, 27 L. ed. 844; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 568; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

Mr. Robert Hodges for the State.

Lumpkin, P. J., delivered the opinion of the court:

1. On the trial of this case in the court below, Jenkins, a detective, was introduced as a witness in behalf of the state. It appeared from his testimony that on Sunday morning, the 2d day of August, 1896, Mose Lucas and Jesse Bunkley (both colored) came to his house in Macon, and woke him up; Lucas saying that, if he "wanted to catch those parties down on Third street selling whisly, now was the time." He gave to Lucas "a silver quarter, marked with a cross," and "an empty half-pint whisly flask, with a file on the neck thereof," and to Bunkley "a silver ten-cent piece, marked with a cross on the woman's head." Both then went on down the street, in the direction of the house of Sarah Williams, the accused. "In about five minutes these two men came out of Sarah's back yard, and Mose Lucas handed [Jenkins] the same bottle that [he] had given him, and in the same condition, except that it was full of whisly." As to what then transpired, Jenkins testified: "I called Police Officer Charley Moseley, and we went to Sarah's house. We went in, and I walked up to Sarah and put my hand in her apron pocket, took out her purse, and found these two pieces of money in it. The two pieces of money are the same I marked and gave to Lucas and Bunkley. I then searched her house, and found a gallon jug of blackberry wine, and three bottles, to wit, two quart bottles and one half-gallon bottle. One of the bottles was nearly full of whisly, another had only the bottom covered with whisly, and the third, the half gallon bottle, was full of something that looked like whisly, though I have never opened it, and do not know for certain what it contains. . . . I had no search warrant to search either the defendant or the house." Moseley, the police officer, who also appeared at the trial as a witness, corroborated Jenkins as to the account above given of the search made by them, and the finding and seizure of the marked coins and the liquors, and identified a small tin funnel as having also been found at the same time. The "jug of wine, the half-gallon bottle of whisly, the quart bottle of whisly, partly used, and the other bottle of whisly, which contained a little bit in the bottom of it," together with the tin funnel and "the twenty-five-cent and ten-cent pieces of silver money," were then tendered in evidence by the state, and admitted over objection by the accused. All of the testimony of Jenkins and Moseley with regard to the search of the person and premises of the accused, and the seizure of the articles above enumerated, was also specifically objected to on the grounds that this evidence "was obtained under the circumstances just narrated, and particularly 39 L. R. A.

that it was obtained from defendant and her house without a search warrant; that this search was an illegal search and seizure, in violation of the constitutional rights guaranteed to defendant, as a citizen of the state and of the United States, under paragraph 16 of the Bill of Rights of the state Constitution of 1877, and under the United States Constitution; that this was a constitutional right of defendant to be secure in her person, property, home, and effects, from such unlawful, unreasonable, and outrageous searches and seizures. And defendant then and there (at the trial) claimed that right both under the state Constitution and under the Constitution of the United States, which prohibits the state or its officers from abridging the constitutional and inalienable rights, privileges, and immunities of citizens of the United States. Defendant then and there insisted before the court, by way of objection to said evidence, that, should it be admitted to the jury, it would violate the constitutional and inalienable right of defendant to be secure against such searches and seizures; and she then and there expressly claimed this right, privilege, and immunity, not only under the state Constitution, but as one to which she was entitled under the United States Constitution, and especially under the provisions of the 1st section of the 14th Amendment to said United States Constitution; she then and there claiming said rights, privileges, and immunities as a citizen of the United States and of said state."

The position assumed by counsel for the accused does not present for determination a new question. That evidence pertinent and material to the issue is admissible, notwithstanding it may have been illegally procured by the party producing it, was early settled by the English courts. The case of *Legatt v. Tollervey*, 14 East, 302, to this effect, decided in 1811, followed a previous ruling made in *Jordan v. Lewis* (1789), the substance of which is stated in a note, as the report of the latter case in 2 Strange, 1122, was meager and imperfect. And such was the rule observed in subsequent decisions. *Caddy v. Barlow*, 1 Mann. & R. 275; *Stockfleth v. De Tastet*, 4 Campb. 10; *Robson v. Alexander*, 1 Moore & P. 448. In this country the question certainly arose as early as 1841. *Com. v. Dana*, 2 Met. 329. There it was insisted that the issuing of a warrant authorizing a search of the premises of the accused, who was suspected of having in his possession lottery tickets, invaded his constitutional right to be secure against unreasonable searches and seizures, and "that the seizure of the lottery tickets and materials for a lottery, for the purpose of using them as evidence against the defendant, . . . [was] virtually compelling him to furnish evidence against himself, in violation of another article in the Declaration of Rights." But Wilde, J., speaking for the supreme court of Massachusetts, summarily disposed of this contention by saying (p. 337): "Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant is

sued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice how they were obtained whether lawfully or unlawfully, nor would . . . [it] form a collateral issue to determine that question;" citing *Legatt v. Tollerrey*, 14 East, 302, and *Jordan v. Lewis*, 2 Strange, 1122, and adding: "We are entirely satisfied that the principle on which these cases were decided is sound and well-established." Such has been the view since entertained, and consistently adhered to, by the Massachusetts court. *Com. v. Certain Lottery Tickets*, 5 Cush. 369, 374; *Com. v. Certain Intoxicating Liquors*, 4 Allen, 593, 600; *Com. v. Welsh*, 110 Mass. 359, 360; *Com. v. Taylor*, 132 Mass. 261, 262; *Com. v. Henderson*, 140 Mass. 303, 305; *Com. v. Keenan*, 148 Mass. 470, 472; *Com. v. Ryan*, 157 Mass. 403, 405; *Com. v. Tibbets*, 157 Mass. 519, 521; *Com. v. Hurley*, 158 Mass. 159; *Com. v. Brelsford*, 161 Mass. 61, 64; *Com. v. Welch*, 163 Mass. 372; *Com. v. Smith*, 166 Mass. 370, 376. It may here be remarked that no distinction is, or should be, observed between an unauthorized search of the person, and one which merely involves an invasion of the citizen's constitutional right to be secure in his "houses, papers, and effects;" for none is recognized either by the Federal or by our state Constitution, the right to be secure in the lawful possession and enjoyment of property evidently being regarded as no less sacred than the citizen's right to immunity from an unreasonable search of his person. In *Welch's Case*, just cited, it appeared that an officer unlawfully seized an object which a daughter of the accused was carrying under the folds of a loose dress, suspecting it to be a bottle of whisky, over the protest of the accused, who was present; but, though the knowledge so acquired by the officer was thus wrongfully obtained, he was nevertheless permitted to testify that the object she was carrying was, "in size and shape, like a quart bottle." In *State v. Flynn*, 86 N. H. 64, the court was called upon to pass on the same constitutional questions raised in *Dana's Case*, 2 Met. 329, and unhesitatingly adopted as sound the conclusions reached by the Massachusetts court; holding that "evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued." Citing the above cases as authority, Mr. Bishop says: "The evidence which a search warrant procures may be used against the party; not being inadmissible as an admission under duress or as furnished by the prisoner through compulsion against himself, or as otherwise unfairly or illegally, obtained, even if the search warrant was illegally issued." 1 Bishop, Crim. Proc. § 246; 1 Bishop, New Crim. Proc. p. 148. Mr. Greenleaf evidently regarded the admissibility of evidence of this character as no longer a vexed, but as a definitely settled, question; 89 L. R. A.

for in his treatise on the Law of Evidence (§ 254a) he thus briefly deals with the subject: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." Almost identically the same language is to be found in 2 Taylor, Ev. 9th ed. § 922. The correctness of the view announced by the supreme court of Massachusetts in the earlier part of this century has long been acquiesced in. In more recent years a few attempts have been made in this country to overturn this now well-established rule of evidence. They have, however, met with anything but success. In Illinois, South Carolina, Alabama, Missouri, Connecticut, and Arkansas, the courts of last resort have declined to venture a departure from this sound doctrine. See *Gindrat v. People*, 138 Ill. 108, wherein it was held that "the fact that evidences of the commission of a crime are found by a mere private detective on an authorized search of a party's rooms will not, of itself, render the evidence thus found incompetent against the party in whose possession the articles are found, if such evidence is otherwise competent," which ruling was followed in the later cases of *Siebert v. People*, 143 Ill. 571; and *Trask v. People*, 151 Ill. 523. See also *State v. Atkinson*, 40 S. C. 363, holding that papers illegally obtained by searching the room of the accused during his absence were competent evidence against him on a trial for murder; *Shields v. State*, 104 Ala. 35, holding that "on a trial for carrying concealed weapons, where it is shown that a pistol was found concealed on defendant's person as the result of a forcible search by an officer, the evidence of the discovery of the pistol concealed about his person is admissible against the defendant, although the search was unauthorized and unlawful;" *State v. Pomeroy*, 130 Mo. 489, wherein it was decided that "it is not a violation of the constitutional provision that no one shall be compelled to testify against himself in a criminal case to introduce in evidence, in a prosecution for establishing a lottery, tickets, papers, etc., taken from the person and premises of the accused, even though they were seized without authority of law;" *State v. Griswold*, 67 Conn. 290, 33 L. R. A. 227, laying down the rule that "evidence otherwise pertinent and admissible will not be rejected because it was taken from the possession of the accused by a trespass;" *Starchman v. State*, 63 Ark. 538, to the same effect, decided July 8, 1896, by the supreme court of Arkansas.

In the present case, counsel for the accused cited and relied upon the case of *Boyd v. United States*, 16 U. S. 616, 29 L. ed. 746, as sustaining the contention that the constitutional rights of the accused were infringed by admitting the evidence to which objection was made. We do not think the decision rendered in that case is authority supporting this contention. A clear statement of the issues raised in it, and of the precise questions passed

on by the Federal Supreme Court, is to be found in *Gindrat v. People*, 188 Ill. 103, the able opinion in which, pronounced by Mr. Justice Baker, of the Illinois supreme bench, relieves us from any necessity of attempting to show (as he does conclusively) that, so far as the question now before us is concerned, the decision in *Boyd's Case* is not to be regarded as authoritative, or even pertinent. After citing a number of cases in point, he concludes his discussion of that decision by saying: "We think that the cases last cited, as well as the present case, are clearly distinguishable from *Boyd v. United States*. In the latter case, the unconstitutional and erroneous order, process, and procedure of the trial court compelled the claimants to produce evidence against themselves, and such order, process, and procedure were also held to be tantamount to an unreasonable search and seizure, while here, and in the other cases cited, the question of illegality was raised collaterally, and the courts exercised no compulsion whatever to procure evidence from the defendants, and neither made orders nor issued process authorizing or purporting to authorize a search of premises or a seizure of property or papers, but simply admitted evidence which was offered, without stopping to inquire whether possession of it had been obtained lawfully or unlawfully. Courts, in the administration of the criminal law, are not accustomed to be oversensitive in regard to the sources from which evidence comes, and will avail themselves of all evidence that is competent and pertinent and not subversive of some constitutional or legal right." The case of *Boyd v. United States*, was also relied on in *Atkinson's Case*, 40 S. C. 363, but McIver, Ch. J., speaking for the South Carolina court, after briefly summarizing the points passed on by the Supreme Court of the United States, says: "This case, therefore, while very interesting, as furnishing an able and elaborate discussion of the right of exemption from unreasonable searches and seizures, has no application to the present inquiry." In *State v. Pomeroy*, also above cited, it likewise was insisted that this decision of the Federal Supreme Court should control; but Sherwood, J., adopted the above extract taken from the opinion of Mr. Justice Baker, as expressing the view of the Missouri court, that *Boyd's Case* was entirely inapplicable. We confidently entertained the same opinion. Our attention has not been called to any case in which the Supreme Court of the United States has undertaken to pass upon the precise question now before us, nor are we aware of any decision by that court which has any direct bearing thereon. In *Re Spies*, 128 U. S. 181, 81 L. ed. 80, the question was informally presented to the court, but not decided. Says Chief Justice Waite (page 180, 128 U. S., and page 91, 81 L. ed.): "Something was said in argument about an alleged unreasonable search and seizure of the papers and property of some of the defendants, and their use in evidence on the trial of the case, . . . but we have not been referred to any part of the record in which it appears that objection was made to the use of this evidence on that account. . . . The question whether the letter, if obtained in the man-

ner alleged, would have been competent evidence is not before us."

Irrespective of the many respectable authorities above referred to, and speaking for ourselves, we are satisfied that the contention of the accused, that her constitutional rights were infringed by the ruling of the trial judge admitting the evidence complained of, ought not to be sustained. As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures, was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the Constitutions of the United States and of this and other states merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify, or declare lawful, any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual responsibility and of their own volition, surely none of the three divisions of government is responsible. If an official, or a mere petty agent of the state, exceeds or abuses the authority with which he is clothed, he is to be deemed as acting, not for the state, but for himself only; and therefore he alone, and not the state, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a mere individual, the most that any branch of government can do is to afford the citizen such redress as is possible, and bring the wrongdoer to account for his unlawful conduct. The office of the Federal and state Constitutions is simply to create and declare these rights. To the legislative branch of government is confided the power, and upon that branch alone devolves the duty, of framing such remedial laws as are best calculated to protect the citizen in the enjoyment of such rights, and as will render the same a real, and not an empty, blessing. With faithfully enforcing such laws as are thus provided the responsibility devolving upon the executive and judicial branches must necessarily end. We know of no law in Georgia which renders inadmissible in evidence the fruits of an illegal and wrongful search and seizure, nor are we aware of any statute from which it could be logically gathered that the admission of such evidence violates any recognized principle of public policy. Whether or not prohibiting the courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen's constitutional right to immunity therefrom, is a matter for legislative determination.

In *Rusher v. State*, 94 Ga. 863, this court

sustained a ruling of the trial court admitting in evidence against the accused, who was on trial for burglary, evidence showing that money, the fruit of his alleged crime, was found in a place of concealment to which he had accompanied the state's witnesses, and in which he had informed them it was secreted. All this evidence—including, not only that which showed the independent fact of the discovery of the money, but also that which related to acts and declarations of the accused necessary to account for the discovery, and explain the manner of it—was held admissible, although it appeared that these very acts and declarations were not free and voluntary, but the result of some sort of constraint or coercion. The foregoing statement fully discloses all that was really involved in the *Rusher Case* with respect to the admissibility of evidence, and the conclusions reached upon the questions actually presented for decision do not in the least conflict with anything laid down in the case at bar. The headnotes were prepared and the opinion delivered by Ex-Chief Justice Bleckley, the eminent jurist, whose great wisdom and profound learning, demonstrated by his services upon this bench and elsewhere, have made for him a high place among the recognized leaders of judicial thought in this day and generation. Read without a firm grasp upon the facts,—especially the great fact that, while there was evidence enough to show coercion by some means not specified, there was no evidence to show any criminal breach of law, by personal violence or otherwise, in coercing the accused to speak and act,—some of the language used in that opinion is perhaps open to misunderstanding. It does not hold that, as matter of existing law, violence, even to the degree of torture, would render the evidence in that case inadmissible; but the opinion does say that the law ought to be that way, and that any criminal breach of law whatever in the procurement of evidence ought to be a good legal reason for rejecting the evidence so procured. The case being one in which no crime whatever was in sight, as means to coerce either speech or conduct, surely that case afforded no basis for adjudicating one way or the other the rule of existing law which governs the admissibility of speech and conduct brought about by the commission of a crime to induce the same, or to gain information bearing on the offense for which the accused is being tried. It is certainly good law, as announced in the first headnote of the *Rusher Case*, "that the well-established rule that independent facts discovered in consequence of a constrained confession made by a prisoner are admissible against him, . . . unless it appears that criminal violence was used in procuring the confession or making the discovery." It is only by treating this language as affirming by implication more than it expressly affirms that it can be construed as ruling that the evidence would not be admissible if criminal violence were used in its procurement. When, however, the facts of the case are examined, it is manifest that they afford no basis for such a construction, inasmuch as it did not appear whether there was criminal violence or not. The express affirmation of the headnote, therefore, should not be enlarged by adding

to it another affirmation, neither made directly nor called for by the facts. Moreover, if it had been the purpose of the court, or of the writer of the opinion, to lay down more law on the subject than was necessary to rule the case on its actual facts, the phrase "it may be" would have been altogether inappropriate as an opening of the topic. See text of opinion, on page 866, 94 Ga. On page 869, 94 Ga., the opinion says: "The theory of whipping was left wholly unsupported. It has, therefore, no relevancy to the merits of the objection." In view, therefore, of the overwhelming weight of authority by which the decision rendered in the present case is supported, and with the above explanation of the *Rusher Case*, we are clear that it decides nothing which should constrain us to hold otherwise than we have done on the question now made.

The universally recognized rules governing the admissibility of confessions furnish much light touching the question whether, in passing upon the competency of evidence, the manner in which it was procured is ordinarily to be considered. It is an elementary rule of law that a confession unduly induced by the influence of hope or fear will never be received. This is true, however, not because it may have been procured by improper means, but solely because the truthfulness of a confession thus inspired is of such doubtful probability that it cannot reasonably be regarded as having any probative value. "A confession produced by artifice is not for that reason inadmissible, unless the artifice used was calculated to produce an untrue confession." 3 Am. & Eng. Enc. Law, p. 481, citing numerous instances in which the courts have held confessions competent. So, also, "although confessions made by threats or promises are not evidence, yet, if they are attended with extraneous facts which show that they are true, any such facts thus developed, and which go to prove the crime of which the defendant was suspected, will be received as testimony,—as, for instance, where the party so confessing points out or tells where the stolen property is, or where he states where the deceased was buried, or gives a clue to other evidence which proves the case." *Daniels v. State*, 78 Ga. 99. And, to the same effect, see *Jones v. State*, 75 Ga. 825, and *Rusher v. State*, 94 Ga. 868. Of late, the courts of this country have many times been called upon to pass on the question whether a confession would be received where it appeared that the same had been secured by a detective introduced into the cell of a prisoner in the role of a supposed fellow criminal, with a view to "worming out of" the prisoner admissions which could be construed into a confession of guilt. *Heldt v. State*, 20 Neb. 492. 57 Am. Rep. 835; *People v. Barker*, 60 Mich. 277; *Burton v. State*, 107 Ala. 108, and cases cited. Such a practice would, indeed, seem to be a pernicious one; having a tendency towards preventing, rather than towards promoting, the due course of justice. *Green v. State*, 88 Ga. 518; *Smith v. State*, 88 Ga. 628. Nevertheless, while judges in dealing with the question have frequently and freely said as much, and have in no uncertain language condemned the practice, we have found no satisfactory authority or reasoning which would warrant the courts

to usurp legislative functions by declaring that a resort to such methods is a violation of public policy. On the contrary, evidence thus acquired is generally, if not universally, held to be competent, the manner in which it was procured going only to its credit. Thus, in *Heidt v. State*, just cited, a profession procured under such circumstances was held to be admissible in evidence, although Chief Justice Maxwell, in delivering the opinion of the court, took occasion to say of the detective who testified to the alleged confession. "A man who will deliberately ingratiate himself into the confidence of another for the purpose of betraying that confidence, and while with words of friendship upon his lips seeks by every means in his power to obtain an admission which can be tortured into a confession of guilt, which he may blazon to the world as a means to accomplish the downfall of one for whom he professes great friendship, cannot be possessed of a very high sense of honor or of moral obligation. Hence the law looks with suspicion on the testimony of such witnesses, and the jury should be specially instructed that in weighing their testimony greater care is to be exercised than in the case of witnesses wholly disinterested." Our own case of *Cornwall v. State*, 91 Ga. 277, is likewise in point. We quite agree with counsel that in the present case there was an "unlawful, unreasonable, and outrageous" search of the person and the private dwelling of accused. No search is more unreasonable or more obnoxious to our fundamental law than one without warrant, based upon a bare suspicion that a criminal offense has been committed. *Pickett v. State*, 99 Ga. 12. The offenders certainly deserve to be severely dealt with for thus overstepping the bounds of official authority. Indeed, their offense would seem to call for a more summary mode of redress than is now provided for by the laws of this state. The citizen's right to immunity from such outrages being considered one so sacred as to demand constitutional preservation, it would, in our opinion, be eminently proper for the general assembly to strive to discourage and prevent, as far as possible, a wilful disregard and violation of this right, by providing a punishment calculated to deter petty officials from essaying to act as violators, rather than as conservators, of the law.

2. As will have been observed from the statement of facts which prefaces the first division of this opinion, the accused unquestionably had on hand, in abundant measure, the means wherewith to administer to the demands of those desiring intoxicants,—certainly to such of them as may have wished blackberry wine or whisky. According to the testimony of Lucas, one of the persons whose services were enlisted in securing proof against her, both he and his companion, "on the 2d day of August, 1896, which day was Sunday, went into her house, and bought from her small quantities of whisky, which they were permitted to drink upon the premises." "On two different Sundays" during that year, prior to the 2d day of August, this witness had gone to her house, "and each time bought a drink of whisky from her, and drank it there." Indeed, he testified: "I got it there whenever I wanted it. I went to her because I knew I could get

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it." Although Lucas further stated that he could not undertake to swear he had ever seen "her sell any whisky to anybody else except" his companion, he did profess to know the character of her house; and the circumstances brought to light by the state's evidence as a whole strongly tended to show that she was carrying on a more or less general, though perhaps surreptitious, Sunday traffic in spirituous and intoxicating liquors. At any rate, "whether the house where the liquor is charged to have been sold was a tippling-house, and whether the defendant kept it open on the Sabbath," were questions directly brought in issue by the evidence, and it was the province of the jury to determine what was the truth in that regard. *Kelly v. State*, 19 Ga. 426. Our Code does not attempt to define what shall constitute, or be considered, a "tippling-house." "It deals with them [houses of this character] as establishments too well known to need description, and simply prescribes a penalty for keeping them open on the Sabbath day or Sabbath night." *Minor v. State*, 68 Ga. 821. Doubtless any one of the several slightly varying definitions of the term given by law writers is broad enough to cover such an establishment as that now under consideration. See 2 Bouvier, Law Dict. 732; Black, Law Dict. 1173; Anderson, Law Dict. 1084; Kinney, Law Dict. 656; 26 Am. & Eng. Enc. Law, p. 18. Were this otherwise, however, these definitions, purporting to be general only, and not altogether precise or exhaustive, are to be deemed sufficiently flexible and expansive to include every resort of that character which can reasonably be considered as having been aimed at by our statute; for, as was remarked in *Minor's Case*, 68 Ga. 821, by Bleckley, J., before he became chief justice, "the dictionary definition of a term is frequently the mere air of the music which the accused has attempted to execute with variations. Frequently, too, the variations are so luxuriant and ingenious that the air is much disguised, and to hum it over from the bench is but little assistance to the jury in following the real performance. It is something easier for an offender to baffle the dictionary than the Penal Code, for the former is perplexed with verbal niceties and shades of meaning, while the latter grasps in a broad, practical way at the substantial transactions of men." In this connection, see also *Hussey v. State*, 69 Ga. 58, 59. Our courts are not very astute in shielding violators of this provision from punishment by resorting to the niceties of verbal criticism, such as would be intelligible only to grammarians and fastidious scholars, but would utterly fail to impress less cultivated minds and tastes, in order to provide for them a way to escape." *Sanders v. State*, 74 Ga. 85. Therefore, though the establishment presided over by the accused might perhaps be more graphically described as being what is colloquially termed a "blind tiger," as was suggested in the argument before us, it was nevertheless, in a legal sense, a "tippling-house." As to the length of time during which it had existed as such, the offense was fully made out, the proof showing that whisky was sold at retail on at least three different Sundays within the same year. While not professing to know exactly how long a period

would have to elapse before a house of this kind could fairly be called a tippling-house, it would surely seem that three weeks would ordinarily be sufficient. Be this as it may, however, that with which we are now called upon to deal was shown by the prosecution to be capable, on the last, if not upon the first, of the three Sundays in question, of fully performing its office as a house of this character; and this being so, it is to be treated as being then in existence, irrespective of the precise date of its inception. When once a house becomes a tippling house, and exists as such, "if the owner keep it open but for a moment" on the Sabbath, he will be guilty of a violation of the statute. *Monsee v. State*, 78 Ga. 110.

We have therefore reached the conclusion that for no reason assigned by the accused, or disclosed by the record brought to this court, should her conviction be set aside.

Judgment affirmed.

RALEIGH & GASTON RAILROAD COMPANY *et al.*, *Plffs. in Err.*,

v.

J. M. SWANSON.

(.....Ga.....)

*1. A contract entered into between a railroad company and a ticket broker, whereby the latter was enabled to sell tickets to individuals, over the company's lines leading from this to another state, at less than the established rate for the sale of tickets by its regular agents between the same points, and for the same accommodations, is in violation of the act of Congress "to Regulate Commerce," approved February 4, 1887.

2. A party to such a contract cannot recover in an action which does not seek to disaffirm, but to enforce, it, by suit for its breach.

3. A demurrer by the defendant upon the ground that such a suit set forth no cause of action should have been sustained.

(December 20, 1897.)

ERROR to the City Court of Atlanta to review a judgment in favor of plaintiff in an action brought to recover damages for breach of contract to honor requisitions for tickets issued by plaintiff for through carriage of passengers. *Reversed.*

The facts are stated in the opinion.

Messrs. Vasser Woolley and Erwin & Brown for plaintiffs in error.

Messrs. W. R. Hammond and L. P. Skeen for defendant in error.

Lewis, J., delivered the opinion of the court:

The questions made in this case arose upon the following state of facts: Swanson brought an action against the Raleigh & Gaston and Seaboard & Roanoke Railroad Companies, as joint lessees of the Georgia, Carolina, & North-

ern, the Carolina Central, and the Raleigh & Augusta Railroads, which constitute the system known as the Seaboard Air Line, extending from Atlanta, Georgia, to Norfolk, Virginia, for breach of contracts. In his petition he alleged, in substance, as follows: He being a ticket broker in Atlanta, Georgia, and in position to control a great amount of business over the various roads centering there and leading therefrom, defendants, desiring to have tickets over their system handled by him, procured the Suwanee River Railroad Company, a corporation of Florida, to issue a large number of tickets from Ellaville, in that state, *via* Atlanta, and over the Seaboard Air Line to Norfolk, Virginia, and others to Washington, District of Columbia, *via* Weldon, North Carolina, which tickets were not to be used from Ellaville to Atlanta, but only from Atlanta to the points above stated. Defendants agreed with plaintiff that, if he would purchase and handle these tickets, they would honor them for passage over their system of railroads to the points named. In pursuance to said agreement, he did purchase a large number of said tickets from the Suwanee River Railroad Company, at such prices as were agreed upon, and as would enable him to sell the same for passage over the Seaboard Air Line below the regular rates established by defendants and make a profit thereon, in the regular course of business as a ticket broker, and sold a great number of said tickets from time to time, all of which were duly honored by defendants over their said lines until September, 1894, when they notified him that said tickets would be withdrawn, and that they would no longer honor them. He then had on hand, undisposed of, a large number of said tickets, which he had purchased from the Suwanee River Railroad Company in accordance with this agreement with defendants, for which he had paid \$909, and which were therefore worthless to him, and of no value whatever. In the same month, and shortly after the date when the tickets were so withdrawn, he notified defendants that he held them, and that they were worthless, and demanded that defendants should make them good, and reimburse him in the sum that he had paid for them, which defendants failed and refused to do, but, recognizing their liability to him, proposed that if he would take the tickets he then had on hand, and get the Suwanee River Railroad Company, in lieu thereof, to issue what are known as "exchange orders" on the Seaboard Air Line each order to call for a first class ticket from Atlanta to Norfolk over the Seaboard Air Line, defendants would then honor, from time, as might be presented to them by plaintiff, as many of said exchange orders as would be necessary, at the rate of \$9 each, to cover the value of the tickets which he then had on hand. This agreement was entered into on condition that he would guarantee to hold the defendants harmless against loss should the Suwanee River Railroad Company fail and refuse to pay and settle with defendants for said exchange orders. Plaintiff acceded to all these demands of defendants, obtained such exchange orders from the Suwanee River Railroad Company by surrendering to it said tickets which he then had on hand, and tendered

*Headnotes by Lewis, J.

NOTE.—For state regulation of rates, see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 36 L. R. A. 179.
39 L. R. A.

one of said exchange orders, together with his written guaranty to defendants that he would hold them harmless against loss should the Suwanee River Railroad Company fail to settle with them for said orders, and demanded of defendants a ticket from Atlanta to Norfolk over the Seaboard Air-Line, in accordance with the agreement before stated. Defendants accepted said written guaranty of plaintiff, dated February 7, 1895, and now have the same. The defendants refused to honor said exchange order, but retained it, and refused to deliver to plaintiff a ticket therefor in accordance with said agreement, but, instead, notified plaintiff that they would not honor any of said exchange orders, and would not issue to plaintiff any tickets therefor, as they had agreed to do, until the Suwanee River Railroad Company had made good to them certain arrearages which had accrued prior to the time of the contract between plaintiff and defendants in reference to said exchange orders. Plaintiff, by reason of the breach of said contract, has been damaged \$1,212, because the tickets which he would have received under said contract for said exchange orders were worth to him, and would have been sold for, \$12 apiece, and he would have been entitled to 101 tickets under said contracts. Plaintiff, by amendment to his declaration to meet one of the grounds of the demurrer of the defendants, more specifically alleged the number or tickets on hand, and the price at which they were bought and the price at which they could have been sold. To this petition the defendants demurred, among others, upon the ground, that the contracts declared on were illegal, and contrary to public policy and the laws of the United States and the state of Georgia, and that it therefore set forth no cause of action. This demurrer was overruled by the trial judge, and we are now to consider whether or not he erred in so doing.

1. Section 2 of the act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887 (24 Stat. at L. 379), provides as follows: "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." Section 10 of the same act, as amended by the act of March 2, 1889 (25 Stat. at L. 857), provides as follows: "That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done,

or shall willingly suffer or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed \$5,000 for each offense: provided, that if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term not exceeding two years, or both such fine or imprisonment, in the discretion of the court." One purpose of this act was to prevent any railroad company engaged in the transportation of passengers from any state or territory to another from charging any person or class of persons a rate other than that established for others under substantially similar circumstances and conditions. Such discrimination is declared by the statute itself to be unjust, and cannot be effected, either directly or indirectly, by any device whatever. It would follow from this that any scheme entered into by such a railroad company with a view of placing upon the market tickets, over its line, to be sold to individuals at a less rate than they could be procured at its regular ticket office in the usual course relating to the transaction of such business, would be unlawful. Indeed, the parties to this case seem to recognize that it would be unlawful to place in the hands of a broker tickets direct from its terminus in Atlanta to other points outside of this state, and to charge therefor less than its established rate. It would not necessarily have been in violation of the statute for the Florida corporation, acting in concert with the defendants, to have issued tickets from Ellaville, in that state, *via* Atlanta, to Norfolk, Virginia, at a less rate per mile than tickets could be procured over defendants' lines alone from Atlanta to Norfolk. Hence, in order to evade the statute, a device was entered into by the parties to this contract to have these tickets issue from Ellaville *via* Atlanta. The purpose of this was not to sell tickets to parties desiring transportation from Ellaville, but to parties desiring transportation from Atlanta over defendants' lines alone. Therefore that portion of the ticket from Ellaville to Atlanta was discarded under the contract between the parties, and it could have been used only as a mere device to evade the statute; otherwise, why did not the defendant companies issue tickets to the plaintiff directly from Atlanta? To contend that a railroad company can offer tickets to individual passengers, through its brokers, at a less rate than that established for their sale by its regular ticket agents, would

enable common carriers, *ad libitum*, to defeat the very purpose of the statute in question. In the case of *Smith v. Northern P. R. Co.* 1 Inters. Com. Rep. 208, it was held that "the sale of 'land explorers' tickets' and 'settlers' tickets' at less than the regular rates charged to passengers at the usual ticket offices, as practised by the Northern Pacific Railroad Company, is unjust discrimination," and that "the rule under which passenger transportation should be conducted requires absolute equality of payment from all persons enjoying the same accommodations." Prior to the act of Congress above quoted, interstate commerce traffic in this country was regulated by the principle of common law applicable to common carriers. There seems to be a conflict of authority as to whether or not, at common law, common carriers would be bound to make the same charges to all persons for the same service, the weight of authority in this country being in favor of equality of charges. See *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 275, 276, 36 L. ed. 703, 4 Inters. Com. Rep. 92. Perhaps, on account of such conflict, and further for the reason that the several states were powerless to prevent unjust discrimination as to traffic going beyond their respective boundaries, Congress took the matter in charge, with a view of preventing unjust discrimination throughout the country. It was contended by the able counsel for defendant in error in this case that the transaction in question was tantamount only to a sale of tickets at wholesale, and that, under the ruling in the case last above cited, the act of Congress was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It will be seen from an inspection of that case that the question involved therein was the legality of the sale of what is known as a "party-rate ticket;" that is, a ticket for the transportation of a number of persons from a place in one state or territory to a place situate in another state or territory at a rate less than that charged to a single individual for a like transportation on the same trip. There is no similarity in that respect between the present case and the one just cited. If, instead of issuing a single ticket for a company of ten or more persons, the common carrier had issued in that case a number of tickets to a broker, at such price as would have enabled him to have sold them to individuals at less than the established rate, and had used the term "party-rate ticket" as a device to evade the law, then we apprehend the ruling of the United States Supreme Court would have been entirely different; for the court in that case, on page 284, 145 U. S., and page 706, 36 L. ed., says: "The party-rate ticket, as it appears in this case, is a single ticket covering the transportation of ten or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two thirds of the regular fare for that number of people. It is possible to conceive that party-rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates; but should such be

the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy." This being a contract, therefore, not only declared unlawful by the statute, but made a penal offense by its terms, a suit for the breach thereof cannot be maintained.

2. It is further contended on behalf of the defendant in error that, even if the contract is illegal, it is not *malum in se*, but *malum prohibitum*, and that he can recover back the money he paid the railroad. "A broker, or other agent, employed to carry out an illegal transaction, cannot recover for losses incurred or disbursements made by him in the course of the transaction, if he was privy to the principal's unlawful purpose." Clark, Cont. § 213. The same author, on page 494, quotes from Lord Kenyon, to the effect that "there is no case to be found where, when money has been actually paid by one of two parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back again." Some exceptional cases, however, are recognized by this author, and are undoubtedly sustained by good authority. These he groups as follows: "(a) Cases in which a *locus penitentiae* remains; and while the agreement is unperformed, money or goods delivered in furtherance of it are allowed to be recovered. (b) Cases in which the parties are not regarded as being in *pari delicto*, as (1) where the party asking relief was induced to enter into the agreement under the influence of fraud or strong pressure, or (2) where the law which makes the agreement unlawful was intended for the protection of the party asking relief." This case falls within none of these exceptions. This is not an action to disaffirm an illegal contract, and seeking to recover back from the defendants money had and received thereunder before its full execution. Upon the contrary, it is a suit for damages growing out of a breach of the contract. Instead, therefore, of being an effort to rescind the contract, it is really a proceeding to enforce it. Besides, it appears from the plaintiff's petition in this case that payment for these tickets was made, not to any of the defendant railroad companies, but to a railroad corporation in Florida; and it does not appear that the defendants have in hand, or have ever received, any portion of the fund. There is a very patent distinction between this case and the case of *Clarke v. Brown*, 77 Ga. 606. In that case it appears that the principal deposited money in the hands of his agents, to be used for an illegal purpose, namely, the purchase of futures in pork and grain. It was there held: "He could not set up the illegal contract to recover profits realized thereunder; nor could the agents set up the illegal contract for the purpose of defeating a recovery by the principal of the money deposited with them, and which was held by them." The plaintiff in that case did not rely upon his illegal contract. He was not seeking to enforce the same, and hence the court very properly draws the distinction between that case and the previous rulings of this court on the subject of enforcing illegal contracts. It is true, in the case of *Western U. Teleg. Co. v. Blanchard*, 68

Ga. 300, 45 Am. Rep. 480, it is held that, "although a speculation in cotton futures may be an illegal contract, yet an agent who incurs expenses or loss on behalf of his principal, in carrying out such contract, may recover the amount thereof from such principal." But this court has never adhered to that ruling. On the contrary, the principle decided in that case was virtually overruled in the case of *National Bank v. Cunningham*, 75 Ga. 386, and *Cothran v. Western U. Teleg. Co.* 83 Ga. 25. It may seem a hardship, in some cases, to allow a party to insist upon his illegal contract as a reason why he should be relieved from his

obligations thereunder. The law, in refusing to enforce such contracts, has not in view the benefit of the litigants themselves, but questions of public policy, and the protection of the people against the violation of statutes enacted for the public good.

3. From the above, we conclude that the petition in this case sets forth no legal cause of action, and that, therefore, the court erred in overruling the demurrer thereto.

Judgment reversed.

All the Justices concur except Cobb, J., disqualified.

INDIANA SUPREME COURT.

Peter L. BISHOP, *Appl.*,

v.

STATE of Indiana, *ex rel.* Daniel E. GRINER.

(.....Ind.....)

1. The postmaster of a local postoffice is a "deputy postmaster" within the meaning of Const. art. 2, § 9, providing that the office of a deputy postmaster whose compensation does not exceed \$90 per annum shall not be deemed lucrative within the provision respecting the right to hold other offices.
2. One who has surrendered or vacated one office by accepting another cannot be restored to any right or title under the first by subsequently resigning the second.
3. The exception in favor of a postmaster whose annual compensation does not exceed \$90, in Const. art. 2, § 9, prohibiting a person from holding more than one lucrative office at the same time, must be negatived in an allegation that a person holding another office has forfeited it by becoming a postmaster.

(January 4, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Jay County in favor of relator in a quo warranto proceeding to oust defendant from the office of township trustee.

Reversed.

The facts are stated in the opinion.

Messrs. John M. Smith and Frank H. Snyder for appellant.

Messrs. D. T. Taylor and D. E. Griner for appellee.

Jordan, J., delivered the opinion of the court:

This action was prosecuted in the lower court upon information, in the name of the state, on the relation of the prosecuting attorney, for the purpose of ousting the appellant from the office of township trustee. A judg-

ment of ouster was rendered, from which appellant prosecutes this appeal. The errors assigned are: (1) That the court erred in overruling a demurrer to the information; (2) error in sustaining a demurrer to the answer.

The information charges, substantially, that the defendant, Peter L. Bishop, at the November election of 1894, was elected township trustee of Bearcreek township, in Jay county, Indiana, for a term of four years, and that on the 6th day of August, 1895, he duly qualified as such trustee, and entered upon the discharge of the duties of the office; that subsequently, on the 9th day of October, 1896, the defendant was duly appointed and commissioned, by the postoffice department of the United States, postmaster at the village of Bryant, in said county of Jay, for a term of four years, and duly qualified as such postmaster at said time, and entered upon the discharge of the duties thereof, and from said day on has continued to hold said office of postmaster, and discharge the duties thereof. By reason of his accepting and entering upon the discharge of the duties of postmaster at Bryant, it is charged that he forfeited and surrendered the office of township trustee, and the prayer is that he be ousted therefrom. The state bases its right to expel appellant from the office in question on § 9 of art. 2 of the Constitution, which is as follows: "No person holding a lucrative office or appointment under the United States, or under this state, shall be eligible to a seat in the general assembly; nor shall any person hold more than one lucrative office at the same time, except as by this Constitution expressly permitted: provided that officers in the militia to which there is attached no annual salary, and the office of deputy postmaster, where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative; and provided, also, that counties containing less than one thousand polls may confer the office of clerk, recorder, and auditor, or any two of said offices, upon the same

NOTE.—As to incompatibility of offices, see also *De Turk v. Com.* (Pa.) 5 L. R. A. 853, and *note*; *Chambers v. State*, *Barnard* (Ind.) 11 L. R. A. 613, and *note*; *Atty. Gen. v. Marston* (N. H.) 13 L. R. A. 39 L. R. A.

670; *People, Sherwood, v. State Bd. of Canvassers* (N. Y.) 14 L. R. A. 646; *State, Walker, v. Bus* (Mo.) 33 L. R. A. 616.

person." The contention of counsel for appellee is that appellant, by accepting the office of postmaster, when he was an incumbent of another lucrative office created by the laws of this state, violated the above provision of the Constitution, prohibiting one from holding two lucrative offices; and it is claimed that by this unlawful act he *ipso facto* surrendered his right to longer hold the office of trustee, and the latter office thereby became vacant. This proposition counsel for appellant to an extent controvert, and they insist that the information is insufficient for its failure to negative the exception in § 9, *supra*, which provides that the office of deputy postmaster, where the compensation does not exceed \$90 per annum, shall not be deemed lucrative. Their insistence is that the pleading, upon any view of the case, must affirmatively disclose that the postoffice in question does not fall within this exception. Counsel, in their brief, say: "When our Constitution was constructed and created, there was one 'general postoffice at Washington, District of Columbia,' and the Postmaster General was in charge, and denominated 'postmaster,' and the different officers throughout the country were known, and in fact designated, as 'deputy postmasters,' by the Federal statute. This was true until 1876, when the postoffices were designated as 1st, 2d, 3d, and 4th class, and the lower class only are appointed by the Postmaster General. The others are appointed by the President. In this latter statute the word 'deputy' was dropped, and the offices classified as we have said." In support of their contention they argue that the term "deputy postmaster," as employed in the Constitution, means and includes what is now generally denominated "postmaster," and if the state relies on the positive prohibition of the Constitution, to oust appellant from the office of trustee, it must, at least, by proper averments, show that the annual compensation of the postoffice accepted and held by him exceeded \$90, and thereby place him beyond the exception. On the other hand, counsel for the state contended that the information is sufficient, and in support of their contention they say that, at the time of the adoption of the Constitution, the various postoffices throughout the state were filled by officials denominated and known as "postmasters," and the term "deputy postmaster," as used in the Constitution, was understood and intended to apply only to a person who was an assistant or deputy of a local postmaster, and for whose acts the latter officer was liable. Therefore they contend that inasmuch as the appellant was a postmaster, and not a deputy postmaster, he in no manner can avail himself of the exception to the prohibition against holding at the same time more than one lucrative office.

We regret that counsel in this appeal have not given us the aid which they should, in our search for a solution of the controversy on the point involved. The inquiry, under the circumstances, is: What is the correct interpretation of the term "deputy postmaster," as employed in § 9 of art. 2 of the Constitution? The precise question, so far as we have been able to ascertain, has not heretofore been considered by this court. In the cases of *Foltz v.*

Kerlin, 105 Ind. 221, 55 Am. Rep. 197, and *Wood v. State*, 130 Ind. 364, the interpretation of the term "deputy postmaster," as now involved, does not seem to have been presented nor considered.

In order to discover the true sense of the term in question, and thereby determine if the exception in controversy can be of any avail to the appellant in this action, we may properly examine the postal laws of the United States passed by Congress prior to the constitutional convention of 1850, which framed our present fundamental law, and learn from such facts if the term "deputy postmaster" was employed therein, and what duties were assigned to such officer. An inspection of the several acts of Congress relative to the postal affairs of the national government passed between the years 1789 and 1827 discloses that the term "deputy postmaster" was used therein, and in other acts subsequently passed, and that it was intended to, and did, apply to the persons who were intrusted with the distribution of the United States mail at the various localities where it was delivered. The Postmaster General was considered the executive head of the postoffice department, and those who served under him at the various towns and cities throughout the country were considered his deputies. See 1 Stat. at L. 733; 4 Stat. at L. 102. By the act of July 2, 1836, the President was authorized, with the advice and consent of the Senate, to appoint a "deputy postmaster" for each postoffice where the commissions allowed amounted to \$1,000 and over, for the year ending June 30, 1835. 5 Stat. at L. 80. In the act of March 3, 1845, the term "deputy postmaster" is again used, and likewise in the act of March 1, 1847, wherein certain pay is directed to be allowed to "deputy postmasters" in lieu of commissions previously paid. 5 Stat. at L. 732; 9 Stat. at L. 147. By an act of March 3, 1847, the Postmaster General is directed to establish a postoffice at Astoria, Oregon, and appoint a "deputy postmaster" to discharge the duties thereof. 9 Stat. at L. 189, 200. By the act of March 3, 1851, the Postmaster General was directed to furnish stamps, etc., to all deputy postmasters. 9 Stat. at L. 589. Section 6 of the act of March 3, 1853, provided certain regulations in regard to "deputy postmasters." 10 Stat. at L. 249, 255. It is apparent, therefore, that the statutes of the United States, passed before and long after the adoption of our Constitution, applied the term "deputy postmaster" to each and all persons who were incumbents of, and discharged the duties of, the postoffices established at the towns and cities throughout the nation. That these officials, in a legal sense, to a certain extent, were each considered as the deputy of the Postmaster General, is evident. In fact, in many of the decisions of the Federal courts the term "deputy postmaster" was applied to a person filling a postoffice, and such officer is said to be the deputy of the Postmaster General. *Boody v. United States*, 1 Woodb. & M. 150; *Postmaster General v. Early*, 25 U. S. 12 Wheat. 136, 6 L. ed. 577; *United States v. Le Baron*, 60 U. S. 19 How. 73, 15 L. ed. 525; *Ware v. United States*, 71 U. S. 4 Wall. 617, 625, 18 L. ed. 389, 390; *Postmaster General v. Furber*, 4 Mason, 333. Many other cases may be found to the

same effect, but those to which we have referred will suffice for the purpose which we have in view.

Turning to the proceedings of the constitutional convention leading up to the framing and adoption of the section in controversy, and it appears that, after several propositions were made to exempt postmasters where the office did not exceed a certain annual compensation from the term "lucrative office," the matter of holding more than one lucrative office at the same time was finally referred to the committee on revision and phraseology. The result of their deliberations was embodied in the following sections:

"Sec. 6. No person holding any lucrative office or appointment under the United States or this state shall be eligible to a seat in either branch of the general assembly; provided, that officers in the militia, to which there is attached no annual salary, shall not be deemed lucrative."

"Sec. 1. No person shall hold more than one lucrative office at the same time except as in this Constitution expressly permitted; provided that counties containing less than one thousand polls may confer the office of clerk, and recorder, and auditor, or any two of said offices upon one person: provided, however, that the office of postmaster, where the compensation does not exceed ninety dollars per annum shall not be deemed lucrative."

This committee, after giving the question consideration, seems to have consolidated these sections, and prefixed the word "deputy" to postmaster, and incorporated the whole into § 9 of art. 2 of the Constitution in which form it was reported to the convention, and finally adopted and ratified by the people. *Convention Journal*, pp. 166, 167, 527 *et seq.* No reasonable doubt can exist but what the committee on phraseology considered the phrase "deputy postmaster" as the one technically correct and proper to be used, in view of the fact that the postal laws of the United States applied this term to the particular Federal officer which the convention had under consideration, and which had been designated in the section referred to the committee as "postmaster." In the debates of the convention on the question of making a person ineligible to hold more than one lucrative office, the term "postmaster" was generally used. Mr. Owen, a member of the convention, speaking on the question in regard to excluding postmasters from holding offices created by the laws of the state, said: "I ask the gentlemen if there is a single postmaster who receives but \$90 a year who is not obliged to do something else for a livelihood. . . . It is not for the sake of the receipts of the office that the postmaster accepts the office, but for the accommodation of the neighborhood. It is wrong then, in my opinion, to deprive them of the right to be elected to the legislature." *Debates on the Constitution*, pp. 1423, 1424. In the address to the people of the state, prepared by Mr. Owen, and unanimously concurred in by the convention, wherein, among other things, the principal changes made in the old Constitution, under the new one about to be submitted, were pointed out to the electors, is the following: "Postmasters, if their annual compensation be

\$90 or less, but not otherwise, may be elected members of the legislature." *Debates on the Constitution*, p. 2042. This announcement or declaration to the electors of the state relative to the provisions of the Constitution which was about to be submitted for their ratification, by the men who had just completed the work of molding and giving it form, certainly must be accepted as revealing what was understood by the term "deputy postmaster," as used in the section in controversy, and the particular officer to whom the term was intended to be applied. It is a rule generally asserted that words or terms used in a Constitution which is dependent upon a ratification by the people must be interpreted in a sense most obvious to the common understanding at the time of its adoption, in the belief that such was the sense or meaning designed. *Cooley, Const. Lim.* 6th ed. pp. 69, 73, 81. Guided by this principle, in the light of the contemporaneous facts and circumstances to which we have referred it is plain, we think, that the term in question, according to the common understanding of both those who framed and those who ratified our Constitution, was understood and intended to mean the office of postmaster as now denominated, and consequently must be applied to such office. Therefore, if the annual salary or compensation of a postoffice in this state is not in excess of \$90, in that event such office cannot be considered a lucrative one, within the prohibition of § 9, *supra*. But, where such compensation exceeds \$90, the office must be held to be lucrative; and, under the positive mandate of the Constitution, the incumbent thereof is debarred from holding any other lucrative office created by the Constitution or laws of this state. The settled rule of the common law prohibits an incumbent of a public office from holding a second one incompatible with the first, and the acceptance of the second office will *ipso facto* terminate his right or title to the first. The authorities affirm that the act of accepting, under such circumstances, the second office, operates as a surrender of the first; and when the officer has been once inducted, under his election or appointment, into the second office, his subsequent resignation of the latter can in no manner serve to restore his right or title to the first office, for it is evident that, when a public office once becomes vacant, a former incumbent cannot be restored to it by his own act. *Yonkey v. State, Cornelison*, 27 Ind. 286; *Howard v. Shoemaker*, 85 Ind. 111; *Gosman v. State, Schumacher*, 106 Ind. 203, and authorities there cited; *State, Walker, v. Bus*, 125 Mo. 325, 33 L. R. A. 616; *People, Kelly, v. Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659; *State, Metcalf, v. Goff*, 15 R. I. 508; *Mechem, Pub. Off.* §§ 420, 425, 426; *Throop, Pub. Off.* §§ 30, 81; 19 Am. & Eng. Enc. Law, p. 562u.

The question, however, with which we have to deal in this case, is not one relating to the holding of incompatible offices in defiance of the common law, but relates to the holding of one incompatible with the inhibition of the Constitution. The doctrine of the common law which we have mentioned, however, is in some respects applicable. The test to be applied is not whether the two offices held by the appellant are incompatible with each other,

but are they lucrative ones, within the meaning of the Constitution. That the office of township trustee is lucrative is settled beyond controversy. *Creighton v. Piper*, 14 Ind. 182; *Foltz v. Kerlin*, 105 Ind. 231, 55 Am. Rep. 197. If the annual compensation of the post-office accepted and held by appellant is over \$90, it is manifest that it falls within the constitutional interdiction; and appellant, by accepting it at the time he was holding that of trustee, violated the fundamental law of the state, and his unlawful act in so doing would produce the same result or effect as does the acceptance by an officer of a second/incompatible office under the rule at common law to which we have theretofore referred. It could not be presumed that appellant intended to violate the Constitution by accepting and holding the office of postmaster if it was beyond the exception in question, when he was the occupant of that of township trustee; and the result to be implied from his act in doing so, under such circumstances, would be that he intended to completely surrender and vacate the latter office, and the law would attribute such a surrender as the necessary consequences of the act. 19 Am. & Eng. Enc. Law, p. 5626; *Mechem*, Pub. Off. § 439; *Dickson v. People*, *Brown*, 17 Ill. 191; *State v. Buttz*, 9 S. C. N. S. 156; *Re Corliss*, 11 R. I. 638, 23 Am. Rep. 588; *State v. De Gress*, 53 Tex. 887; *Davenport v. New York*, 67 N. Y. 456; *Hoglan v. Carpenter*, 4 Bush, 89. Assuming, therefore, that the annual compensation of the postoffice in controversy exceeds \$90, the act of the appellant in accepting it while the incumbent of the office of trustee would operate as a surrender or resignation of the latter; and it would become vacant to the extent, at least, that the proper appointing authority could lawfully proceed to fill the vacancy. This rule, we think, is well affirmed by the authorities cited. *Gosman, v. State*, *Schumacher*, 106 Ind., at page 208; *Osborne v. State*, *Michaels*, 128 Ind. 129.

But counsel for appellant urge that, in consideration of the fact that appellant subsequently resigned the office of postmaster, as alleged in his answer, consequently this action cannot be maintained. This contention is not tenable. As we previously said, where the first office is once surrendered or vacated by accepting a second, in defiance of law, the officer cannot be restored to any right or title under the first by resigning the second. Counsel refer us, however, upon this question to the cases of *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197; and *De Turk v. Com.* 129 Pa. 151, 5 L. R. A. 853. In both of these cases the party was holding the office of postmaster when he accepted and was inducted into the office created by the laws of the state. As the laws of the state could exert no dominion over a Federal officer, as an officer, it was therefore said in the first case to be inconceivable, under such circumstances, that the acceptance of an office created by the state could operate to vacate one held under the statutes of the United States. In *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197, Elliott, J., intimated that the incumbent of a postoffice, when installed into that of township trustee, might surrender the office of postmaster, and retain that of trustee, but ex-

pressly said that 'both could not be held in defiance of the Constitution. In the appeal of *De Turk v. Com.* 129 Pa. 151, 5 L. R. A. 853, in view of the fact that the officer was postmaster at the time he accepted the office of commissioner, under the laws of the commonwealth of Pennsylvania, it was held that he might resign the former and retain the latter. The facts in these two cases, it will be seen, were just the reverse of those in the case at bar. The question as here presented does not in any manner involve the right of the courts of the state to oust the occupant of a Federal office, for in this respect it must be conceded they are utterly powerless. Their right, however, to pass upon the title to an office of one who claims to hold it under the laws of their own jurisdiction, and expel him therefrom, whenever he has vacated it by his act of accepting a Federal office, great or small, in violation of the state's Constitution, cannot be successfully controverted. Likewise a state court has the power, as held in the *Foltz Case*, to oust one from an office existing under state laws, when at the time he accepted and was installed into the latter he was also the incumbent of an office under the authority of the United States, and insists, under such circumstances, in holding both in defiance of the state's Constitution.

Having reached the conclusions expressed on the foregoing propositions, we may next proceed to consider and determine the ultimate question: Is the information sufficient, in the absence of any averments, to show that the compensation of the postoffice in controversy exceeds ninety dollars per annum? We are of the opinion that this question must be answered in the negative. The action is apparently instituted under the second subdivision of § 1145, Rev. Stat. 1894 (Rev. Stat. 1881, § 1131, Horner's Rev. Stat. 1897, § 1131), which provides that "an information may be filed, etc., whenever any public officer shall have done or suffered any act which by the provisions of law shall work a forfeiture of his office." The information under this provision of the Code must state facts sufficient to clearly show a forfeiture of the office in controversy. *Chambers v. State*, *Barnard*, 127 Ind. 865, 11 L. R. A. 618. We have seen that the act upon which the state relies to operate as a forfeiture of the office in dispute was the acceptance by the appellant of a second lucrative office,—that of postmaster,—contrary to the provisions of the Constitution. But, as we have heretofore said, § 9 of article 2, which forbids the holding of more than one lucrative office, also makes an exception in favor of a postmaster where the compensation of his office is not in excess of \$90 per annum. In the absence of any averment to the contrary, a court would be compelled to presume that the office in question was within the exception reserved by the Constitution. We are not authorized to presume that the positive command of the law has been violated by appellant, and that he must therefore be subjected to a judgment of ouster. At least, as a matter of pleading, the plaintiff was required to negative the exception made in favor of a postmaster whose annual compensation does not exceed \$90. *Brutton v. State*, 4 Ind. 601, 602; *Shearer v. State*, 7 Blackf. 99; *Howe v.*

State, 10 Ind. 423; *State v. Carpenter*, 20 Ind. 219; *Wiley v. State*, 53 Ind. 516; *Burke v. State*, 52 Ind. 522; *State v. Buckner*, 52 Ind. 278; *Meier v. State*, 57 Ind. 386; *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 Ind. 242; *Steenenson v. State*, 65 Ind. 409; *Whart. Crim. L.* 7th ed. § 614; *Whart. Crim. Pl. & Pr.* 9th ed. §§ 238 *et seq.*; *Whart. Crim. Ev.* 9th ed. 128; *High, Extr. Legal Rem.* § 591; *Bliss, Code Pl.* §§ 202 *et seq.*; 1 *Greenl. Ev.* 18th ed. § 79, and note; 1 *Chitty. Pl.* (1867) 224; *Gould, Pl. chap. 4, § 22; Ship. Pl. p. 33; Stephenson, Pl. Heard's ed. p. 443.* From the small population of the town of Bryant, as disclosed by the last Federal census, it may be inferred that its postoffice belongs to the fourth class, the annual compensation of which, under the postal laws, seems to be fixed and adjusted quarterly by the postoffice department, and depends, to an extent, on the amount of business done at the office. For the reason pointed out, the information must be held to be insufficient; and the court therefore erred in overruling the demurrer thereto. The answer of the appellant, which set up his resignation of the postoffice in question, was no defense to the action, and the demurrer to it was properly sustained.

The judgment is reversed, and the cause remanded to the lower court, with instructions to sustain the demurrer to the information, with leave to amend, and for further proceedings in accord with this opinion.

STATE of Indiana, *ex rel.* John T. MORRIS,
Appt.,
v.

Elijah McFARLAND.

(.....Ind.)

The right of the auditor to give a casting vote in case of a tie on a vote by township trustees to fill a vacancy in the office of county superintendent under Rev. Stat. 1894, § 5900, is not limited to a case in which there has been a tie vote by ballot for such officer, but extends to a tie on a *viva voce* vote on a motion or resolution preliminary to making the appointment or a motion to appoint.

(January 11, 1898.)

A PPEAL by relator from a judgment of the Circuit Court for Martin County in favor of defendant in a quo warranto proceeding to oust defendant from the office of superintendent of Martin County. *Affirmed.*

The facts are stated in the opinion.

Messrs. Houghton & Marshall and *Hiram McCormick* for appellant.

Messrs. F. Gwin, Rogers & Rogers, and *Ogden & Inman* for appellee.

Jordan, J., delivered the opinion of the court:

This proceeding was instituted, upon information filed in the lower court in the name of

the state, on the relation of the appellant, John T. Morris, whereby he sought to eject the appellee, Elijah McFarland, from the office of county superintendent of the county of Martin, and gain admission himself to that office. On the issues joined there was a trial, and special finding of facts by the court, and conclusions of law stated thereon, to the effect that the appellee was legally elected and entitled to the office in dispute, and that the relator take nothing by the action, and judgment was rendered accordingly.

The only material question presented for decision is as to whether the auditor of Martin county, under the facts, was authorized by law to give the casting votes which he did in the proceedings by the township trustees relative to the appointment of a superintendent. A summary of the material facts, as disclosed by the finding, is as follows: There are ten township trustees of Martin county, Indiana, and all of these trustees assembled at the office of the county auditor of that county on the 1st Monday in June, 1897, in compliance with the statute, for the purpose of appointing a county superintendent to succeed the relator, who was then the incumbent of that office, and had held the same for four years prior to said day. The trustees organized by electing one of their number chairman (the auditor acting as clerk, as provided by the statute), and then proceeded to ballot for superintendent, taking 38 ballots, and no one person receiving a majority of all the votes cast, as a result of any one of the ballots taken, the votes cast being distributed among several persons. At the close of the thirty-eighth ballot, no appointment having been made, on motion it was ordered that the meeting adjourn to convene again at 6:30 P. M. on the same day, at which hour the trustees all again convened, and proceeded to ballot until 11:50 P. M. without succeeding in securing the appointment of a superintendent, when, having taken 188 ballots in all on said day, they again adjourned to meet at 8 o'clock A. M. the next day, June 8, 1897, at which time they assembled, and proceeded with the unfinished business before them. After taking 14 more ballots, making a total of 152, and no one, as the result of any of said ballots, having received a majority of all the votes cast, and no two persons having received an equal number of the votes cast on any of said ballots, a motion was then made and seconded that the method of voting be changed from voting by ballot to that of voting upon a motion to appoint; and on the adoption of the motion, as made, five of said trustees voted in favor of the motion and five against it, and thereupon, a tie having resulted, the auditor cast his vote in the affirmative, and the motion was declared adopted. It was then moved and seconded that a resolution be adopted as follows: "Be it resolved by the trustees of Martin county, Indiana, that Elijah McFarland be appointed county superintendent of schools of said county for the ensuing two years." A motion was made to amend the resolution by striking out the name of McFar-

NOTE.—As to casting vote, see note to *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 308; also *Magenau v. Fremont* (Neb.) 9 L. R. A. 788; *State, Rylands, v. 39 L. R. A.*

Pinkerman (Conn.) 22 L. R. A. 653; *Wooster v. Mullins* (Conn.) 25 L. R. A. 694; and *Brown v. Foster* (Me.) 31 L. R. A. 116.

land, and inserting that of John T. Morris. On the adoption of this motion, five of the trustees voted in favor thereof and five against, and the chairman announced a tie, and thereupon the auditor voted against the proposition to amend, and it was declared lost. A vote was then taken on the motion to adopt the resolution, which resulted in five of the trustees casting their votes in favor of the resolution and five against its adoption, and thereupon the chairman declared a tie, and the auditor then cast his vote in favor of the resolution, and the chairman declared it adopted, and that McFarland had been appointed county superintendent for the term of two years, and the meeting then, on motion, was declared to be adjourned. Other facts are found, showing that McFarland, the appointee, and appellee herein, was eligible to be appointed to the office in controversy, and that he duly qualified under said appointment, and entered upon the discharge of the duties of the office.

Rev. Stat. 1894, § 5900 (Rev. Stat. 1881, § 4424; Horner's Rev. Stat. 1897, § 4424), being the statute upon which the appointment of appellee to the office in question is based, omitting parts not essential to the question involved, reads as follows: "The township trustees of the several townships of each county shall meet at the office of the county auditor of such county on the 1st Monday of June, 1873, and biennially thereafter, and appoint a county superintendent. . . . Whenever a vacancy shall occur in the office of county superintendent, by death, resignation, or removal, the said trustees, on the notice of the county auditor, shall assemble at the office of such auditor, and fill such vacancy, . . . and the county auditor shall be clerk of such elections in all cases, and give the casting vote in case of a tie, and shall keep the record of such elections in a book to be kept for that purpose." (Our italics.) It is claimed by counsel for the relator that, upon a proper interpretation of this statute, under the facts, the appellee, McFarland, was not legally appointed to the office in dispute, for the reason that he did not receive a majority of the votes cast by the ten trustees present and voting at the time the appointment is said to have been made. Their specific contention is that, in view of the fact that the resolution which named the appellee as the person to be voted for received the votes of but five of the trustees, while those of the remaining five were cast against it, this action of the trustees did not operate to create a tie, within the meaning of the statute, and therefore the auditor was not authorized to vote either for or against the adoption of the resolution. It is insisted that, under the provisions of the statute, it is only where the votes of the trustees have been cast for two persons, each of whom receives an equal number of such votes, that a tie can result, which would warrant the auditor to give the casting vote. It is further urged that the auditor had no right, as he did, to vote, under the circumstances, and thereby change the mode of making a choice by ballot to that of making the appointment by means of a resolution. The law, as we have seen, lodges the authority of appointing a county superintendent in the township trustees of the county.

They, when assembled for that purpose, constitute the body invested with the power to discharge this important duty. The auditor, it appears, is made the clerk of the election, and it is only in the event of an equal division of the trustees (a quorum being present) that the auditor is invested with power to cast his vote for or against the particular proposition involved. The law does not, in terms, prescribe any precise methods, manner, or form by which the trustees shall choose a superintendent, and therefore the form or means by which the appointment may be made is not material. The choice of such officer by the body empowered to make the selection may be ascertained by ballot, or a *viva voce* vote, or by the adoption of a motion or resolution declaring that the person therein named be appointed to fill the office. See *Sturges v. Spofford*, 52 Barb. 436, on page 446; *State v. Jeffries*, v. *Kilroy*, 86 Ind. 118; *State v. Drummond*, v. *Dillon*, 125 Ind. 65.

It is conceded by counsel for the appellant that, had the resolution under which appellee claims to have been appointed received a majority of the votes cast by the trustees it would have been adopted, and he would have been thereby legally elected. It being permissible, then, for a majority of the trustees to designate their choice of a person by either the adoption of a motion or resolution to that effect, upon what tenable grounds can it be asserted that, when an equal division of the trustees present and voting results upon the adoption of such motion or resolution, it does not constitute a tie vote, within the meaning of the statute? That it would be such under parliamentary law or usage is evident. We must confess that we can perceive no sufficient reason for upholding the right of the auditor to give the casting vote, when the tie results from a vote taken by means of a ballot, and denying his right to do so when the trustees are equally divided upon a *viva voce* vote, taken on making the appointment by means of a motion or resolution. From the number of ballots taken in the case at bar, it must have been evident to all that further efforts to appoint a superintendent by means of a ballot vote would be of no avail; and as the statute commanded that the appointment should be made, it certainly was apparent that, under the existing circumstances, the purpose and object of the law could be more easily and conveniently carried out by the adoption of a resolution naming the person to be chosen. In the case of *State v. Drummond*, v. *Dillon*, 125 Ind. 65, all of the trustees, being eight in number, met at the time and place fixed by the law, and, after an organization had been secured, the name of Dillon was presented by a motion to be voted for to fill the office of county superintendent. Four of the trustees voted in favor of the motion, and the other four refused to vote either for or against it. The county auditor, under the circumstances, cast his vote in favor of the motion. While it is true that, in the case mentioned, the vote of the auditor was not considered as a controlling factor, as it was held that Dillon had been legally elected, for the reason that he had received a majority of the votes of a quorum present and voting. The view of the court, however, expressed through

Olds, J., speaking as its organ, relative to the question as now involved, was as follows: "In this case the elective body was in session. It consisted of eight members, and it was properly moved that Dillon be elected county superintendent, and four of the eight voted for his election, and the other four declining to vote. *If the other four had voted against his election, the law in that case provided that the county auditor should give the casting vote.* [Our italics.] It was the duty of all the members of the board to vote for or against the candidate whose name was proposed, and they could not defeat the object of the meeting and avoid the law and prevent an election by remaining silent and refusing to vote either for or against the candidate proposed." The mayor of a city, in this state, by the charter law relative to the incorporation of cities, is made the presiding officer at the meetings of the common council, and in the case of a tie on the part of the members of the council he has the casting vote. It is the frequent practice, where the council is empowered to appoint city officials, to designate the person appointed by the adoption of a resolution, and in the case of an equal division of the council on a vote taken on such a resolution, the right of the mayor to give the casting vote, to our knowledge, has never been called in question, although such power, under such circumstances, has been frequently exercised. In *Launtz v. People, Sullivan*, 118 Ill. 137, 55 Am. Rep. 405, the charter of the city of East St. Louis authorized the mayor to give the casting vote in case of a tie in the common council. On the adoption of a motion to approve the bond of the city treasurer, four of the eight members of the council voted in the affirmative, the other four refusing to vote, either in the affirmative or negative. It was said by the court in that case that the mayor might treat those who refused to vote as being opposed to the motion, and the result would be equivalent to a tie, and would, therefore, warrant him in voting, as in case of a tie. In the appeal of *Carroll v. Wall*, 85 Kan. 36, it was held that where the mayor, under the law, had the casting vote when the council was equally divided, he had the power, where a tie resulted on a motion to confirm the appointment of a city attorney, to give the casting vote. These decisions will, at least, serve to illustrate that a tie vote of an assembly, in which event a certain person designated by law is entitled to vote, may and does arise, whether the proposition or matter before the body is attempted to be carried out by the means of a ballot or by a *viva voce* vote on a motion or resolution.

The very purpose for which the law requires the township trustees to assemble on the day and at the place fixed is to appoint a superintendent, and under no circumstances does the statute contemplate that this purpose or object

shall be defeated by any "maneuvering" or "jockeying" upon the part of those charged with the duty of making such appointment. Should we hold the grounds upon which counsel for appellant found their contention to be tenable, then, under similar circumstances, the contest for the appointment of a superintendent might be indefinitely prolonged, and an election of anyone prevented. No construction should be placed upon the statute which might lead to such a result. The legislature, in empowering the auditor to vote in case of a tie, no doubt considered the fact that the trustees might be equally divided, not only on the question as to the individual to be chosen to fill the office, but also on propositions preliminary to making the appointment, and, in case of a tie on any such preliminary question, the auditor must be held to have the right to give the casting vote for or against such proposition. It cannot be said that the appellee herein, under the facts, did not receive a majority of all the votes cast by the electoral body upon the occasion in question; for, as the auditor is empowered to vote in case of a tie, consequently, upon the happening of that event, at least, for the purpose of giving the casting vote, that officer must be deemed and considered to that extent as one of the electoral body, and to his vote the law accords the same force and effect as to that of any one of the trustees, and when cast in the affirmative, as it was in this case, it serves as the crowning act in the election. We are constrained to hold that the auditor in each instance herein mentioned was entitled to vote, and therefore the resolution was legally adopted, and the appointment of the appellee to the office in dispute is in all respects valid. He was not only, under the circumstances, permitted to vote, but the law expressly required him to discharge that duty.

We are aware that the doctrine affirmed in the case of *State, Williams, v. Edwards*, 114 Ind. 581, sustains the contention of appellant's learned counsel, and therefore that case is in direct conflict in this respect with the conclusion reached in this appeal. It may be said, however, that the construction placed upon the statute relative to the right of the auditor to vote in that decision is narrow and apparently strained, and is unquestionably contrary to the very spirit or object of the law, and, so far as the holding therein conflicts with that in this case, it must be considered and held to be overruled. Some of the earlier decisions of this court, in construing the statute in question, were inclined to be too strict, while the later ones are more liberal, and, as we believe, more in harmony with the spirit or intent of the law. See *Wampler v. State, Alexander*, (Ind.) 88 L. R. A. 829.

The judgment below, under the facts and the law applicable thereto, is a correct result, and is therefore affirmed.

IOWA SUPREME COURT.

STATE of Iowa, *ex rel.* James A. HOWE,
Appl.,
v.

Mayor, etc., of DES MOINES *et al.*

(.....Iowa.....)

1. The legislature cannot delegate the power to fix and determine the amount of a tax for a public library, which must be levied by the common council to a board which is not chosen by, and directly responsible to, the taxpayers, unless the people assent thereto.
2. Consent to the levying by a board of a tax for a public library is not given by a vote adopting a statutory plan for such library by which the tax is to be levied by the common council, although the board subsequently provided for is to be appointed by the mayor with consent of the council.

(October 9, 1897.)

A PPEAL by complainant from an order of the District Court for Polk County denying a writ of mandamus to compel defendant to levy a tax for the purpose of erecting a library building and maintaining a library. *Affirmed.*

The facts are stated in the opinion.

Messrs. Read & Read, for appellant:

All legislative authority, which includes the power of taxation without limitation, is vested in the legislature.

Const. art. 8, § 1; *Davenport v. Chicago*, R. I. & P. R. Co. 88 Iowa, 683.

It may confer the taxing power upon municipalities to such extent as it may deem expedient or desirable.

2 Dill. Mun. Corp. 8d ed. § 740; *Cooley*, Taxn. 1st ed. p. 51.

A board of library trustees appointed pursuant to the provisions of chap. 41, Acts of the 25th General Assembly, is an agency of the city appointing it, clothed with the power and charged with the duty of performing, on behalf of the city, the acts specified in the statute.

Orois v. Des Moines Park Comrs. 88 Iowa, 674; *State, Merrick, v. Hennepin County Dist. Ct.* 88 Minn. 285.

The legislature may select such municipal agency as it deems proper to exercise the power conferred, and is not limited in its power in that respect, and compelled to select the city council as the sole municipal agency for the purpose of exercising the taxing power.

State, Merrick, v. Hennepin County Dist. Ct. 88 Minn. 285; *Baltimore v. State, Board of Police*, 15 Md. 876, 74 Am. Dec. 572.

A statutory provision that commissioners may levy a tax for school purposes is mandatory.

Jones v. State, Board of Public Instruction, 17 Fla. 411.

The statutes make it the duty of boards of

NOTE.—As to delegation of authority by legislature, see also *Bradshaw v. Lankford* (Md.) 11 L. R. A. 582, and note; *Dowling v. Lancashire Ins. Co.* (Wis.) 81 L. R. A. 112, and other cases cited in footnote.

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directors of independent school districts to fix and determine the amount of tax necessary to be levied for the support of the schools within the district, and to certify the amount thus fixed and determined to the board of supervisors, and requires the board to levy the tax thus certified.

Independent Dist. v. Sioux County Supers. 51 Iowa, 658.

No case is found which holds that the power of taxation may not be delegated by the legislature, in the absence of constitutional restrictions and limitations, to be exercised by such municipal authorities, representatives, or agencies as the legislature may provide. Supporting the proposition are found:

Orois v. Des Moines Park Comrs. 88 Iowa, 674; *State, Merrick, v. Hennepin County Dist. Ct.* 88 Minn. 285; *Baltimore v. State, Board of Police*, 15 Md. 876, 74 Am. Dec. 572; 2 Dill. Mun. Corp. 8d ed. § 740; 25 Am. & Eng. Enc. Law, pp. 22, 71-75.

The question of what tax or for what purpose taxation should be made, is one of policy and expediency, which concerns the legislature only.

Cooley, Taxn. 2d ed. p. 119; *Merchants' Union Barb-Wire Co. v. Brown*, 64 Iowa, 275.

Messrs. Hubbard & Dawley also for appellant.

Messrs. Bishop, Bowen, & Fleming and *J. K. Macomber*, for appellees:

The act of the 25th and 26th General Assembly is void in so far as it authorizes the levy of a tax, and in so far as it gives that power to the board of library trustees, it never having been voted on and adopted by the people after these changes were made.

Cornell v. People, 107 Ill. 872.

It is not within the legislative power to compel the city council against its will to levy a tax for the purposes either of maintaining the library or the erection of a library building.

Cooley, Const. Lim. 5th ed. **280, 281; *Hanson v. Vernon*, 27 Iowa, 78, 1 Am. Rep. 215.

While the legislature has the right to delegate the power of taxation to municipal and political corporations, it has not the right to delegate that power to any other than the proper legislative body of such corporations. The people have delegated their inherent right of taxation to the legislature. The legislature may again delegate that right back to the people, or to the representatives of the people, the legislative bodies of the different municipal and political corporations of the state. But it has not the right, for unusual purposes, to delegate the right of taxation to any but the legislative body of the municipal or political corporations.

Cooley, Taxn. 2d ed. p. 61; *People, McCagg, v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Harward v. St. Clair & M. Levee & D. Co.* 51 Ill. 180; *Hinze v. People, Halbert*, 92 Ill. 406; *Updike v. Wright*, 81 Ill. 49; *People, Dunham, v. Morgan*, 90 Ill. 558; *Parks v. Wyandotte County Comrs.* 61 Fed. Rep. 486; *Wyandotte County Comrs. v. Abbott*, 52 Kan. 148; *People, Park Comrs., v. Detroit*, 28 Mich. 227, 15 Am. Rep. 202.

The constitutional provision of the state of

Illinois has no different force or effect than that which is implied in all state Constitutions.

Cooley, Taxn. p. 61; *Wyandotte County Comrs. v. Abbott*, 52 Kan. 148; *Hanson v. Vernon*, 27 Iowa, 78, 1 Am. Rep. 215.

Kinne, Ch. J., delivered the opinion of the court:

1. The conceded facts in this case are as follows: The city of Des Moines, a city of the first class, in 1882, by a vote of its electors, accepted the provisions of the statute of this state relating to the establishment and maintenance of free public libraries, and had, in the exercise of the powers conferred upon it, established and was maintaining such a library. In pursuance of law a board of library trustees had been appointed, and was exercising the powers and duties imposed upon it. On July 31, 1896, said board of trustees did fix and determine a rate of taxation of one mill on the dollar of the taxable valuation of the property in said city for the purpose of maintaining the public library, and at the same time did fix and determine a rate of taxation of three mills on the dollar for the purpose of creating a sinking fund for the purchase of a lot and the erection of a library building, and did cause said amounts so fixed and determined to be certified to the city council of said city. Said city council refused to levy and certify to the county auditor said amounts so certified to them by said board of library trustees, but did levy and certify one half a mill tax for the purpose of the maintenance of the library. Thereupon this action was brought to obtain a writ of mandamus compelling the city council to levy and certify the rates of taxes fixed and determined by the board of library trustees. As is said by counsel for appellants: "The ultimate question to be determined is whether or not the city council in cities of the first class accepting the provisions of the statute relating to the establishment and maintenance of free public libraries, and maintaining such library, is bound and required to levy and certify the amount of taxes or the rate of taxation fixed and determined by the board of library trustees of said city."

2. On the one hand it is contended that the statute vests in the board of library trustees absolute power to fix and determine the amount of the levy to be made for the purpose of maintenance of the library, and of creating a sinking fund for the purchase of a lot and the erection of a library building, subject only to the limitations in the statute; and that the duty devolves upon the city council to levy and certify the sums so certified to them by said board; that the city council is without any discretion in the matter. On the contrary, the appellees contend that the board of library trustees has no such power; that its power in the matter is advisory merely, and that the city council is invested with a discretion as to the amount or amounts which shall be levied for the purposes mentioned. As in the discussion which may follow reference may be made to various acts of the legislature touching the creation and maintenance of free public libraries, it may tend to brevity to here recite the substance of all such statutes which can have any bearing upon the question under consideration. Chap-

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ter 45, Acts 13th Gen. Assem., provided that cities of the first and second classes might levy an annual tax not exceeding one-half mill on the dollar of the taxable property in such city for the maintenance of a free public library and reading room, provided a suitable lot and building be first donated for such purposes. The city council was authorized to appoint officers for such library and reading room. The 14th Gen. Assembly, in chapter 47, extended the provision of the former act so as to include incorporated towns, increased the amount of the levy, and authorized all the municipalities referred to in the act out of the money raised to purchase land and erect buildings or lease rooms. The act also provided that before exercising any of the powers conferred it should be accepted by a vote of the people. The same provisions, in substance, were incorporated in the Code of 1878 (§ 461), in which it was declared that "the establishment and maintenance of a free public library is hereby declared to be a proper and legitimate object of municipal expenditure." Such was the law in force at the time the electors of the city of Des Moines voted to accept its provisions, and to establish a free public library. By chapter 41, Acts 25th Gen. Assem., it was provided that in any city which had accepted the provisions of Code, § 461, there should be created a board of library trustees, to be appointed by the mayor, with the approval of the council. That act vested in said board full power of control over the library, including the power to appoint and remove librarians and employees; that they should have full power over the moneys raised for the library by taxation; and said act also contained the following, *viz.*: "The board of library trustees shall, before the 1st day of August in each year, determine and fix the amount of rate to be appropriated for one year under § 461 of the Code of Iowa for the maintenance of such library, and cause the same so fixed to be certified to the council, and the council shall make such appropriation and levy the necessary tax for such year to raise said sum and certify the percentage or rate not exceeding one mill on the dollar or such tax to the county auditor, . . . provided that in cities of the first class the city council may and shall levy and certify such further sum of tax as it may deem expedient to create a sinking fund and pay interest under the provisions of chapter 18, Acts of the 22d General Assembly, and acts amendatory thereof." By chapter 99 of the Acts of the same general assembly power was conferred upon the city to levy and collect a tax of not exceeding three mills on the dollar to pay interest on any indebtedness theretofore contracted or to be thereafter contracted or incurred for the purchase of real estate and the erection of a building or buildings for a public library, and to create a sinking fund for the payment of such indebtedness. By chapter 5, Acts 26th Gen. Assem., the tax was authorized to be collected annually. By chapter 50, Acts 26th Gen. Assem., it was provided that the board of library trustees should determine and fix the rate, not exceeding one mill on the dollar, for the maintenance of the library, and not exceeding three mills on the dollar for the purpose of paying for a building and the creation of a sinking fund, and "cause

each of the amounts or rates so determined and fixed to be certified to the council, and the council shall levy the taxes necessary to raise said sums respectively for such year and certify the percentage or rates . . . of such tax to the county auditor." In pursuance of the provisions of chapter 41, Acts 25th Gen. Assem., a board of library trustees had been appointed. In March, 1892, the city of Des Moines, as it then existed, by a vote of the electors accepted the benefit of the law relating to public libraries. Prior to the passage of the acts of the 26th General Assembly, the city council was clearly invested with discretionary power as to levying a tax for a library building and for the creation of a sinking fund. The act of the 26th General Assembly in terms seems to require the council to levy and certify the tax certified to it for maintenance and for building or sinking fund so long as the same does not exceed the amount provided by the statute.

3. The questions involved in this appeal are of great interest and importance. Irrespective of our duty to uphold the act of the legislature as constitutional, if it be possible to do so without doing violence to well-known legal principles and accepted canons of construction, our interest in the welfare of the people, which is so largely promoted by the establishment and maintenance of public libraries, would prompt us to give the questions presented most careful consideration. If it be conceded that a tax for the maintenance of a public library and for the erection of a library building is a tax for a public purpose, and hence one which, in furtherance of the general public policy of the state, may be compelled to be levied, may the legislature authorize its levy by the board of library trustees? Touching the power of the legislature to delegate the taxing power, Judge Cooley says: "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly understood, permits of no exception. And it is applicable with peculiar force to the case of taxation. The power to tax is a legislative power. The people have created a legislative department for the exercise of the legislative power; and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. . . . There is, nevertheless, one clearly defined exception to the rule that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent which is conclusive. This exception relates to the case of municipal corporations. Immemorial custom, which tacitly or expressly has been incorporated in the several state Constitutions, has made these organizations a necessary part of the general machinery of state government, and they are allowed large authority in matters of local government, and to a considerable extent are permitted to make the local laws. This indulgence has been carried into

matters of taxation; the state in very many cases doing little beyond prescribing rules of limitation within which for local purposes the local authorities may levy taxes. . . . The legislature, however, in thus making delegation of the power to tax, must take it to the corporation itself, and provide for its exercise by the proper legislative authority of the corporation. . . . What is true of the state is equally true of the municipalities; that the power they possess to tax must be exercised by the corporation itself and cannot be delegated to its officers or other agencies." Cooley, *Taxn.* 2d ed. pp. 61, 63, 65. The doctrine laid down by the learned author is that the delegation of the power to tax by the legislature must be made to the municipality itself, and that it cannot be delegated to other agencies.

The Constitution of the state of Illinois contains the following provision: "The corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes." Ill. Const. 1848, art. 9, § 5. In construing this provision, the supreme court of that state said that the phrase "corporate authorities," as used in the Constitution, must be understood as "those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they have given their assent." *People, McCagg, v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278. The same court, in construing the same constitutional provision, said: "The power of taxation is, of all the powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people; and if committed to persons who may exercise it over others without reference to their consent, the certainty of its abuse would be simply a question of time. No person or class of persons can be safely intrusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that, as in the present instance, it is to be professedly exercised for public uses, by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority, of any kind, by those whom they propose to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution. We are of opinion that we do no violence to the language of the clause in the Constitution we have been considering, by holding that it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons other than the corporate authorities of the municipality or district to be taxed. These authorities are elected by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated." *Harvard v. St. Clair & M. Levee & D. Co.* 51 Ill. 130. In still another case, in which the constitutionality of the metropolitan police act of the city of East St.

Louis was under consideration, and in which the police commissioners were appointed by the act, and given power, not to levy a tax, but to estimate what sum of money would be necessary for each fiscal year to enable them to discharge the duties imposed upon them, and the act required the city council to appropriate and set apart the amount so certified out of the general fund of the city, and, in case the council failed so to do, then it was made the duty of the board of commissioners to issue certificates of indebtedness in the name of the city for the amounts so certified, the court said: "These police commissioners are not the corporate authorities of East St. Louis, and therefore can have no power of taxation. They are not elected by the people of that city, nor appointed in any mode to which the people have given their assent. The act creating them has never been accepted by the people or by the city council, but, on the other hand, as alleged in the bill, the council has constantly denied the authority of the commissioners." *Hinsæ v. People, Halbert*, 92 Ill. 406. See also *Updike v. Wright*, 81 Ill. 49; *People, Dunham, v. Morgan*, 90 Ill. 558.

The legislature of the state of Kansas passed an act authorizing the creation of a board of road commissioners, and empowering them, among other things, to levy taxes. The act was held unconstitutional. *Wyandotte County Comrs. v. Abbott*, 52 Kan. 148. The question of the constitutionality of the same act came before the Federal court, and the court said: "Does the Constitution of the state of Kansas authorize the legislature to delegate the power of taxation either to the signers of these petitions or to these road commissioners? Can a tax be arbitrarily forced upon the taxpayers of a county, either by the individuals or by officials in whose appointment they have no voice? The power of taxation is a power inherent in all governments. In a constitutional government, the people by the Constitution confer it on the legislature. It is one of the highest attributes of sovereignty. It includes the power to destroy. It appropriates the property and labor of the people taxed. Unrestrained power of taxation necessarily leads to tyranny and despotism. Hence, in all free governments, the power to tax must be limited to the necessities for the purposes of government, and the agencies for local taxation should be fixed and their powers limited by organic law: and they should be so selected as to be directly answerable for their official acts to their local constituencies or districts to be taxed. If they act corruptly those directly interested may then remove them, and appoint others. If those directly interested have no voice in their appointment or power to remove them, they have no means of correcting their abuses. No other rule can secure those to be taxed from oppression and fraud on the part of the taxing officers. In *McCullough v. Maryland*, 17 U. S. 4 Wheat. 428, 4 L. ed. 606, Marshall, Ch. J., said: 'The only security against the abuse of this power [the taxing power] is found in the structure of our government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.' This reasoning ap-

plies with equal force to all kinds of taxation, and has been applied as well to local assessments or improvement districts as to taxes levied in local, political, and municipal corporations. . . . Self-taxation, or taxation by officers chosen by or answerable to those directly interested in the district to be taxed, is inseparable from that protection of the right of property that is either expressly or impliedly guaranteed by all written Constitutions, under our system of government. Of all the powers of government the one most liable to abuse is the power of taxation. If placed in hands irresponsible to the people of the district to be taxed, its abuse is a mere question of time. . . . The act is a plain violation of the principle of self-taxation, and a clear invasion of the right of property. . . . The legislature is not the fountain—not the source—of power. Under our system of government the legislature can exercise only such powers as the people have delegated to that body, either expressly or by necessary implication, by the Constitution. All rights not so delegated are retained by the people. The right to life, liberty, and property is among the inherent and inalienable rights that the people did not commit to the legislature. Constitutions are adopted and governments administered for the protection, and not for the destruction, of these reserved rights of the people. . . . Illegal or oppressive taxation is destructive of the right of property, and is not government, under the Constitution, but is misgovernment." *Parke v. Wyandotte County Comrs.* 61 Fed. Rep. 486.

The legislature of the state of Michigan passed an act creating a board of park commissioners to be appointed by the governor, with authority to create an indebtedness, and the act was held unconstitutional. Mr. Justice Campbell, in specially concurring, said: "I am not willing, however, to leave out of view an objection which has seemed to me quite as fundamental as the one referred to, and more dangerous, if that be possible, in its tendencies. I think that the very essence of municipal existence consists in a government which allows no discretionary power beyond that of mere administration to be exercised without the immediate or ultimate control of the freemen or their immediate representatives. A city is, and must be, as I conceive, a unit for purposes of government; and all bodies employed in the service of the municipality, and not directly representing the freemen, must act as agencies subordinate to the council. If powers in any way involving the municipal prerogative can be given to any bodies except the common council, to the exclusion of any regulation or control of that body, they can all be so given, and the people may be entirely deprived of representative government. It is a misnomer to apply that term to a system where there is any legislative power over which the people's representatives have no control. A school district is as well organized a municipality as a city, and may coexist with it in territory in whole or in part, as a city may cover the territory of a county wholly or partially. There is no incompatibility between them, and both are separate and in some sense independent popular representative bodies exercising different

functions. The duties of the others are no part of the ordinary concerns of towns or city corporations. But from time immemorial every municipal government, properly so called, and acting within its peculiar sphere, has acted through its common council, composed either of the burgesses or their representatives, subject in some cases to checks and vetoes, but not subject to legislation or final action in defiance of their own decisions. Their supremacy cannot be given up by themselves any more than it can be taken from them. No doubt the state can limit their powers, but it cannot transfer them. The appointment and incorporation of boards as mere agencies is competent, and may be very convenient. But making them anything but agencies is a direct invasion of representative government, and would bring into existence a class of cities unknown to our institutions, and very different from the municipal corporations recognized by our Constitution as the authorized recipients of local legislative power. Whether the law of 1871 contains any provisions obnoxious to this principle it is not necessary to discuss. But if there are such provisions, I do not conceive they could be made valid by any recognition from the city. Concurring entirely in the general views of my Brother Cooley, I have not deemed it necessary to do more than indicate very briefly my views on the point which he has waived, which, in my judgment, is inseparable from the principles underlying the decisions heretofore made in *People, Le Roy, v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108, and in *People, Hubbard, v. Springwells Twp. Board*, 25 Mich. 158. I therefore agree in the conclusion of my brethren." *People, Park Comrs., v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202.

Under our Constitution the power of taxation has been vested by the people in the legislature. Iowa Const. art. 3, § 1; *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 643. There is no express constitutional restriction or limitation upon the power of the legislature in this state, and that body may, for proper and legitimate purposes, confer the taxing power upon municipalities. 2 Dill. Mun. Corp. § 740; 25 Am. & Eng. Enc. Law, pp. 18, 71. Nevertheless, in the absence of such constitutional restriction, the power of the legislature to confer the right of taxation is limited by implication. *Prouty v. Stover*, 11 Kan. 225. So it is said in *Hanson v. Vernon*, 27 Iowa, 73, 1 Am. Rep. 215: "It cannot be maintained that the Constitution confers upon the state government absolute and unlimited legislative power, authorizing all laws affecting the rights and property of the people, not expressly prohibited by that instrument. . . . There is, as it were, back of the written Constitution, an unwritten Constitution, if I may use the expression, which guarantees and well protects all absolute rights of the people. The government can exercise no power to impair or deny them. Many of them may not be enumerated in the Constitution, nor preserved by express provisions thereof, notwithstanding they exist, and are possessed by the people, free from governmental interference." We say, then, that there is an implied limitation upon the

power of the legislature to delegate the power of taxation. This, of necessity, must be so, otherwise the legislature might clothe any person with the power to levy taxes, regardless of the will of those upon whom such burdens would be cast, and such person might be directly responsible to no one. Whatever the effect of the constitutional provisions in Illinois and Kansas may be, the reasoning of the cases is in line with the views expressed by Judge Cooley, and it is equally applicable to cases where there are no express constitutional limitations. It is said that it is not true that power to determine the rate of taxes must be committed to the proper legislative authority of the corporation, and certain instances in this state are cited as the power given the executive council to determine the rate of tax for state purposes. Code 1878, § 835. But counsel have cited no instances in the legislation of this state, and we have found none, where the power to tax was conferred upon a board or officer not elected by and immediately responsible to the people, and we are unwilling to extend the right to delegate such power to any body or person not directly representing the people. The danger which lies in delegating such power to any person or board not directly responsible to the taxpayers is so forcibly set forth in the citations we have made that we need not enlarge upon it. If the power to tax may be by them vested in a board of library trustees, against the will of the people, it may be reposed in any other body which is not directly accountable to the people.

Counsel for appellants rely upon the cases of *Baltimore v. State, Board of Police*, 15 Md. 376, 74 Am. Dec. 572, and *State, Merrick, v. Hennepin County Dist. Ct.* 33 Minn. 236. The latter case, in its facts, is so different from the case at bar as not to support the contention of appellant; and the Maryland case sustained the constitutionality of an act authorizing the board of police commissioners to levy and collect taxes for the support of the police department of the city. If this case is sustainable at all, it is upon the theory that the state may insist upon the proper exercise of the police power by a municipality, and, if the municipality fails so to do, the state may arbitrarily provide therefor. This is on the theory that one of the objects of the government of the state is to preserve peace and good order.

We have treated this statute as, in effect, authorizing the library board to levy the tax. In fact, it in terms directs them to fix and determine the amount of the tax, which, upon being certified to the council, it must levy. The right to thus fix and determine is equivalent to the right to levy. Now, the uses to which this tax is to be put are local, and the benefits to be derived from such library must necessarily inure mostly to the people of the city of Des Moines. Such being the case, we think that the legislature had no power to vest the levying of this tax in a body not directly responsible to the people of the city. The levy and collection of a tax is a taking of the property of the taxpayer against his will, and such a necessary, arbitrary, and far-reaching power ought not to be conferred upon a body of persons who are not the direct representatives of

the people, who are not elected by them, and who, therefore, are not directly responsible to them unless the people assent thereto.

4. The remaining question is, Have the people of the city of Des Moines in any manner assented to the exercise of the power of taxation attempted to be conferred upon and exercised by the board of library trustees? The people of the city did by vote accept the provisions of the law as it then existed. The law then did not authorize any increase in taxation, and the library was under the direct control and management of the city council, who were elected by the people. By subsequent acts of the legislature a board of trustees was established, and their duties and powers fixed; the control and management of the library was by statute vested in said board, and the board was vested with the power of absolutely determining the amount of tax that should be levied. It will be seen that the people assented by their vote to maintaining a public library, which should be under the control of the council which they elected. They never consented to the creation of a board of library trustees which should be in control of the library, and be substantially vested with the power to levy taxes without the consent and against the will of the people. The placing of the extraordinary power of taxation in a body not the direct creation of, or directly responsible to, the people, was in no way involved in the vote of the people had before such powers were conferred or thought of. Here, by an act passed subsequent to the vote of the people, the legislature empowers an irresponsible board (irresponsible in the sense that they are not directly accountable to the people) to fix a tax levy limited in the amount which may be raised each year, but unlimited in duration; so that millions of dollars may be accumulated without consulting the people, or their immediate representatives, the city council. It may be doubted if any statute of this state can be found wherein such extended and unlimited power as to duration of time has been granted to a body of persons to fix what taxes shall be levied for any such purpose. This law authorizes a levy annually upon the taxable property of the city for the purpose of purchasing real estate, and the erection of a building, and to create a sinking fund; absolutely no limit as to the number of years said tax may be levied. Under its provisions millions may be accumulated and spent, and if appellant's theory is correct the taxpayer who assented to the formation and maintenance of a public library simply was then voting upon himself a burden of taxation for a library building and ground which might be endless in duration as to the ultimate amount to be raised, and which might be invested in a building the cost of which would likewise be unlimited. That a body or board, not elected by the people, and not directly responsible to them, should have been clothed by the legislature with such extraordinary powers without proper safeguards to protect the people from unnecessary taxation—which is confiscation—is marvelous. The people of the city of Des Moines never assented by vote or otherwise to any such legislation. *Cornell v. People*, 107 Ill. 372.

Nor can we agree to the contention that, in 39 L. R. A.

asmuch as the people elect the city council and the mayor, and the mayor appoints the library board with the consent of the council, therefore such board is, in fact, selected by the people, or that thereby the people assented to the legislation creating the board and endowing it with the power to fix and determine the taxes to be levied. If such contention was correct, it would be difficult to find a case of an officer or board vested with taxing powers, no matter by whom appointed, when by the same process of reasoning the original power could not be traced through various offices or agencies to the people themselves. Suppose the act at bar had provided that the board of library trustees for the public library of the city could be appointed by the governor of the state, it would not be contended for a moment that the people by voting for and electing the governor who appoints such a board, thereby gave their assent to such a mode of appointment. No more do they when they elect the mayor and council, whom they must elect in order that the proper business of the municipality may be carried on. Under such an argument, any violation of the taxing power might be ultimately traced to the people, who are the original source of all political power in a government like ours. The power to determine and levy taxes is inherent in government. Its exercise for proper purposes is essential to the very existence of government. When exercised in a lawful manner, and by proper agencies of the state, the burdens imposed must be borne by those upon whom they fall; but when exercised by officers and bodies charged with no direct responsibility to the people the temptation to place upon the people unnecessary burdens under the guise of taxation, and to take from them a portion of their property not needed for legitimate purposes of government, is great. It may be admitted in the case before us that the board of library trustees is composed of high-minded, honorable men and women, and it may be that this board is better qualified to know what such tax should be than is the city council. However that may be, the principle is wrong, and the power of taxation attempted to be conferred upon the trustees is a long step in the direction of permitting boards not elected by or directly responsible to the people to determine what burden the taxpayers' property shall bear. We hold that no officer and no board not elected by and immediately responsible to the people can be made the repository of such power. If this power was given to the city council, and it was abused, the people could, at least, prevent a recurrence of the wrong at the polls; but if it be reposed in a body not elected by the people the remedy is uncertain, indirect, and likely to be long delayed. The absolutely unlimited power of taxation, as to duration, attempted to be conferred by the act under consideration, is of itself a forcible reminder that the power to fix, determine, and levy a tax for local purposes should be conferred upon some body which stands as the direct representative of the people to the end that an abuse of such power may be speedily and directly corrected by those whose property must bear such burdens. The act in question is unconstitutional in so far as it undertakes to confer the arbitrary power upon

the board of library trustees to fix and determine the amount of tax to be levied for the purposes therein mentioned, and the city council cannot be compelled to levy (regardless of any discretion) the amounts fixed by the library board, and certified to said council. The questions involved in the case were not raised or considered in *Orvis v. Des Moines Park Comrs.* 88 Iowa, 674.

The action of the district court in refusing a writ of mandamus and in rendering a judgment against the plaintiff for costs was correct, and the judgment is affirmed.

BROWN SHOE COMPANY, Appt.,

v.

Frank HUNT.

(.....Iowa.....)

1. Samples belonging to his employer may be retained to satisfy the hotel bill of a traveling salesman, under a statute authorizing the retention of all property under the control of guests which may be in the hotel.

2. A statute making an employer's samples liable to a lien for hotel bills of his traveling salesman in whose possession they are does not deprive him of his property without due process of law.

(October 23, 1897.)

APPEAL by plaintiff from a judgment of the District Court for Woodbury County in favor of defendant in an action brought to recover possession of certain sample cases and their contents. *Affirmed.*

The facts are stated in the opinion.

Messrs. Lynn & Foley, for appellant:

Appellee having received the goods, knowing them to be the property of a third party, and that they were not owned by his guest, his lien, if he had any as innkeeper, did not attach.

Cook v. Kane, 13 Or. 482; *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 21 L. R. A. 229; *Covington v. Neuberger*, 99 N. C. 523.

The goods were not of such character as to be classed as goods for the convenience or comfort of the guest, but rather such as would enable a person to carry on a trade or business.

Mowers v. Fethers, 61 N. Y. 34, 19 Am. Rep. 244; *The Innkeepers' Lien and the Commercial Traveler*, 80 Am. Law Rev. p. 142; *Fisher v. Kelsoy*, 121 U. S. 383, 30 L. ed. 930.

In a judicial proceeding, due process of law requires notice, hearing, and judgment—any orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend and protect his rights.

6 Am. & Eng. Enc. Law, p. 43; *People, Witherbee, v. Essex County Supers.* 70 N. Y. 284.

The statute in question makes no provisions for the bringing in of a third party or notifying him in any manner of the attempt to enforce said innkeeper's lien, and nothing of the kind was attempted in this case.

Zeigler v. South & North Ala. R. Co. 58 Ala.

NOTE.—As to innkeeper's liens, see note to *Singer Mfg. Co. v. Miller* (Minn.) 21 L. R. A. 229, 39 L. R. A.

599; *South Platte Land Co. v. Buffalo County Comrs.* 7 Neb. 258; *Hutson v. Woodbridge Protection Dist. No. 1*, 79 Cal. 90.

Private property cannot be taken from one person and delivered to another person or applied to the private use of another except by suit instituted and conducted in accordance with the prescribed course of procedure for determining the title to property.

Re Haich, 11 Jones & S. 91.

Neither can it be claimed that the legislative act is due process of law, as it simply undertakes to appropriate the property of one citizen for the use of another.

People, Herrick, v. Smith, 21 N. Y. 598; *Garrison v. New York*, 88 U. S. 21 Wall. 196, 22 L. ed. 612.

Notice is absolutely essential to the validity of the proceeding, and while it may be given by citation in some cases, possibly by statute in others, yet it must be given in some form.

San Mateo County v. Southern P. R. Co. 13 Fed. Rep. 145; *Fleming v. Hull*, 73 Iowa, 598.

Messrs. S. J. Quincy and Wright & Hubbard for appellee.

Kinne, Ch. J., delivered the opinion of the court:

This cause was determined upon the following agreed statement of facts: "This is an action in replevin, in which the Brown Shoe Company, a corporation organized under the laws of the state of Missouri, is plaintiff, and Frank Hunt, of Sioux City, Iowa, is defendant. That immediately prior to and within the last two years, before the commencement of this action, the defendant was the agent and general manager of and for Lola M. Hunt, the proprietor of the New Oxford Hotel, in Sioux City, Iowa. That said hotel was kept for the general accommodation of the general traveling public. That one M. K. Sheehan applied for and was furnished meals, lodgings, extras, and accommodations usually furnished the general public at inns and hotels as a guest of said hotel, which said accommodations were furnished by defendant. That said accommodations so furnished were of the value of \$68.60, all of which remains due and unpaid. That, at the time the accommodations for which defendant claims a lien were furnished to the said M. K. Sheehan, the said Sheehan was the authorized traveling agent and salesman of the plaintiff, and engaged in the prosecution of its business; and that the goods described in plaintiff's petition, and taken under the writ of replevin herein, were the samples of stock and the cases containing the same furnished by the plaintiff to the said M. K. Sheehan, for his use in the prosecution of the plaintiff's business. That the amount charged against the said M. K. Sheehan, and for which defendant claims a lien upon the goods in controversy, is the fair and reasonable price of the accommodations furnished by the defendant to the said M. K. Sheehan. That at the time the said M. K. Sheehan became a guest of said hotel, the property and goods described in the petition were in his actual possession and under his control in said hotel, and remained in his possession and under his control in said hotel up to the time when said M. K. Sheehan departed therefrom, and said goods and chattels re-

mained at said hotel until the same were taken under the writ of replevin issued in this action. That the defendant took possession of said goods and chattels described in the petition, and held possession thereof as security for the accommodations furnished to said M. K. Sheehan at said hotel as a guest thereof and does not claim to have any other or further interest in said goods and chattels, except that defendant claims he is entitled to a lien thereon for the value of the accommodations so furnished to the said M. K. Sheehan, under the statutes of this state. That the said goods and chattels were at all times the property of plaintiff, and were at the time the said defendant took possession thereof. The plaintiff's ownership of said goods was well known to the defendant while said M. K. Sheehan was a guest at said hotel, and at the time he took possession of the same. That the plaintiff, before the commencement of this action, demanded the possession of said goods and chattels. That the value of said property is as stated in the petition. That the goods and chattels described in plaintiff's petition were taken under the writ of replevin in this action, and delivered to the plaintiff, and have ever since remained in the possession of the plaintiff. That, in case the plaintiff recovers in this action, it is entitled to the possession of said property, and judgment against the defendant for costs. That, in case defendant prevails in this action, he is entitled to a judgment against the plaintiff, and upon the replevin bond filed in this action and the securities thereon, to the amount of \$68.60, and costs of this action." The cause was tried to the court, and a judgment entered in favor of the defendant, and against the plaintiff for \$68.60, and for costs, from which plaintiff appeals.

2. Our statute provides: "All hotel, inn, or eating-house keepers shall have a lien upon, and may take and retain possession of, all baggage and other property belonging to or under the control of their guests, which may be in such hotel, inn, or eating-house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished such guest, and such property so retained shall not be exempt from attachment or execution

to the amount of the proper and reasonable charges of such hotel, inn, or eating-house keeper against such guest, and costs of enforcing the lien thereon." Acts 18th Gen. Assem. chap. 181, § 2. It appears from the statement of facts that defendant knew that the goods upon which he claims a lien did not belong to his guest, but were the property of the plaintiff. It is therefore contended that his inn-keeper's lien did not attach to them. Counsel cite several cases in support of such contention. They were cases where the lien claimed was the common-law lien, and not one created by the statute. This applies also to the claim that the goods were not of such a character as to be considered as for the convenience or comfort of the guest, but rather such as enabled the guest to carry on a trade or business. The common-law doctrine that the inn keeper could have no lien against the property of third parties, he knowing their ownership when he received the guest and the property, has been changed by our statute. Under our statute the inn keepers may "take and retain possession of all baggage and other property belonging to or under the control of their guests, which may be in such hotel or inn." Clearly, the legislature intended by the words used to give a lien, not only upon the property in fact belonging to the guest, and which was in the hotel or inn, but likewise a lien upon property placed therein which was under the guest's control. The guest in this instance was a traveling man, selling goods by sample, and the lien is claimed upon these sample goods and the receptacles in which they were contained. These goods were used in the prosecution of his business as a salesman. The nature and character of his occupation were such that plaintiff must be held to know he would be compelled to stop at hotels or inns, and that, in the proper prosecution of his avocation, he would need his sample goods in such hotels or inns. The statute clearly covers such goods as they were, under the control of the guest.

3. The statute is not unconstitutional. It does not deprive the owner of his property without due process of law. It simply provides for a lien and a possession, and makes no provision as to how the lien shall be enforced.

The judgment below is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS

Thomas J. WILSON *et al.*, *Appls.*,

v.

S. B. HUGHES *et al.*

(.....W. Va.....)

*1. **Petroleum oil**, as it is found in the cavities of the rock, is part of the realty, and embraced

*Headnotes by ENGLISH, P.

NOTE.—As to rights of life tenants in mines, see also *Koen v. Bartlett* (W. Va.) 31 L. R. A. 128; *Marshall v. Mellon* (Pa.) 35 L. R. A. 816; *Williamson v. Jones* (W. Va.) 38 L. R. A. 604.
39 L. R. A.

in the comprehensive idea which the law attaches to the word "land."

2. **The only manner in which a guardian can lease or sell** the land of his ward for the purpose of its development, or any other purpose, is in the manner prescribed by statute, under a decree of the court.

3. **The petroleum oil underlying a tract of land** which has been devised to a life tenant who is in possession, and which is to go to certain infant children after the decease of the life tenant, may be sold, upon the petition of the guardian of said infants, under the provisions of chapter 88 of the Code, or leased; and the life ten-

ant will be entitled to the interest on the royalty during the continuance of the life estate, and then the residue or *corpus* of the royalty will be paid to the remaindermen.

4. **An oil lease, investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per cent thereof, is, in legal effect, a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises.**

(November 17, 1897.)

A PPEAL by complainant from a decree of the Circuit Court for Marion County dismissing a bill filed to compel an accounting for oil which had been taken from land in which complainants claimed an interest. *Reversed.*

The facts are stated in the opinion.

Messrs. John Bassel, Charles Powell, and William P. Hubbard, for appellants:

The infant need not wait until attaining his majority before exercising his right to assail or set aside a decree affecting his rights which is erroneous, but the period of six months named in the statute is merely the limit of time within which such a proceeding will be entertained.

Tyler, Infancy, 2d ed. § 150; Powell v. Koehler, 52 Ohio St. 108, 26 L. R. A. 480; Walker v. Page, 21 Gratt. 686; Durrett v. Davis, 24 Gratt. 305; Hull v. Hull, 26 W. Va. 1.

Oil in place is part of the body of real estate.

Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222.

Courts of chancery, independently of chap. 88, § 12, of the Code, have the right in just such cases as this to prevent injury to the inheritance, and the rules under which a court acts in such cases are well settled.

Tooker v. Annesley, 5 Sim. 285; Waldo v. Waldo, 7 Sim. 261, 12 Sim. 107; Tollemache v. Tollemache, 1 Hare, 456; Ferrand v. Wilson, 4 Hare, 381; Consett v. Bell, 1 Younge & C. Ch. Cas. 569; Gent v. Harrison, Johns. 517; Story, Eq. § 919, and cases cited in note.

The statute for the sale of infants' real estate must be strictly pursued or the proceeding is a nullity. The statute does not authorize a barter or exchange, and does not authorize a sale for anything but a money price.

Perin v. Megibben, 6 U. S. App. 348, 53 Fed. Rep. 86, 3 C. C. A. 443; Faulkner v. Davis, 18 Gratt. 657; Pierce v. Trigg, 10 Leigh. 410.

While the statute in relation to the sale of infants' lands is remedial in its nature and is to be construed liberally, that means that it is to be construed as bringing within its purview like cases as to which the literal meaning of the words did not extend, but which were within the legislative policy indicated by the statute, as in—

Faulkner v. Davis, 18 Gratt. 669.

The most that was ever done or claimed for the life tenant was to give him the interest of the proceeds of the timber sold.

Hussey v. Hussey, 5 Madd. 35; Delapole v. Delapole, 17 Ves. Jr. 151; Milamay v. Milamay, 4 Bro. Ch. 76.

The court will direct the interest of the proceeds to be paid to the tenant for life, though impeachable for waste.

89 L. R. A.

Fletcher v. Ashburner, 1 Lead. Cas. in Eq. 1008.

The courts of this country decide kindred questions upon the same ground, that it is done for the preservation of value and the benefit of those who may become entitled.

2 Story, Eq. Jur. § 919.

Equity will in any proper case interfere in cases where the tenant in possession is impeachable for waste, and direct timber to be felled which is fit to be cut down and in danger of running into decay, and will thus secure the proceeds for the benefit of those entitled.

1 Spelling, Extraordinary Relief, § 252.

Courts of equity are always prompted to action by the necessity of preserving the property and its value; thus they will not permit an engine and boilers to be torn out of a sawmill and sold separately.

Witmer's Appeal, 9 Wright (Pa.) 455.

Infants are under the special protection of courts of equity whose duty it is to vacate every judgment and decree by which injustice has been done to them.

Newland v. Gentry, 18 B. Mon. 866; Berrett v. Oliver, 7 Gill & J. 191; Lefevre v. Laraway, 22 Barb. 167.

Mr. John W. Mason for appellees.

English, P., delivered the opinion of the court:

J. D. Youst, by his last will and testament, bearing date on the 29th day of November, 1881, devised his home tract of land, situated in Marion county, West Virginia, to his wife, Susanna Youst, during her natural life, and at the death of said Susanna Youst said tract of land was devised to Hermentia Wilson, the wife of Alpheus M. Wilson, during her natural life, to be held by her free from the control of her husband, Alpheus Wilson, as her separate property and estate, and to descend to her heirs at her death; stating in said will that it was his intention to give said home tract of land to his wife for and during her life, and after her decease to the said Hermentia C. Wilson for and during her life, and at her death to descend to her heirs, but with the following charge, limitation, and direction, *viz.*: That if the said Hermentia C. Wilson should not survive his wife, so as to come in possession of said home tract of land, and, dying during the lifetime of his wife, should leave, surviving her (said Hermentia C. Wilson), no child or children, nor the descendants of any children, then, instead of said tract of land going to the heirs of Hermentia C., he directed that one half of said home tract of land should, at the death of his wife, go to, and be the property of, her said husband, Alpheus M. Wilson, if living, and the other half to the heirs of his sister, Eliza Wade, and the heirs of his deceased brother, Nicholas B. Youst, by his first wife, etc. This will was duly admitted to probate on the 14th day of March, 1889. Alpheus M. Wilson died on the 29th day of November, 1891, and left surviving him, by his wife, Hermentia, three children,—Thomas J., Jehu D., and Clarence L. Wilson. Another child (Stella May Wilson) was born January 11, 1891, and died in April, 1892. After the death of her husband, Alpheus M. Wilson, his widow, Hermentia, was married on the 8th day

of June, 1893, to one James W. Powell, by whom she had one child, named Minnie C. Powell, and died in November, 1893, leaving, surviving her, her husband, said James W. Powell, and four children,—three by the first husband, and one by the latter. On the 12th day of July, 1890, the said Susanna Youst, and Hermentia C. Wilson and A. M. Wilson, her husband, and Alpheus M. Wilson, as guardian of Thomas J. Wilson, Jehu D. Wilson, and Clarence L. Wilson, infant children of said Hermentia C. Wilson, leased said tract of land, containing 255 acres, more or less, to the firm of C. E. Wells & Co., for the purpose of mining and operating thereon for oil and gas, for the consideration of one-eighth royalty for all oil removed, and \$200 a year for the gas from each and every gas well drilled on said premises. On the — day of November, 1890, the said Alpheus M. Wilson, as guardian for Thomas J. Wilson, Jehu D. Wilson, and Clarence L. Wilson, infant children of Hermentia C. Wilson and Alpheus M. Wilson, filed a petition in the circuit court of Marion county, pursuant to § 12 of chap. 83 of the Code of West Virginia, praying the sale of the interest of his wards in the oil and gas underlying or contained in said tract of land; and such proceedings were had therein that on the 29th day of November, 1890, a decree was entered by said circuit court directing that said A. M. Wilson, as such guardian, should sell the oil and gas underlying said land, either at public or private sale, by making a lease of said land for oil purposes for a term of years, for which the lessee was to deliver one eighth of the oil as rental or royalty, one third of which eighth was to be delivered to the said three infants or their guardian. It appears that in pursuance of said decree the guardian of said infants executed a lease of said land, or of the infants' interest in the oil therein, to C. E. Wells and others, who subsequently assigned said lease to the South Penn Oil Company, and reported said lease to the court, which was confirmed in December, 1890. It further appears that the said South Penn Oil Company proceeded at once to bore for oil on said land, and has produced a large quantity of oil from it; that by the 1st day of June, 1894, the royalty of one eighth of the oil obtained from said land amounted in value to the sum of \$22,000. Said Susanna Youst and Hermentia C. Wilson, shortly after the rendering of said decree, assigned two thirds of said one eighth of said royalty to one S. B. Hughes, who up to the 1st day of July, 1894, had received about \$15,000 as the two thirds of said royalty thus assigned to him. After the lease of said land for oil purposes was confirmed, another child was born to said Hermentia C. and Alpheus M. Wilson, which was named Stella May, and she was admitted by a subsequent decree of said court to share in said royalty; which last-named child was born on the 11th day of January, 1891, and died in April, 1892. Said Alpheus M. Wilson died on the 29th day of November, 1891. In 1893 his widow intermarried with one James W. Powell, by whom she had one child, Minnie C. Powell; and a few days after the birth of said Minnie C. Powell the said Hermentia Powell died intestate, leaving her husband, said James W. Powell, and four children; and in January, 1894, upon

petition filed in the intermediate court, said Minnie C. Powell was admitted as a co-owner in the one eighth of said royalty. Said Susanna Youst is still living; and the said infant children, Thomas J. Wilson, Jehu D. Wilson, Clarence L. Wilson, and Minnie C. Powell, by their next friend, Harrison Manley, filed a bill in the circuit court of said county of Marion, attacking said proceedings as being erroneous and void so far as it was decreed that said infants should share equally with Susanna Youst and Hermentia C. Wilson and Alpheus M. Wilson, her husband, in the value and production of the oil and gas in and under the land in said petition and exhibits described, giving to said infants the one third of said royalty; claiming that, said oil being part of the real estate, the life tenant, during her natural life, was entitled to the interest upon the sum realized as royalty, and that said Hughes as assignee of the life tenants, should be compelled to account for all money received by him as royalty in excess of annual interest upon the one eighth of the oil paid by said lessee, and praying the appointment of a receiver to collect said royalty during the life of said Susanna Youst, and that he be required to pay the interest annually upon the same to said Hughes, and that the entire principal should at the death of said Susanna Youst be paid to petitioners. The complainants in said bill alleged that the decree of November 29, 1890, was based upon the supposition that the three children of said A. M. Wilson and Hermentia C. Wilson were the owners in fee simple of said land subject to the life estate of said Susanna Youst and said Hermentia, and ignored the fact that other and different persons might be the heirs at law of said Hermentia at her death; and they further alleged that the circuit court of Marion county had no authority to take from the complainants, and give to said Susanna Youst and Hermentia C. Wilson any part of the body of said real estate, as was done by said decree of November 29, 1890, and the subsequent decree confirming the sale to said Wells.

The South Penn Oil Company answered said bill, in which answer, after stating the manner in which it claimed the right to the lease of said tract of land for oil purposes, it alleged that said royalty of one eighth of all the oil produced and saved from said land had been delivered to the Eureka Pipe-Line Company, a common carrier of oil, in accordance with the rules and customs of the business, and in accordance with the terms and provisions of said contract, and the proceedings and decrees under which said interests were sold, and under which its right accrued to bore for and produce said oil, and that all of said one-eighth royalty of the said oil as was produced and saved from said land, except so much thereof as may remain unsold and in the custody of the pipe-line company, had been delivered to S. B. Hughes, assignee and grantee of Susanna Youst and Hermentia C. Wilson, and to the guardian of said infants, in accordance with the said decrees and contracts. It denies every allegation of said bill that is in any way intended or calculated to raise any question affecting respondent's title to the oil and gas in said land, and the proper delivery and disposal of the one-eighth royalty

of said oil to the persons entitled thereto according to the contracts and decrees of the court creating title in respondent to such oil, and avers that it is not interested, as between the plaintiffs in the case and the defendant S. B. Hughes, as to how the royalty of one eighth of said oil should be thereafter disposed of, but claims that so much of said royalty as has been delivered to the said pipe-line company, or has been disposed of by the plaintiffs or the defendant S. B. Hughes, has been delivered in accordance with the provisions and requirements of said contracts and decrees entered by the court in said proceedings, which said decrees, respondent avers, fully protect said respondent in the delivery and disposition of said royalty of oil so made as aforesaid. Respondent further avers that the payment, delivery, and disposal of said royalty of oil produced from said land was legally made, delivered, and disposed of strictly in accordance with the requirements and provisions of said decrees of said court, to the persons legally entitled thereto under the provisions of said decrees; and it denies the right of the complainants to have said decrees, or either of them, set aside or annulled, or in any manner changed to such an extent as would in any way or manner affect the rights and interests of respondent, or in any way make the said respondent liable to account for such part of said royalty of oil as has been delivered or disposed of by said respondent to said S. B. Hughes under the provisions of said decrees and said contracts and deeds; and said respondent further averred that said orders and decrees under and by which said royalty of oil was delivered and disposed of were pronounced and entered in and by a court of competent jurisdiction, and in and by a court having jurisdiction of the subject-matter disposed of by said decrees. S. B. Hughes and the Eureka Pipe-Line Company also filed answers to said bill, putting in issue its allegations. The cause was heard on the 18th of July, 1894, and the court dismissed the plaintiffs' bill with costs; and from this decree the plaintiffs obtained this appeal.

The first error assigned by the appellants is that "the circuit court, in its decree of November 29, 1890, erred in directing that two thirds of the royalty or rental reserved by said decree should be paid or delivered to the said Susanna Youst and Hermenia C. Wilson, the life tenants, for the reason that the oil contained in or under said land was part of the body of the estate, as much as coal or other minerals that might have been contained therein, and the court could not under the law authorizing a sale of lands held by the infants in reversion, subject to a life estate, give a part of such real estate to the life tenant; the latter being entitled only during life to the annual interest upon the fund realized from the sale or disposition of the infant's estate under the decree." In considering the questions raised by this assignment of error, and determining the rights of the respective parties to the record with reference to the matters in controversy, it is necessary to look to the source of their title. The tract of land containing 255 acres belonged to Jehu D. Youst at the time of his death; and when we look to his will for the purpose of ascertaining what disposition

he made of it, and when he comes to make plain his intention respecting said tract of land, he says: "My intention being to give said home tract of land to my wife for and during her life, and after the decease of my wife to the said Hermenia C. Wilson for and during her life, and at her death to descend to her heirs, but with the following charge, limitation, and direction, *viz.*: That if said Hermenia C. Wilson should not survive my wife, so as to come into possession of said home tract of land, and, dying during the life of my wife, should leave surviving her (said Hermenia C. Wilson) no child or children, nor the descendants of any children," then, instead of said home tract of land going to the heirs of said Hermenia C., he directs that one half thereof shall go to said Alpheus M. Wilson, if living, and the other half to his sister, Eliza Wade, and the heirs of his deceased brother, Nicholas B. Youst, by his first wife. Under the plain provisions of this will, then, Susanna Youst took a life estate in the 255-acre tract of land, and Hermenia C. Wilson took nothing during the lifetime of said Susanna Youst; and, as it appears that said Susanna Youst survived said Hermenia C. Wilson, it follows that said Hermenia never took any interest in said tract of land. The said Hermenia C. Wilson, at her death, however, left the plaintiffs in this suit, her infant children, who, under said will were entitled to said real estate, subject to the life estate of Susanna Youst. At the time the death of said J. D. Youst occurred, no lease had been made of said land for oil purposes, and no well had been opened or commenced thereon. In March, 1889, however, said Susanna Youst, Alpheus M. Wilson, and Hermenia C. Wilson executed a paper purporting to be a lease of said land to T. M. Jackson & Co., for the purpose of mining and boring for oil upon the usual terms. On July 12, 1890, the same parties, in their own right, and the said Alpheus M. Wilson, as guardian of his three children, Thomas J., Jehu D., and Clarence L., Wilson (Stella May not having been born), made another lease of said land for oil purposes to C. E. Wells & Co., who assigned to the South Penn Oil Company. At the fall term of the circuit court, 1890, a petition was presented, under § 12 of chap. 83 of the Code, praying a sale of his ward's land; and a decree was entered in pursuance thereof, directing the sale by said guardian, through the form of a lease of the oil under said land, for which the lessee was to pay a rental of one eighth, which the court directed to be divided equally between Susanna Youst, Hermenia C. Wilson, and her three children,—one third to the children, one third to said Hermenia C. Wilson, and one third to Susanna Youst. Before the decree of November, 1890, was entered, said Susanna Youst assigned her interest in the one-eighth part of said oil to S. B. Hughes; and on December 2, 1890, Alpheus M. Wilson and his wife transferred their interest in said oil to S. B. Hughes. Now, said Susanna Youst had only a life estate in said real estate, and her rights with reference to said realty were the same as any other life tenant. No well had been commenced or completed on said land at the time of the death of her husband. Under the head of "Mines," 2 Minor. Inst. p. 147

(*128), the author says: "A widow is dowerable of mines and quarries, but only of those which were opened and worked in the husband's lifetime, although what shall be regarded as an open mine or quarry is not always easy to define. It seems that, if any part of a bed or deposit of mineral matter has been excavated for the purpose of mining, the whole bed, and the strata lying under it, are to be deemed, for dower purposes, an open mine and that new pits or shafts may be sunk for the purpose of reaching it. Nor is it less open because the working has been discontinued. On the other hand, for a dowress or any other life tenant to open new mines is waste, which will be punished with damages, and, as being of irreparable injury to the reversioner, will be inhibited by injunction from a court of equity." In the case of *Crouch v. Puryear*, 1 Rand. (Va.) 258, 10 Am. Dec. 528, it was held that "it is not waste in a tenant in dower of coal lands to take coal to any extent from a mine already opened, or to sink new shafts into the same veins of coal." So, Washb. Real. Prop. p. 208, states the law thus: "A widow is entitled to dower in mines belonging to her husband in fee, which may have been opened during his lifetime, whether within his own land or that of another. . . . But though she may work an open mine, under her claim of dower, to exhaustion, she may not open new ones even within the land set to her as a part of her dower."

The question is whether petroleum oil, as it is found in the rock beneath the surface, is part of the real estate in which it is found; and the same law that applies to the ownership of the surface and soil applies to it. This question has been passed upon by the courts of last resort in different states. Gould, in his valuable work on Waters, § 291, says: "Petroleum oil, like subterranean water, is included in the comprehensive idea which the law attaches to the word 'land,' and is a part of the soil in which it is found. . . . A lease of land for the purpose of mining oil, coal, rock, or carbon oil passes a corporeal interest which is the proper subject of an action of ejectment, and the sale of a proportionate part of the oil to be procured by an oil well is an interest in land, a parol sale of which is void under the statute of frauds." This question was before the supreme court of Pennsylvania in *Stoughton's Appeal*, 88 Pa. 198, and it was there held that "a guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease; but without the approval of the orphan's court he cannot dispose of any part of the realty. Oil is a mineral, and being a mineral, is part of the realty, and a guardian cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of the *corpus* of the estate of his ward." Mr. Justice Gordon, in delivering the opinion of the court, said: "Oil, however, is a mineral, and being a mineral, is part of the realty; *Punk v. Halde-man*, 53 Pa. 229. In this it is like coal or any other natural product which *in situ* forms part of the land. It may become, by severance, personality, or there may be a right to use or take it, originating in custom or prescription, as the right of a life tenant to work opened

mines, or to use timber for repairing buildings or fences on a farm, or for firebote. Nevertheless, whenever conveyance is made of it, whether that conveyance be called a lease or deed, it is, in effect, the grant of part of the *corpus* of the estate and not of a mere incorporeal right. In the case above cited, this is said to be so as to leases of coal lands for the purpose of mining, and there is no reason why the same doctrine should not apply to oil leases." This question was also before this court in the recent case of *Williamson v. Jones*, 39 W. Va. 281, 25 L. R. A. 222, and it was held that "petroleum or mineral oil in place is as much a part of the realty as timber, coal, iron ore, or salt water;" also, that "it is a part of the inheritance, and an unlawful removal thereof is a disherison of him in remainder, constituting waste, which a court of equity in a proper case will restrain and enjoin."

The plaintiffs in the case under consideration do not appear to be seeking to set aside the sale or lease of their interests in the 255 acres of land in controversy, but they claim that the said Susanna Youst, being entitled only to a life estate in the land, had no right to bore wells and take petroleum oil from the land, and, not having that right herself (when no well had been bored thereon in the lifetime of her husband), as a matter of course she could not assign that right to any other person. Susanna Youst survived Mrs. Hermenia Wilson, and for that reason said Hermenia took no interest in the land or the oil contained therein. But while it is true that said Susanna Youst was not entitled to any portion of the oil contained in the land, and could not bore a well for the purpose of developing the same, yet she was entitled to the surface (that is, to its possession and use during her lifetime, and could prevent any person from entering thereon for the purpose of drilling a well for oil or gas; and although this fact would not prevent the remaindermen, through their guardian, from filing a petition, under § 12 of chap. 83 of the Code, asking a sale of the oil underlying said land, and obtaining a decree for the sale thereof, upon a proper case being presented to the court, yet such decree would be useless in the absence of the consent of the life tenant, Susanna Youst, that the party to whom the oil was sold might enter upon her possession for the purpose of putting down such wells as might be necessary to bring the oil to the surface. At the time of entering this decree the said Susanna Youst and Hermenia C. Wilson were before the court, as well as the guardian and guardian *ad item* for the infants; and the said Susanna Youst and Hermenia C. Wilson consented that the petitioners might share equally with them in the value and production of the oil and gas in and under the land in their petition and exhibits described (that is, that said petitioners should have an estate *in presenti* of an undivided one third of said oil and gas in and under said land,—the said Susanna Youst one third, and the said Hermenia C. Wilson one third.) It is stated in the petition filed by A. M. Wilson, guardian for petitioners, that oil had been found in paying quantities on lands adjoining said 255 acre tract, and numerous wells were being put down near to the lines of said tract, which would exhaust the oil

underlying the same, and that it was necessary that wells should be drilled at once on said 255 acre tract, or said remaindermen would be deprived of the oil underlying their land by said adjacent wells; and it is presumed that proof of these facts was before the court. It was also stated that neither petitioners nor said life tenants were peculiarly able to put down a well, and, unless a sale of the oil by means of a lease was made, they would, in all probability, be deprived of the oil therein without compensation, and it would promote the interest of said wards to have a sale of their interest therein; and the court (being of opinion that it was clearly shown by said petition and exhibits and the evidence adduced, considering the consent of Susanna Youst and Hermenia C. Wilson and Alpheus M. Wilson, her husband, that the petitioners might together share equally with them in the value and production in the oil and gas in and under the land in said petition described as thereafter decreed and provided, that the interests of the said infant defendants would be promoted by a disposition or sale of their interest in the oil and gas as prayed for in said petition as thereafter provided and decreed, and that the rights of no person would be violated thereby) proceeded to decree a sale of said oil and gas, and directed that the petitioners should have one third thereof, and Susanna Youst and Hermenia C. Wilson the other two thirds. On the 1st Monday in June, 1894, Thomas J. Wilson, Jehu D. Wilson, Clarence L. Wilson, and Minnie C. Powell, infant children of said Hermenia C. Wilson, who sued by their next friend, Harrison Manley, filed their bill in the circuit court of Marion county against Susanna Youst, S. B. Hughes, the South Penn Oil Company (a corporation), and Harrison Manley, administrator of Hermenia C. Powell, deceased, calling upon the said S. B. Hughes and said South Penn Oil Company to state how much had been paid to or received by said Hughes, as the assignee of said Hermenia C. Wilson and Susanna Youst, or in any other capacity, of the royalty paid by said South Penn Oil Company as the lessee of said land, and praying that the decree of November 29, 1890, might be set aside, so far as it gave or attempted to give to three of the complainants one third of one eighth of all oil produced from said land, and gave or attempted to give any portion of said oil to said Susanna Youst and Hermenia C. Wilson, or any other person; also, that there might be a decree against the said S. B. Hughes for all money received by him in excess of what would have been the annual interest upon the entire royalty of one eighth of the oil produced from said land; also, for a decree requiring that all money paid and received for the one-eighth royalty of oil produced from said land be placed at interest during the life of said Susanna Youst, and directing that at her death the principal of such sums be equally divided between complainants; that said South Penn Oil Company and said Eureka Pipe-Line Company be both enjoined and restrained from paying or delivering to the said S. B. Hughes any further share, price, or portion of said royalty of one eighth of the oil produced from said land, until such time as the rights of the

39 L. R. A.

complainants to said royalty should be ascertained and determined, and that a receiver be appointed to receive, sell, and collect the proceeds of said one eighth or royalty of oil produced from said land during the pendency of this suit, or until such time as the rights of the complainants therein might be adjudicated. Such proceedings were had in this cause that on the 18th day of July, 1894, a final decree was rendered in the cause dismissing the plaintiffs' bill, and from this decree this appeal was obtained.

The first error relied on by the appellants is that the circuit court erred in its decree of November 29, 1890, in directing that two thirds of the royalty or rental reserved by said decree should be paid or delivered to the said Susanna Youst and Hermenia C. Wilson, the life tenants, for the reason that the oil contained in or under said land was part of the body of the estate, as much as coal or other minerals that might have been contained therein, and the court could not, under the law authorizing a sale of infants' lands held by the infants in reversion, subject to a life estate, give a part of such real estate to the life tenant, the latter being entitled only during life to the annual interest upon the fund realized from the sale of the infants' estate under the decree; and, second, for holding that such decree was not erroneous as against the appellants, and in dismissing their bill filed to correct said decree. These assignments raise the same questions, and may be considered together; and, in doing so, let us refer again to the provisions of the will of J. D. Youst, by which he gave this tract of land to his wife, Susanna Youst, during her natural life. After the death of his wife, he gave said tract of land to Hermenia C. Wilson for life, and at her death the same was to descend to her heirs; and in the event that said Hermenia C. Wilson died during the lifetime of his wife, leaving no child, or the descendants of any children, then the one half of said land was to go to Alpheus M. Wilson, if living, and the other half to the heirs of his sister, Eliza Wade, and the heirs of his deceased brother, Nicholas B. Youst, by his first wife, etc. At the time the decree of November 29, 1890, was rendered, both Susanna Youst and Hermenia C. Wilson were living. Susanna Youst was in possession of the land as a life tenant, and was then a widow; and, as we have seen, she had no right to open a mine on the land she held as life tenant, unless the same had been opened in the lifetime of her husband. This, however, had not been done; and, not having the right to open and work a mine that had not been opened in the lifetime of her husband, it follows that she could not confer that right upon another. Oil in place under the land, as we have seen, has been held in this state to be a part of the realty, and as much so as timber, coal, iron ore, or salt; that it is a part of the inheritance, and an unlawful removal thereof is a disherison of him in remainder, constituting waste, which a court of equity, in a proper case will restrain and enjoin. See the case of *Williamson v. Jones*, 39 W. Va. 231, 25 L. R. A. 222. Now, can we sustain the decree of the circuit court of Marion county, rendered on the 29th day of November, 1890? Had said court any right to direct

a sale of the oil underlying said land, by way of a lease, and apportion the royalty arising from said lease equally between the life tenant in possession, the life tenant in expectancy, and the remaindermen, who were infants? Could the court change the character of the estate held by the infant petitioners from an estate in remainder to an estate *in presenti*, and could the court authorize Susanna Youst to receive the product of a mine opened on her estate for life, subsequent to her husband's death, and authorize Hermenia C. Wilson to receive one third of the product of the oil wells drilled on said land, in which her estate was dependent on the death of Susanna Youst, to which she might never be entitled, and, as the sequel shows, never was entitled, for the reason that her death preceded that of Susanna Youst? These are questions which must be met and answered, in passing upon the validity of the decree of November 29, 1890. Now, if the court could properly decree a sale of the oil underlying this tract of land upon the petition of the infants, and the testimony showing it was to their advantage to make the sale, was it proper that the product of these oil wells (the royalty) should have been divided as it was? What entitled either of the life tenants to one third of the royalty, and especially Hermenia C. Wilson, who never was entitled to a life estate, she having died before Susanna Youst? A case somewhat similar to the one under consideration is found in 174 Pa. 425 (*Blakley v. Marshall*). The syllabus reads as follows: "An oil lease, investing the lessee with the right to remove all the oil in place in the premises in consideration of his giving the lessors a certain per centum thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises. If the lessors in an oil lease are life tenants and remaindermen the life tenants are entitled to the interest on the royalties during life, and at their death the *corpus* of the fund made up of the aggregate royalties goes to the remaindermen." And this decision, as I think, propounds the law correctly. If the infants, in pursuance of their petition and the testimony adduced before the court, had the right to have the oil underlying the land in which they were interested as remaindermen sold, to prevent its being drawn from the land by adjoining wells, the law provides where the royalty shall go, and what interest the life tenant shall receive. Was the division of the royalty in the manner provided for in the decree complained of in any manner justifiable on the ground of expediency? That it was not is plainly indicated by the fact that there was no reluctance evinced by Susanna Youst in entering into the arrangement by which she received one twenty-fourth of the oil produced from the wells drilled on said land, as the portion to which she was entitled as life tenant. The fact that Susanna Youst showed no hesitation about leasing her interest in this land is manifest from her conduct in

deeding all of her interest in the oil produced from said land to S. B. Hughes on the 26th day of November, 1890, three days before the decree was entered in the circuit court, which, by and with the consent of said Susanna Youst and Hermenia Wilson, allowed the infant children aforesaid to share equally with them in the royalty arising from the oil wells drilled upon said land. Susanna Youst had no right to drill an oil well on the land of her deceased husband, and, not possessing the right herself, she could not confer such right upon another. Neither could she consent to the sale of the oil. In other words, her consent would be utterly futile, so far as it supplied any legal foundation for the action of the court in said decree, in dividing the royalty arising from the oil produced on said land as it was; and yet the decree shows that Susanna Youst was present, by her counsel, consenting to the sale, although she had sold and conveyed all interest she claimed in the oil underlying said land, three days before the decree was rendered, to S. B. Hughes. Now, our statute (§ 14 of chap. 88 of the Code) provides that if it be clearly shown by the petition, exhibits, and evidence adduced that the interest of the minor will be promoted by the sale, and the court be of opinion that the rights of no person will be affected thereby, it may order a sale of the estate, or any part thereof, either public or private, on such terms and in such parcels as may be deemed beneficial to the minor, etc. The complainants, however, in their bill, do not seek to set aside the sale for any irregularities in the proceedings of the circuit court in reference thereto, but they claim that, if the court had authority to sell or lease said land for oil and gas purposes, it had no right to decree to said Susanna Youst and Hermenia Wilson, or either of them, any part of the principal of any sum realized from oil produced, or the royalty thereof, from said land, but that the said Susanna Youst, during her life, would have been entitled to receive the annual interest upon the principal realized from said royalty, and that the plaintiffs, the infants aforesaid, would have been entitled to the principal after the death of said Susanna, and in this contention I am of opinion that the plaintiffs were clearly right (following the decision of the supreme court of Pennsylvania in the case of *Blakley v. Marshall*, 174 Pa. 425, and for these reasons the decree complained of, which dismissed the plaintiff's bill, must be reversed, with costs, and remanded to the circuit court of Marion county, with directions to ascertain the amount of interest that accrued upon the royalties arising from the oil wells drilled on said land during the lifetime of Susanna Youst, which amount, when so ascertained, is to be paid to the assignee of said Susanna Youst; and after deducting said interest the remainder of the royalty is to be paid to Thomas J. Wilson, Jehu D. Wilson, Clarence L. Wilson, and Minnie C. Powell, plaintiffs in said chancery suit.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

NATIONAL HARROW COMPANY, *Appt.*

v.

HENCH & DROMGOLD.

(55 U. S. App. 53, 83 Fed. Rep. 38.)

1. **An agreement to sell no harrow for less than a schedule price** is invalid when made by the owner of the patent with a corporation organized by rival manufacturers of harrows to take title to the patents and license the former owners to operate under them and sell only at schedule prices to be fixed by the corporation.
2. **The owners of distinct patents have no right** by virtue of their grants to combine for the purpose of restraining competition and trade.
3. **The exposure of holders of patents** covering similar articles to litigation will not justify them in making a combination in restraint of competition.

(October 20, 1897.)

A PPEAL by plaintiff from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania refusing an injunction to restrain defendants from selling harrows in violation of an agreement with the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Before *Dallas*, Circuit Judge, and *Butler* and *Kirkpatrick*, District Judges.

Mr. W. P. Quin, with *Messrs. William Kernan, Edward H. Risley, and Henry M. Love* for appellant.

Mr. John G. Johnson, with *Messrs. Strawbridge & Taylor*, for appellees.

Butler, District Judge, delivered the opinion of the court:

The essential facts are well stated by the circuit court as follows:

"The National Harrow Company, a corporation of the state of New York,—to whose contract rights and general purposes the plaintiff, a subsequently created New Jersey corporation, has succeeded,—originated in a written agreement between a number of leading and distinct manufacturers, under various United States letters patent of float spring-tooth harrows, whereby it was agreed that they should organize a corporation under the laws of New York, and would assign to the corporation all United States letters patent which they respectively then owned or should thereafter acquire relating to float spring-tooth harrows, and the goodwill of their business in such harrows, and that they would not thereafter be interested in the manufacture or sale of such harrows, except as agents or licensees of the corporation; that the corporation should issue to the persons, firms, and corporations, respectively, so assigning to it their said patents and the goodwill of their business, exclusive licenses to manufacture and sell upon their own account,

subject to uniform terms and conditions, the same style of harrows which they were making and selling just prior to the agreement, and that the corporation itself would not manufacture and sell any style of harrows covered by its licenses; that each licensee should pay to the corporation \$1 on every float spring-tooth harrow manufactured and sold by such licensee, and that each person, firm, or corporation transferring to the corporation the goodwill of their float spring-tooth harrow business, and their patents relating thereto, should receive in payment therefor the value thereof as agreed upon or as fixed by arbitration in paid-up stock of the corporation.

"The agreement in the first instance was signed by six different manufacturers, but the contract contemplated and provided that others should come into the arrangement and become parties thereto. Accordingly, other manufacturers of float spring-tooth harrows soon joined the combination, which then embraced twenty-two different persons, firms, or corporations. Thus, almost the entire output of float spring-tooth harrows made in the United States was brought under the regulation and control of this organization, its licensees manufacturing and selling at least 90 per cent thereof.

"The defendants were the owners of two United States letters patent relating to float spring-tooth harrows, under which they had been manufacturing and selling harrows. They joined the combination, and, agreeably to the provisions of the above-recited agreement, they assigned to the New York corporation their patents, and that corporation then issued to the defendants a license to manufacture and sell their old style harrows. The New Jersey corporation, which was formed in furtherance of the general scheme, issued to the defendants a second license on terms and conditions substantially like the former license. These are the two license contracts here sued on. The following stated provisions are common to both licenses: The defendants agree not to sell float spring-tooth harrows, float spring-tooth harrow frames without teeth, or attachments applicable thereto, at less prices or on more favorable terms of payment and delivery to the purchasers than as is set forth in the schedule annexed to the license, unless the licensor should reduce the selling prices and make more favorable terms for purchasers, and that the defendants will not directly or indirectly manufacture or sell any other float spring-tooth harrows, etc., than those which they are thus licensed to sell and market except for another licensee, and then only of such style as he is licensed to manufacture and sell. They agree to pay to the corporation \$1 upon each float spring-tooth harrow, etc., manufactured and sold by them agreeably to the terms of the license, and the sum of \$5 as liquidated damages for every harrow, etc., manufactured or sold by them contrary to the terms and provi-

NOTE.—As to illegal combination to fix price, see also *Lovejoy v. Michels* (Mich.) 13 L. R. A. 770, and *note*; *Nester v. Continental Brewing Co.* (Pa.) 24 39 L. R. A.

L. R. A. 247; *Ford v. Chicago Milk Shippers Assn.* (Ill.) 27 L. R. A. 288; *San Diego Water Co. v. San Diego Flume Co.* (Cal.) 29 L. R. A. 839.

sions of the license, and the corporation agrees to defend all suits for alleged infringement brought against the licensees. All the licenses issued by the corporation are upon the like terms and conditions."

It is manifest, as well from the contract as from the proofs outside of it, that the purpose of the parties was to form a combination between the various manufacturers of these harrows, to prevent competition in business, and enhance prices; and such is the effect of their agreement. The corporation, provided to hold the legal title of the several patents, is merely an instrument to effect this object. The prior owners are still the beneficial owners, with right to continue their business, subject only to the restraint in its management imposed by the contract. The provision for licenses is made necessary by the transfers of title, and is simply another part of the scheme for combination and control of the business of the several patentees. The result would be the same in legal contemplation if the corporation and licenses had been dispensed with, and the contract had provided simply, as it does, for combination and restraint of competition. That such a contract would be unlawful seems clear. While it is true, that all contracts in restraint of trade are not prohibited, and it is sometimes difficult to determine whether a particular one is, there is no room for doubt that such a contract as this, which provides for general and unlimited restraint, is unlawful. To justify restraint, reason for it must be found in the nature of the property or the situation of the parties, as, for instance, in the sale of a business or professional goodwill, and other similar cases. Even then the restraint must be confined within such reasonable limits as the circumstances require. Here there is nothing to justify restraint, and that imposed is without any limitation whatever. The fact that the property involved is covered by letters patent is urged as a justification; but we do not see how any importance can be attributed to this fact. Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales, and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges. The object of these privileges is to promote the public benefit, as well as to reward inventors. The suggestion that the contract is justified by the situation of the parties—their exposure to litigation—is entitled to no greater weight. Patentees may compose their differences, as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage. We do not see anything to distinguish this case, in principle, from *Nester v. Continental Brewing Co.* 161 Pa. 473, 24 L. R. A. 247; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46, 7 L. R. A. 46; *Morris Run Coal Co.* 39 L. R. A.

v. Barclay Coal Co. 68 Pa. 173, 8 Am. Rep. 159; *Distilling & Cattle Feeding Co. v. People, Maloney*, 156 Ill. 448; *Strait v. National Harrow Co.* 18 N. Y. Supp. 233. The last of these cases was upon this contract under circumstances substantially like those of the case before us. A similar conclusion was reached by the court in *National Harrow Co. v. Quick*, 67 Fed. Rep. 130, where this contract was involved.

The doctrine of these cases is not new, and we feel no hesitation in applying it to the contract before us.

The judgment is therefore affirmed.

NINTH CIRCUIT.

William HARDMAN, *Pf. in Err.*,

MONTANA UNION RAILWAY COMPANY.

(48 U. S. App. 570, 83 Fed. Rep. 88.)

Permitting a car labeled powder to stand in such close proximity to its warehouse as to deter the city fire department from attempting to extinguish a fire in the warehouse will render a carrier liable for the loss of goods in the warehouse which would not have been destroyed had the car not been there, although liability as carrier had ceased and there was in fact no powder in the car.

(October 4, 1897.)

ERROR to the Circuit Court of the United States for the District of Montana to review a judgment in favor of defendant in an action brought to recover the value of certain property destroyed while in defendant's possession for transportation. *Reversed.*

The facts are stated in the opinion.

Before *Ross* and *Morrow*, Circuit Judges, and *Hanley*, District Judge.

Mr. John W. Cotter, for plaintiff in error:

When the carrier claims exemption on the ground that under the particular circumstances of the case he held the goods, not as a carrier, but as an ordinary bailee, it devolves upon him to show, not only that he has done his whole duty to effect a delivery according to the course of his business, but that he has been guilty of no negligence which has caused or contributed to the loss.

Hutchinson, Carr. 2d ed. 1891, §§ 354, 355; *Wilson v. California C. R. Co.* 94 Cal. 166, 17 L. R. A. 685.

The defendant having alleged that it safely carried the goods to the point of destination, and stored them in its warehouse, and that after they were stored they were destroyed by fire, without its negligence or fault, had the burden of proving this defense.

Code Civ. Proc. § 1080; *Wilson v. California C. R. Co.* 94 Cal. 166, 17 L. R. A. 685; *Whart. Ev.* § 362.

NOTE.—For liability of carrier as warehouseman, see *East Tennessee, V. & G. R. Co. v. Kelly* (Tenn.) 17 L. R. A. 691, and note; also *Missouri P. R. Co. v. Nevils* (Ark.) 28 L. R. A. 80.

A defendant, even as a warehouseman, must use ordinary care in storing property.

Mont. Civ. Code, §§ 2491, 2810-2816, 2910.

Defendant was required to store the goods with due care in a place of reasonable safety.

Aldrich v. Boston & W. R. Co. 100 Mass. 81, 1 Am. Rep. 76, 97 Am. Dec. 74; *Lancaster Mills v. Merchants' Cotton Press Co.* 59 Tenn. 1; *Story, Bailm.* §§ 444-450; *Cooley, Torts*, p. 758; *Schmidt v. Blood*, 9 Wend. 268, 24 Am. Dec. 148, note; *Wilson v. Southern P. R. Co.* 62 Cal. 164; *Wilson v. California C. R. Co.* 94 Cal. 166, 17 L. R. A. 685; *Tower v. Grocers' Supply & S. Co.* 159 Pa. 106; 2 Am. & Eng. Enc. Law, p. 878.

The defendant had no sufficient means for extinguishing the fire at the time in question.

As a part of its duty to exercise reasonable care, it should have proved sufficient means for said purpose.

Leland v. Chicago, M. & St. P. R. Co. (Iowa) 21 Am. & Eng. R. Cas. 108; *Story, Bailm.* §§ 440-450; 4 Lawson, Rights, Rem. & Pr. § 1831.

Storage of gunpowder in or near the warehouse is negligence if it prevents the firemen from working or attempting to extinguish the fire.

Deering, Neg. § 60; *White v. Colorado C. R. Co.* 5 Dill. 428, 3 McCrary, 559; 3 Myer's Fed. Dec. Bailment, §§ 6-12.

Any act of defendant which prevented the firemen from extinguishing the fire is negligence.

Metallic Compression Casting Co. v. Fitchburg R. Co. 109 Mass. 277, 12 Am. Rep. 689; *White v. Colorado C. R. Co.* 5 Dill. 428, 3 McCrary, 559; 28 Am. & Eng. Enc. Law, p. 646, note 1.

While it was not shown in this case that there was any powder stored in the car in question, yet, as a proposition of law, the fire company and persons in the vicinity of the fire had a right to judge by appearances, and judge of things as they appeared to an ordinarily prudent person under the circumstances.

1 Shearm. & Redf. Neg. § 89; *Coulter v. American Merchants' Union Exp. Co.* 56 N. Y. 585; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Lewis v. Riverside Water Co.* 76 Cal. 249; *Lawrence v. Green*, 70 Cal. 417, 59 Am. Rep. 428; *Karr v. Parks*, 40 Cal. 188.

Mr. George Haldorn for defendant in error.

Ross, Circuit Judge, delivered the opinion of the court:

This was an action to recover the value of certain goods shipped by William Hardman, the plaintiff, from the city of Anaconda to the city of Butte, in the state of Montana, which the Montana Union Railway Company, the defendant, a common carrier between the points named, undertook to carry and did carry, for a consideration paid, and which were thereafter damaged by fire while in the warehouse of the defendant company in the city of Butte. The case was tried before the court below without a jury, pursuant to a stipulation of the parties. The facts found by the court are not, therefore, open to review here. *Farwell v. Sturges*, 9 U. S. App. 504, 6 C. C. A. 118, 56 Fed. Rep. 782; *Skinner v. Franklin County*, 9 U. S. App. 89 L. R. A.

676, 6 C. C. A. 120, 56 Fed. Rep. 788; *Wile v. Farmers' State Bank*, 36 U. S. App. 165, 17 C. C. A. 25, 70 Fed. Rep. 188.

From the findings of the court, these, among other facts, appear: On or about June 21, 1895, the plaintiff delivered to the defendant at the city of Anaconda, to be transported by the defendant, and delivered to the plaintiff at the city of Butte, Montana, the goods in question, paying the defendant for such transportation the sum of \$11.09, in consideration of which payment the defendant agreed to deliver the goods to the plaintiff in the city of Butte. The defendant transported the goods to the city of Butte in accordance with its undertaking, and there unloaded the goods from its cars, and stored them in its warehouse in that city, in which they remained from June 21 until the night of July 2, 1895, at which time the warehouse caught fire, inflicting the damage which gave rise to the action. The findings further show that the defendant did not itself have sufficient fire appliances to extinguish or control the fire, but that its warehouse was situated within the city of Butte, which possessed a fire department with sufficient water facilities; that upon the discovery of the fire one of the police officers of the city turned in a fire alarm, to which the fire department immediately responded; that upon the arrival of the department at the scene of the fire it was notified by one of the police officers of the city that a car load of powder was standing immediately adjoining the platform on the south side of the warehouse, and that thereupon the fire department withdrew, upon the order of the chief of the department, until he could make an investigation; that the car was sealed by the employees of the defendant company, and was labeled "Powder," but that by whom it was so labeled did not appear from the evidence; that it was subsequently discovered by the chief of the fire department of the city that the car did not in fact contain any powder, upon the discovery of which fact the fire department was ordered by him to immediately return to the fire and attempt to extinguish it; that a period of about ten or twelve minutes elapsed between the departure of the fire department from the scene of the fire and its return thereto. The thirteenth finding of fact is in these words: "That if the said fire department had not believed that a car load of powder was standing on the track adjoining the said warehouse, and had begun to work at the said fire upon their first arrival, the same could have been extinguished without any loss."

The conclusions of law drawn by the court below, in respect to which errors are assigned, are as follows: "First. That it was not the duty of the defendant to furnish or keep any fire apparatus in the vicinity of the said warehouse, to extinguish fires in or about the same. Second. That the defendant is not liable to the plaintiff for the loss of the said goods so stored in the warehouse as aforesaid, defendant's liability being that of a warehouseman; and it was not guilty of any negligence in connection with said fire, or in extinguishing the same."

The plaintiff in error assigns as error the second conclusion of law above given: "For the reason that the testimony of the defendant's

own witness, McGrade, and all of the evidence, shows that the defendant, by its servants and employees, loaded a car labeled 'Powder,' and negligently allowed and permitted the same to stand upon the track near to and adjoining the said warehouse, at a point at or near where the fire occurred therein, and thereby prevented the fire department of the city of Butte from extinguishing or attempting to extinguish the said fire in its incipency, and that the said act of the said defendant and its servants and employees in negligently allowing the said powder-labeled car to be and remain in said position was the direct cause of the plaintiff's loss, and that, if it had not been for defendant's negligence in allowing the said car to be in said position, labeled 'Powder,' the said fire could have been extinguished without any loss or damage to plaintiff."

If the car labeled "Powder" had in fact contained that dangerous combustible, the right of the plaintiff to recover could not admit of doubt, in view of the finding of the court to the effect that but for its presence the fire would have been extinguished without loss. A railroad company, keeping the property of its patrons in its own warehouse for a reasonable time, until it shall be called for, is to be regarded, in the absence of a statute declaring otherwise, as a bailee for hire, and not as a naked depository. Whart. Neg. 2d ed. § 478;

Norway Plains Co. v. Boston & M. R. Co. 1 Gray, 273, 61 Am. Dec. 428; *White v. Colorado C. R. Co.* 3 McCrary, 559.

The actual storage of powder in such close proximity to the property so held as to prevent, through reasonable fear, firemen from extinguishing the fire that does the damage complained of, would be such negligence as would render the company liable. *White v. Colorado C. R. Co.* 3 McCrary, 559, and authorities there cited; 8 Myer's Fed. Dec. *Bailment*, § 613.

Although, as a matter of fact, there was in the present case no powder in the car, yet it was labeled "Powder," which fact indicated to every ordinarily prudent person that it contained that article. The fire company acted, as it had the right to do, upon appearances. While it is not shown that the defendant actually put the powder label on the car, it had the control of the car, and permitted it to remain so labeled on its track by the side of its warehouse, and thus represented to everyone that it did contain powder. The finding of the court below is to the effect that but for the label upon the car the fire that caused the damage sued for would have been extinguished without loss. Under these circumstances, we are of opinion that the plaintiff was entitled to recover.

Judgment reversed, and cause remanded for a new trial.

IOWA SUPREME COURT.

STATE of Iowa

v.

C. S. PICKETT, *Appt.*

(.....Iowa.....)

1. **The inability of a juror to read or write the English language**, which is not known to the defendant in a prosecution until after the trial, does not entitle the later to a new trial.
2. **Failure to challenge a juror for cause** as to his competency, and to examine him or other witnesses in support of the challenge, is a waiver of the right of challenge, though the fact of incompetency is not known to the party until after the trial.

(December 15, 1897.)

APPPEAL by defendant from a judgment of the District Court for Jefferson County convicting him of adultery. *Affirmed.*

The facts are stated in the opinion.

Mr. A. W. Jacques for appellant.

Messrs. Milton Remley, Attorney General, and *Jesse A. Miller*, for the State:

If counsel fail to make inquiry of the persons called to act as jurors, and as a result an incompetent juror sits during the trial, the ob-

jection to him on the ground of his incompetency is waived and the defendant cannot afterwards take advantage of it.

King v. Sutton, 8 Barn. & C. 417; *King, East India Co. v. Despard*, 2 Mann. & R. 406; *Wharton's Case*, Yelv. 24; *State v. Powers*, 10 Or. 145. 45 Am. Rep. 188; *United States v. Baker*, 8 Ben. 68; *Hickey v. State*, 12 Neb. 490; *Meeks v. State*, 57 Ga. 329; *Costly v. State*, 19 Ga. 614; *Gillespie v. State*, 8 Yerg. 507, 29 Am. Dec. 187; *M'Clure v. State*, 1 Yerg. 208; *State v. Davis*, 80 N. C. 412; *State v. Fisher*, 2 Nott & McC. 261; *State v. Quarrel*, 2 Bay. 150, 1 Am. Dec. 637; *Presbury v. Com.* 9 Dana, 203; *George v. State*, 89 Miss. 570; *Jones v. People*, 2 Colo. 351; *Beck v. State*, 20 Ohio St. 228; *State v. Hinkle*, 27 Kan. 308; *People v. Coffman*, 24 Cal. 230.

An objection to an incompetent juror cannot be made after verdict, even though the disqualification was not known until that time.

Favill v. Shehan, 68 Iowa, 241.

The early doctrine in Illinois (*Guykowski v. People*, 3 Ill. 476) has since been changed, the *Guykowski* Case having been expressly overruled in *Chase v. People*, 40 Ill. 352.

See also *Davison v. People*, 90 Ill. 231.

In *Schumaker v. State*, 5 Wis. 324, it was held that a defendant in a capital case did not waive anything and could object to the competency of a juror after verdict.

But in *State v. Vogel*, 22 Wis. 471, it was held

NOTE.—As to the disqualification of a juror as ground for new trial, see note to *Jewell v. Jewell*, (Me.) 18 L. R. A. 473.

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that in all prosecutions for offenses not capital the incompetency of a trial juror could not be made a ground for a new trial, even though the fact that the juror was incompetent was not known to the defendant until after verdict.

Hill v. People, 16 Mich. 851, is frequently quoted to sustain the doctrine that a defendant in a criminal case cannot waive his legal rights. In this state the contrary doctrine prevails.

State v. Kaufman, 51 Iowa, 578, 88 Am. Rep. 148.

The holding in the *Hill Case* has been so often modified by the supreme court of Michigan that it stands practically overruled.

People v. Scott, 56 Mich. 154.

In *Rice v. State*, 16 Ind. 298, it was held that the incompetency of the juror might be taken advantage of after verdict.

But it was held in *Oroy v. State*, 32 Ind. 384, that as the jurors were all sworn to answer questions touching their competency, and the defendant, having full opportunity to examine them touching their competency in general, did not inquire as to whether or not they were householders, the fact that one of the jurors was not a householder, said fact being first ascertained by the defendant after verdict, did not entitle him to a new trial.

Kingen v. State, 46 Ind. 132; *Gillooley v. State*, 58 Ind. 182.

In *State v. Babcock*, 1 Conn. 401, the fact that the juror was not a freeholder was unknown to the prisoner or his counsel. And in *State v. Tuller*, 34 Conn. 280, it is held that in order to warrant the setting aside of a verdict upon the ground that one of the jurors was incompetent, it must be shown that neither the defendant, nor his attorneys, had knowledge of such fact until after the verdict was returned.

In some states where the incompetency of a juror is discovered after verdict a new trial may be granted, but in order to warrant the granting of a new trial it must be shown that neither the defendant nor his attorneys had knowledge of the incompetency of the juror until after the verdict was returned.

State v. Tuller, 34 Conn. 280; *Achey v. State*, 64 Ind. 56.

Ohio and Kansas might be said to recognize a like rule, though from the decision in those states it cannot be said that they do not approve the general doctrine.

State v. Hinkle, 27 Kan. 808; *State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424; *Beck v. State*, 30 Ohio St. 228; *Parks v. State*, 4 Ohio St. 234.

Given, J., delivered the opinion of the court:

One ground of appellant's motion for a new trial is that one of the jurors who sat on the trial cannot read or write the English language, and that appellant did not know that fact until after the trial. It is shown that one of the jurors, a native of Sweden, who had resided in this country for nineteen years, and become a citizen thereof, and an elector of this state, could not read or write the English language. Such being the fact, appellant contends that the court erred in overruling his motion for a

new trial. Section 1, chap. 61, Laws 26th Gen. Assem., is as follows: "All qualified electors of the state, of good moral character, sound judgment, and in full possession of the senses of hearing and seeing, and who can speak, write, and read the English language, are competent jurors in their respective counties." See § 382 of the Code. Section 4405 of the Code of 1878 (present Code, § 5360) provides among other grounds of challenge for cause: "A want of any of the qualifications prescribed by the statute to render a person a competent juror." Sections 4407, 4408, Code 1878 (present Code, §§ 5361, 5362), provide that the juror challenged, and other witnesses, may be examined, to prove or disprove the challenge. It does not appear that any challenge was made to said juror, or that he, or any other witness, was examined as to his competency. Appellant contends that the fact of the juror's incompetency, and that appellant did not know that fact until after the trial, was a sufficient ground for granting a new trial; and he cites and relies upon *State v. Groome*, 10 Iowa, 308. In that case the defendant moved in arrest of judgment, and for a new trial, for the reason that one of the jurors who tried the case was not an elector of the state; and such was found to be the fact. The court says: "It is claimed by the state that the defendant cannot take advantage of this objection to the juror by a motion for a new trial, that he passed his time by not challenging the juror before the trial for cause. We think it is the duty of the state to place twelve legal jurors in the box, and that it is not the duty of the defendant to inquire whether the jurors are qualified or not. It is presumed that the officer whose duty it is to select the jurors will select those who are competent and legal. The law tenders to defendant a jury for the trial of his cause, and by accepting the jury he waives any objection thereto for bias or prejudice of any character whatever, in the mind of any of the jurors; but if either of the jurors was disqualified to act as such, the defendant does not waive his right to objection for this cause, but has a right to a new trial. If the defendant knew at the time the jury was sworn that any of them were not qualified to act as jurors he would have waived his right to object thereafter. It must appear that defendant had knowledge of this fact before it can be inferred that he waived his objection. Without this knowledge, a waiver cannot be inferred;" citing *Covles v. Buckman*, 6 Iowa, 162. In the cited case, only eleven jurors were called, and both parties, not observing or knowing that fact, accepted the jury. It was held that the parties were entitled to a full jury, that there was no waiver and that appellant was entitled to a new trial. In *Faville v. Shehan*, 68 Iowa, 242, this court held that when, in a civil action, in the absence of concealment or fraud on the part of his adversary, a party accepts a juror without examination as to his qualifications, he waives objections on account of want of qualifications discovered afterwards. It is said: "A different rule applicable to criminal cases was recognized in *State v. Groome*, 10 Iowa, 308. We are not disposed to extend the doctrine of that decision in civil cases;" citing a number of cases. In *State v. Kaufman*, 51

Iowa, 578, 83 Am. Rep. 148, one of the jurors becoming ill, was, with consent of the defendant, discharged; and, with defendant's further consent, the trial was concluded before the eleven jurors. It was held that a defendant in a criminal case may waive a statute enacted for his benefit, and therefore could consent to a trial with eleven jurors. It will be observed that in these cases this court has recognized the right of an accused to waive objections to jurors on the ground of incompetency, or to the panel on the ground of number. In *Groom's Case* the defendant was held not to have waived the objection to the juror, because it did not appear that he had knowledge of the juror's incompetency until after the trial. The contention before us is not as to the right of an accused to waive an objection to an incompetent juror, but whether he should be held to have waived it by not challenging for that cause, and examining the juror, or other witnesses, to sustain the challenge. Counsel for the state concede that, if the doctrine announced in *State v. Groom* is to stand, this case must be reversed. They insist, however,—upon a very full citation and review of the authorities on both sides of the question,—that the rule in *Groom's Case* is so against reason and the current of decisions that it should be overruled. Their citations are so complete that we will not refer to other cases. The following cases do tend quite directly to support the conclusion in *Groom's Case*, namely *Guykowski v. People*, 2 Ill. 476; *Schumaker v. State*, 5 Wis. 324; *Hill v. People*, 16 Mich. 351; *Rice v. State*, 16 Ind. 298; and *State v. Babcock*, 1 Conn. 401. These cases are modified, if not overruled, in the following later decisions by the same courts: *Chase v. People*, 40 Ill. 352; *Davison v. People*, 90 Ill. 221; *State v. Vogel*, 22 Wis. 471; *People v. Scott*, 56 Mich. 154; *Croy v. State*, 32 Ind. 384; *King v. State*, 46 Ind. 182; *Gillooley v. State*, 58 Ind. 182; and *State v. Tuller*, 34 Conn. 280. The following cases fully sustain the claim that the rule generally observed is that a failure to challenge a juror for cause, as to his competency, and to examine him, or other witnesses, in support of the challenge, is a waiver of the right of challenge, though the fact of incompetency is not known to the party until after trial: *King v. Sutton*, 8 Barn. & C. 417; *King, East India Co., v. Despard*, 2 Mann. & R. 406; *Wharton's Case*, Yelv. 24; *State v. Powers*, 10 Or. 145; *United States v. Baker*, 8 Ben. 68; *Hickey v. State*, 12 Neb. 490; *Meeks v. State*, 57 Ga. 829; *Costly v. State*, 19 Ga. 614, at page 628; *Gillespie v. State*, 8 Yerg. 507, 29 Am. Dec. 187; *M'Clure v. State*, 1 Yerg. 208; *State v. Davis*, 80 N. C. 412; *State v. Fisher*, 2 Nott & M'C. 261; *State v. Quarrel*, 2 Bay, 150, 1 Am. Dec. 637; *George v. State*, 39 Miss. 570, at page 590; *Jones v. People*, 2 Colo. 351; *Beck v. State*, 20 Ohio St. 228; *State v. Hinkle*, 27 Kan. 308; *People v. Coffman*, 24 Cal. 230. These cases are grounded upon the fact that the right to challenge for cause,

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and to examine the juror, or others, in support thereof, is discretionary, and may be waived, and that, when the party fails to avail himself of this right he must be taken to have waived all objection on the ground of incompetency. A failure to challenge and examine for cause virtually says: "I am content with that jury, so far as cause is concerned; and, if any juror be incompetent for any reason, I waive my right to challenge for that cause." It is not questioned but that a failure to challenge and examine as to any other of the fifteen grounds of challenge for cause provided in said § 4405 of the Code of 1878 would be a waiver as to said causes. We fail to discover why the same rule should not apply to all those causes, and in all cases, civil and criminal. *Groom's Case*, and those supporting it, are grounded upon the thought that it is the duty of the state to put none but competent jurors in the box, and the accused may presume, in the absence of knowledge to the contrary, that those called are competent. This is certainly at variance with the spirit and purpose of our statute as to the mode of selecting and impaneling juries. The right given to challenge for any of the causes named, and to examine the juror, or other witnesses, in support of the challenge, precludes the conclusion that the law assumes to present none but competent jurors, or that a party has a right to so assume. The right to examine for such cause would be an idle provision, if such were the law. The state makes no guaranty as to the competency of jurors, but says to litigants, "Examine for yourselves." In *Groom's Case* it is held that, by accepting the jury without inquiring as to bias or prejudice, the defendant waived any objection on those grounds. We think that, by the same reasoning, he should be held to have waived the objection for incompetency. No sufficient reason is given for the distinction that is made in some of the cases between civil and criminal cases, and between capital and other criminal cases. The same statutes govern as to the selection of jurors for all cases, civil and criminal. True, different provisions are made for impaneling juries, but none that impose upon the state the duty of presenting none but competent jurors. There is no reason why every party to an action, civil or criminal, should not be held to exercise the right given him to examine as to the qualifications of jurors called to act in his case, and, if he waives that right, to be concluded thereby unless actual prejudice is otherwise shown. See also *State v. Betzel*, 89 Iowa, 405, 27 L. R. A. 846. Our conclusion is that the rule announced in *State v. Groom*, 10 Iowa, 808, on this question, is not sustained by the better reasoning, and is not in harmony with the general current of decisions, and that it should be overruled.

This disposes of the only question presented in the partial record before us, and it follows from what we have said that the judgment of the District Court should be affirmed.

TEXAS COURT OF CRIMINAL APPEALS.

W. E. BURT, *Appt.*,
v.
STATE of Texas.

(..... Tex.)

1. To permit an answer by an expert on a hypothetical question as to insanity, embracing only the evidence of one party, is not reversible error if both parties subsequently submit and obtain answers to questions containing all the evidence.

2. The trial court may receive evidence until the argument is concluded, whether in rebuttal or not.

NOTE.—Expert opinions as to sanity or insanity.

I. Admissibility; generally.

II. Privilege of witnesses.

a. Effect on opinions generally.

b. Waiver of privilege.

III. From observation or examination.

IV. From the evidence.

a. The general rule.

b. The contrary rule.

V. On hypothetical statements or questions.

a. Admissibility.

b. Hypothesis; upon what based.

c. Evidence in support of hypothesis.

d. Form of question.

VI. Qualifications of experts.

VII. Basis of facts or reasons for opinion.

VIII. Scope.

a. General considerations.

b. Symptoms and causes.

c. Comparison; illustration; speculation.

d. Questions of law for the court.

e. Questions of fact for the jury.

f. The question at issue.

IX. Cross-examination; contradiction; redirect examination.

X. Weight.

a. Generally.

b. As affected by facts and opportunity to observe.

c. As affected by character, bias, and nature of the question.

d. As compared with other expert opinions.

e. As compared with nonexpert opinions.

f. A question for the jury.

I. Admissibility; generally.

The opinions of medical experts, and experts with relation to mental disease, are admissible in evidence generally on an issue as to sanity or insanity. *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Cholce v. State*, 31 Ga. 424; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Baxter v. Abbott*, 7 Gray, 71; *Hastings v. Elder*, 99 Mass. 622; *People v. Finley*, 38 Mich. 432; *Clarke v. Sawyer*, 3 Sandf. Ch. 351; *Re Kiedalsch*, 2 Connoly, 438; *Gibson v. Gibson*, 9 Yer. 329; *Charter Oak L. Ins. Co. v. Rodel*, 96 U. S. 232, 24 L. ed. 433. And see *infra*, II., III., and IV.

Without reference to the question of the weight. *Charter Oak L. Ins. Co. v. Rodel*, 96 U. S. 232, 24 L. ed. 433.

And they may be based upon symptoms and circumstances which come within their own observation, or as testified to by others, or upon hypothetical statements or questions assuming their existence. *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Pidcock v. Potter*, 68 Pa. 342, 8 Am. Rep. 181; *McAllister v. State*, 17 Ala. 430, 52 Am. Dec. 180; *Boardman v. Woodman*, 47 N. H. 120; and see *supra*, II., III., and IV.

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3. An opinion as to sanity may be given by a nonexpert witness who has given a very full detail of the facts upon which the opinion is based.

4. Excerpts from standard works on medical jurisprudence cannot be read by counsel to the jury on the question of insanity in a murder trial.

5. After one accused of murder has offered evidence of his demeanor for the purpose of convincing the jury of his insanity at the time of trial, for the purpose of raising the presumption of insanity when the crime was committed, a person who is acquainted with him may testify that he is simulating.

And the testimony of a medical expert examined in a former trial of the same cause, as to the sanity or insanity of the maker of notes the validity of which is in question, is admissible in evidence on a subsequent trial. *First Nat. Bank v. Wirebach*, 106 Pa. 37.

Expert testimony as to insanity, however, is to be received with caution and subject to patient and intelligent investigation. *Wilcox v. State*, 94 Tenn. 108.

Medical men are allowed to give their opinions on an issue of sanity or insanity because they are supposed by their study and practice to understand the symptoms of insanity, and to possess peculiar knowledge on that subject, without which the jury would not be able to decide the question correctly. *Lake v. People*, 1 Park. Crim. Rep. 495.

The opinions of an expert from the facts of a case are admissible in evidence as a scientific deduction from the facts, where such facts are not conflicting, and are either admitted or proved. *Coyle v. Com.* 104 Pa. 117.

They are received because the facts are of such a character that they cannot be weighed or understood by the jury, the expert giving his opinion as to what they do or do not indicate. *People v. Youngs*, 151 N. Y. 210.

A physician may form an opinion as to the nature of a disorder and its probable effect upon the mind with some degree of accuracy where the symptoms are truly stated to him, because from a long course of experience and observation by himself and others of the profession such has been the ordinary effect of its symptoms. *Harrison v. Rowan*, 3 Wash. C. C. 580.

But the opinions of witnesses are never received as evidence where all the facts upon which such opinions are founded can be ascertained and made intelligible to the court or jury. *Clark v. Fisher*, 1 Paige, 171, 19 Am. Dec. 402.

And medical experts cannot testify as such in a will contest in behalf of the contestants where a prima facie case of testamentary incapacity had not been made out. *Re Miller*, 26 Pittab. L. J. N. S. 423.

Nor is it an abuse of discretion for the court in a will contest to limit the number of expert witnesses upon the question of insanity to five upon each side. *Fraser v. Jennison*, 42 Mich. 206.

The inquiry as to the opinion of a medical expert on the question of the sanity or insanity of the accused in a criminal prosecution should be as to his condition on the day of the criminal act, and not at the time of the trial, but where the expert is a physician in charge of the prison in which the accused was confined, and his duties have familiarized him with cases of insanity, and he had made an examination of the accused for the purpose of ascertaining his mental condition just before and during the trial, and had observed him from day

6. A physician may give an opinion as to the sanity of a person accused of crime, if it is based upon a sufficient observation of him.
7. A minister who has read authors on moral and intellectual science, but nothing on insanity or medical jurisprudence, cannot give an opinion as an expert upon the sanity of one accused of crime.
8. An opinion as to sanity based on observations of the accused is not inadmissible because at the time they were made the accused was in the jail unwarned.
9. A sheriff may give his opinion as to the sanity of an accused person in his custody, based upon observations made after he had warned him.
10. Express malice is shown in a homicide if the circumstances show such a reckless dis-

regard of human life as necessarily to include a formed design against the life of the person slain.

11. An indictment for murder should charge the use of every means suggested by the proof, where there is doubt about how the death was produced, although it is unnecessary to prove them all.
12. The court may submit to the jury the question of murder in the second degree as well as in the first degree, although the evidence tends to prove only the latter.
13. Where the burden is on the accused to establish insanity, the rule of reasonable doubt does not apply to that defense.
On rehearing.
14. The state may formulate a hypothetical question for an expert as to the in-

to day, and had stated what he had done in examining him, he may speak also as to the mental condition of the defendant at the time of his trial. *People v. Hoch*, 150 N. Y. 291.

And the testimony of a medical expert as to the sanity of a person accused of crime, founded upon his appearance at the time of the trial, is admissible. *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180.

So, a medical witness may testify in a prosecution for a criminal act in which insanity is alleged as a defense, from an examination made in July, as to whether the accused was insane on the preceding March. *Freeman v. People*, 4 Denio, 9, 47 Am. Dec. 216.

And a physician who became acquainted with the defendant in a prosecution for homicide, and with his mental condition at a prior period of his life when he was insane, may state his opinion as to his sanity or insanity at that time as bearing upon his mental condition at the time of the commission of the crime. *State v. Felter*, 25 Iowa, 67.

And physicians who had previously attended the testator on his deathbed may be permitted to testify as to their opinion of his mental capacity immediately before and after the execution of a will during such sickness, accompanied by a statement of the symptoms and appearance upon which that opinion was formed. *Hastings v. Rider*, 90 Mass. 624.

The exclusion of expert testimony, however, is not prejudicial error where it does not appear that the evidence excluded was in any way material. *Morton v. Heidorn*, 135 Mo. 608.

And the opinion of an expert as to the condition of a party's mind, based on her physical condition a year and a half afterwards, is too conjectural to be admissible. *Missouri P. R. Co. v. Lovelace*, 57 Kan. 195.

II. Privilege of witnesses.

a. Effect on opinions generally.

In *Allen v. Public Administrator*, 1 Bradf. 221, it was held that the New York statutory provision prohibiting physicians from disclosing any information acquired in attending any patient in a professional character, which information was necessary to enable him to prescribe for such patient, is not applicable to the physician of a deceased person in a proceeding to contest his will, upon the question of mental incapacity.

But this doctrine is without support, and has been repeatedly overruled in effect.

Thus, the opinion of physicians as to the unsoundness of mind of a testator during a designated period, based on knowledge acquired by them while attending him respectively in a professional capacity, is inadmissible within the prohibition against divulging professional communications, contained in N. Y. Code Civ. Proc. § 834. *Re Coleman*, 111 N. Y. 220; *Re Connor*, 37 N. Y. S. R. 905.

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And a physician who is called by the attending physician of a person whose sanity is in question, and goes in his professional capacity to see the patient, is within the statute prohibiting the disclosure by a physician of any information received by him in a professional capacity, and cannot be called upon for his opinion as to the sanity or insanity of such person based upon such information. *Renihan v. Dennin*, 103 N. Y. 574, 57 Am. Rep. 770.

So, in Indiana the rule is that a physician who attended a testator in his last illness cannot testify in the will contest as to his mental and physical condition from knowledge acquired by him while in the discharge of his professional duty if objection is made. *Heuston v. Simpson*, 115 Ind. 62.

And a contestant of a will cannot give his opinion as to the mental capacity of a testator when it is based upon personal transactions and conversations had with the deceased which are rendered inadmissible in evidence by Iowa Code, § 3639. *Re Goldthorp*, 94 Iowa, 536.

And an administrator who was the testator's family physician cannot testify in an action on the testator's note as to the condition of his mind at the time it was made, under Ala. Code, § 2065, forbidding testimony as to any transaction with or statement by a deceased person. *Davis v. Tarver*, 65 Ala. 98.

The rule that the statute prohibiting the disclosure of information received in a professional capacity does not cover a case where its prohibition is invoked solely for the protection of a criminal, and not at all for the benefit or protection of the patient who was dead, and a waiver of the prohibition had, therefore, become impossible, does not apply to a mere contest over the patient's property. *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770.

And the prohibition of the New York Code of Civil Procedure against the disclosure by physicians of professional information applies to an affidavit made by a physician for the purpose of supporting an application for an appointment of a committee of a lunatic or habitual drunkard. *Re Hoyt*, 20 Abb. N. C. 162.

And a physician who had known the insured for a long time, and who attended him professionally a short time before his death, cannot state how he found him in an action upon the insurance policy in which it is claimed that he committed suicide while insane, as the evidence is incompetent and privileged under N. Y. Code Civ. Proc. § 834, prohibiting a disclosure of information acquired by a physician attending a patient in a professional capacity. *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56, 52 Am. Rep. 1.

The fact that a medical expert was the jail physician of the jail in which a person accused of crime was confined, however, does not create the relation of patient and physician between him and the accused so as to exclude his opinion in a prosecution for a criminal act, in the absence of proof that the

sanity of the accused, embracing such facts as it deems proper and competent, and if defendant is not satisfied he has the privilege of submitting his case embracing any or all the testimony introduced on the trial.

15. To obtain a legal answer from an expert on the question of the sanity of the accused, the hypothetical question need not contain all the testimony bearing upon it.

16. Upon trial of one for the murder of his wife, which fact is admitted, testimony is admissible that a short time prior to the homicide a woman was heard to say in defendant's house, "I will stand this thing no longer," when no woman was in the house at the time but the deceased, and defendant is known to have been there a short time afterwards.

17. To warrant reversal for instruc-

accused was at any time sick during his confinement, or that the witness ever attended or prescribed for him, or that he derived any of the information upon which his opinion could be based while attending him as a physician. *People v. Schuyler*, 106 N. Y. 288.

And the opinion of a medical expert as to the sanity or insanity of a person accused of crime, based on an examination made for the people under employment by the district attorney for the purpose of their prosecution, is not subject to the objection that it was based upon information acquired in attending a patient in a professional capacity. *People v. Hoch*, 150 N. Y. 291; *People v. Kemmler*, 119 N. Y. 580.

So, the physician of the jail where a person accused of homicide was confined prior to the trial, who had medical charge of prisoners in the jail and had examined the accused and kept an eye on the case, may give his opinion on the trial of the case as to the sanity of the accused upon a hypothetical question from which was excluded all personal knowledge of the accused, but which was based entirely upon facts which occurred before he came to the jail, though he was influenced by knowledge acquired by seeing the accused in jail. *People v. Schuyler*, 106 N. Y. 288.

And an assumption by the court in a criminal prosecution that the mere fact that an expert witness was jail physician created the relation of patient and physician between them, and that the mere existence of that relation was sufficient to exclude his opinion as to the sanity or insanity of the accused, will not be deemed prejudicial error where the assumption was beneficial rather than harmful to the accused in restricting the examination of the witness and embarrassing him in giving his evidence, and it does not appear and cannot be inferred that the accused omitted to prove anything which he otherwise could or would have proved in consequence of such assumption. *People v. Schuyler*, 106 N. Y. 288.

So, an attending physician of a testator for eight years previous to his decease is not prevented from testifying as to what he knew of the testator derived from what he observed while he was attending him, for the purpose of showing that he was of unsound mind and incompetent to make a will, by a statute prohibiting a disclosure of information acquired in a professional capacity, where it does not appear that the information sought was information of any facts necessary to enable him to act in the capacity of physician, but of facts which were open to the observation of any person who had seen and conversed with him. *Staunton v. Parker*, 19 Hun, 56.

The burden rests with a party seeking to exclude the testimony of a physician under the provisions of the New York Code of Civil Procedure, § 854, forbidding physicians from disclosing information

which were not objected to, they must have been calculated to injure the rights of the complaining party.

(*Henderson, J., dissents from proposition 14.*)

(June 9, 1897.)

A PPEAL by defendant from a judgment of the District Court for Travis County convicting him of murder. *Affirmed.*

The facts are stated in the opinions.

Messrs. George S. Walton, E. T. Moore, and Walton & Hill, for appellant:

Medical experts may state their own opinions upon the whole evidence if they have heard it all, or upon a hypothetical statement,

acquired in attending a patient in a professional capacity, and which was necessary to enable him to act, to show, not only that the information which he seeks to exclude was acquired in attending the patient in a professional capacity, but also that it was necessary to enable him to act in that capacity. *People v. Schuyler*, 106 N. Y. 288.

b. Waiver of privilege.

The general rule is that the privilege of a physician under statutes prohibiting the disclosure of confidential communications may be waived by the persons interested.

Thus, a request by a testator to sign his will as a witness thereto is a waiver on his part of the provisions of Iowa Code, § 3643, prohibiting a practicing attorney from disclosing any confidence uniformly entrusted to him in his professional capacity, so as to permit the attorney to speak as to the mental capacity of the testator. *Denning v. Butcher*, 91 Iowa, 425.

And the privilege given by Iowa Code, § 3643, providing that no physician shall be allowed to disclose knowledge acquired in the performance of his duties as such, may be waived by those whose interest it is to maintain the integrity of a will of a deceased person, thus effectuating the wishes of its maker. *Denning v. Butcher*, 91 Iowa, 425.

Where an executor of a will calls physicians who attended the testator as witnesses as to his mental capacity in a contest of the will, he waives the provisions of Iowa Code, § 3643, prohibiting them from giving evidence acquired in the performance of their duties as physicians during the lifetime of the testator. *Denning v. Butcher*, 91 Iowa, 425.

And the prohibition of Mich. Comp. Laws, § 5943, against the disclosure by a physician of any information which he may have acquired in attending a patient in his professional character, may be waived by those representing the patient's interests in a contest of his will after his death, so as to permit the physician to give evidence as to the testator's sanity based upon his observation while in attendance upon him. *Fraser v. Jennison*, 42 Mich. 306.

So, the provisions of Mo. Rev. Stat. 1879, § 4017, rendering physicians incompetent to testify concerning information acquired from a patient in a professional character, prohibit giving an opinion based upon knowledge thus acquired; but the protection offered may be waived by the patient and those representing him after his death, and is waived by calling them as witnesses to give such evidence. *Thompson v. Ish*, 90 Mo. 180.

The executor or administrator of a party cannot waive the privilege of the deceased party given by New York Code of Civil Procedure, § 834, prohibiting a practicing physician from disclosing information acquired by him in a professional capacity, however, so as to permit him to give evidence on

which is in conformity with the whole evidence.

Webb v. State, 9 Tex. App. 490; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 688.

In case of opinions as to sanity it must appear that the acquaintance of the witness with the party is such as to enable him to form correct conclusions as to the mental condition.

Thomas v. State, 40 Tex. 68.

Where the text is pertinent and applicable to the issue, and is of standard authors on the subject-matter, the privilege to have the authority before the jury is valuable.

The discretion in this instance was abused.

Wade v. De Witt, 20 Tex. 400.

An expert is one who is conversant with the subject-matter on questions of science, skill, trade, and others of the like kind.

Best, Ev. § 346.

the issue of the mental capacity of the deceased. *Westover v. Aetna L. Ins. Co.* 99 N. Y. 54, 52 Am. Rep. 1.

In *Thompson v. Ish*, 99 Mo. 180, the New York cases on the subject of the prohibition against physicians giving testimony as to information acquired in a professional character were distinguished on the ground that the New York statute goes further and says that the prohibition shall apply to every examination of the designated persons unless expressly waived by the patient.

In *Staunton v. Parker*, 19 Hun. 56, however, it was held that heirs-at-law, who are the only representatives of the deceased testator and succeed to his rights, are competent to waive the provisions of the act prohibiting disclosure by a physician of information acquired in a professional capacity so as to enable the physician to testify for the purpose of showing that the testator was of unsound mind and incompetent to make a will.

III. From observation or examination.

An expert witness who has had opportunities of knowing and observing a person accused of crime whose insanity is alleged may give an opinion as to his sanity of insanity based on knowledge obtained from such observation. *State v. Potts*, 100 N. C. 457; *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180.

If a medical expert in a criminal prosecution is able from a physical examination of the accused subsequent to the criminal act to determine satisfactorily in his own mind the condition of the brain of the accused, and could state from such examination that there was a disease of such long standing affecting it that it must have existed when the crime was committed, the accused is entitled to the evidence. *People v. Wood*, 128 N. Y. 261.

Thus, a physician who lived near the defendant in a criminal prosecution for a long time, knew him well, and had had frequent conversations with him, may give his opinion as to whether he was sane or insane, though it is not based on the evidence adduced on the trial or upon a hypothetical case stated. *Taylor v. State*, 83 Ga. 647.

And the opinion of the family physician of the accused, who had been a practicing physician for many years and had attended him when his mind was in a disordered condition, and had particular facilities for observation and knowledge as to his condition, is admissible in a criminal prosecution on the question of his sanity at the time of the commission of the criminal offense. *Pigg v. State*, 43 Tex. 108.

So, the opinion of a physician of forty years' practice, who had seen, examined, and conversed with the accused in a criminal prosecution one or two days after the commission of the criminal act

An expert need not necessarily be a professional man. If he has studied the subject-matter of inquiry, and understands it, he may give his opinion the same as if he were a professor of the art or science.

Upon what principle of logic or justice can we give to presumption so much power in a case involving the question of sanity as to shift the burden to the prisoner, and in the other cases hold that it does not shift.

Ake v. State, 6 Tex. App. 398, 32 Am. Rep. 586; *Com. v. McKie*, 1 Gray, 61, 61 Am. Dec. 410.

The burden of proving insanity was not upon the defendant.

People v. McCann, 16 N. Y. 58, 69 Am. Dec. 642; *Com. v. McKie*, 1 Gray, 61, 61 Am. Dec. 410; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Hopps v. People*, 81 Ill. 385, 83 Am. Dec. 281; *State v. Crawford*, 11 Kan. 82; *State v. Bart-*

while the accused was under arrest, that he was mentally deranged, is admissible in evidence on a prosecution for such act. *Murphy v. Com.* 92 Ky. 485.

And where an expert witness in a criminal prosecution in which insanity is alleged as a defense has testified that the accused presented the appearance of an abject and despairing man he may explain the reasons for such appearance. *Coyle v. Com.* 104 Pa. 117.

So, a medical witness in a criminal prosecution in which insanity is alleged may be asked whether from the whole of his intercourse with the accused it appeared to him that he was insane. *Frith's Case*, 22 How. St. Tr. 307.

And the evidence of a physician sent to the jail by the district attorney to make an examination of the prisoner's mental and physical condition, as to his opinion of his mental condition, is not subject to the objection that he was thereby compelled to furnish evidence against himself. *People v. Kemmler*, 119 N. Y. 580.

And the opinion of a family physician of a person accused of homicide, who was also an expert, upon the subject of mental diseases, who had testified to having assisted at the birth of her two children and at other times, and that he was well acquainted with her and her ailments, as to whether from his treatment of her and her ailments and all he knew of her she was of ordinarily good mind or weak minded, is not subject to the objection that the test of legal responsibility is whether the accused was capable of knowing right from wrong, and not whether she was weak minded, as the inquiry as to the character and quality of her mind is material to the question of her capacity to know that the act was wrongful. *People v. Worthington*, 105 Cal. 166.

The opinion of an expert witness in a prosecution for burglary, as to whether the accused could distinguish between right and wrong to such an extent as to know that it was wrong to commit burglary, however, is inadmissible where in his opinion opportunity had never offered itself for him to determine whether the accused could abstain from the commission of that crime when he knew and believed it to be wrong. *Shaeffer v. State*, 61 Ark. 241.

And the court in a criminal prosecution will not stop the trial and give physicians unlimited time to observe the accused and form their opinions as to his sanity, where they had delayed the trial for a long time by continuous and dilatory methods, and there was ample time during such delay for the observation of his mental condition. *State v. Crisp*, 126 Mo. 605.

So, an expert witness in a will contest who has testified fully as to his knowledge of the testatrix may

lett, 48 N. H. 224, 80 Am. Dec. 154; *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 332; *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499; *Coffin v. United States*, 156 U. S. 432, 39 L. ed. 481; *Brotherton v. People*, 75 N. Y. 159; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Walker v. People*, 88 N. Y. 81; *Chase v. People*, 40 Ill. 352; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360; *Dove v. State*, 3 Heisk. 348; *Plake v. State*, 121 Ind. 433; *Bradley v. State*, 31 Ind. 492; *McDougal v. State*, 88 Ind. 24; *Guiteau's Case*, 10 Fed. Rep. 161.

The charge presented a phase of criminal homicide, and of murder in the first degree which does not arise out of all the facts or any of them in evidence, and is in no way applicable to this case.

give his opinion as to her sanity based upon his own knowledge, such knowledge consisting of the facts which he had already stated. *Foster v. Dickerson*, 64 Vt. 233; *Puryear v. Reese*, 6 Coldw. 21.

And the opinion of a physician who has long been acquainted with a testator and his habits, conduct, and conversation, is admissible in evidence in a proceeding to contest his will on the ground of mental incapacity. *Bitner v. Bitner*, 65 Pa. 347.

And a physician who had known the testator, and had seen and talked with him at a specified time, may give his opinion in a will contest as to his mental capacity at that time. *Rice v. Rice*, 53 Mich. 432.

So, an attending physician of a testatrix who was present when her will was executed may give his opinion as to her mental capacity in a will contest, where he fully states her condition, appearance, and conversations at the time. *Brown v. Mitchell*, 75 Tex. 9.

And physicians called as witnesses in a will contest may be inquired of whether, from the circumstances of the patient and the symptoms they observed, they are capable of forming an opinion of the soundness of her mind, and if so whether they from thence conclude that her mind was sound or unsound. *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106.

And evidence of a medical attendant in a lunatic asylum in which a testator resided at the time of making her will is admissible on the question of testamentary capacity to show that she was sane, and that her continuance in the asylum was voluntary. *Martin v. Johnston*, 1 Fost. & F. 122.

So, the physician of a testator who had committed suicide, who had testified to his mental condition during the time he attended him, may be asked in a will contest to state from his personal knowledge whether the testator's condition was or was not an indication of insanity, and what the act of suicide would indicate as to the soundness or unsoundness of his mind. *Frary v. Gusha*, 59 Vt. 257.

And testimony of an attending physician of a testator to the effect that the fact that the testator judiciously managed his property prior to his last sickness and the making of his will tends to show that he was subject to no delusion while making his will, is competent and admissible. *Coryell v. Stone*, 62 Ind. 307.

And a question asked an expert witness, who had testified that she had seen and conversed with the testatrix for an hour or two at a time on three different occasions, whether she thought she could have conversed with her an hour and a half and not have discovered any insanity if any existed, is not objectionable as leading. *Foster v. Dickerson*, 64 Vt. 233.

So, a practising physician who states on an inquisition of lunacy that he had met and conversed with the alleged lunatic in order to test the

The charge of the court must be confined to the issues raised by the evidence.

Mayfield v. State, 23 Tex. App. 645; *Boren v. State*, 23 Tex. App. 28; *Willson*, Crim. L. § 2387.

On rehearing.

We thought the rule of practice on hypothetical questions was settled in this state, by this court.

Webb v. State, 9 Tex. App. 490; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638; *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 687.

Not having objected to the evidence of Miss Sparks at the time it was introduced does not preclude the defendant from objecting to it by motion to exclude it.

Burke v. State, 15 Tex. App. 167; *Gaines v.*

condition of his mind, and noticed his general expression and appearance, but had formed no settled opinion as to the depth of his mind, may be asked whether he discovered any evidence of unsoundness of mind, and may be permitted to state his opinion on the question of his sanity or insanity. *Re Carmichael*, 36 Ala. 514.

And a question asked a physician as to the state of mind of a person whose sanity was in question on a particular day, based upon his appearance, actions, condition, and conversation, is not objectionable as leading and suggestive where he had previously testified at length that he had attended such person for some time including the day specified, and described his ailments and physical condition, and that he had conversed with him. *Wheelock v. Godfrey*, 100 Cal. 578.

But while medical experts may give their opinions as to the testator's sanity in a will contest where they are based upon observation or examination, they must give the symptoms or circumstances from which they draw their conclusions. *Puryear v. Reese*, 6 Coldw. 21; *Gibson v. Gibson*, 9 Yerg. 329.

And depositions of physicians stating their opinion that a party was insane will be rejected where the deponents state no facts on which they ground their opinions. *Dickinson v. Barber*, 9 Mass. 225, 6 Am. Dec. 58; *White v. Bailey*, 10 Mich. 155; *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106.

So, it is the better practice to require an expert witness on the question of sanity or insanity to state the circumstances of his examination, and the facts, symptoms, or indications upon which his conclusion is based, before giving the opinion to the jury. *People v. Youngs*, 151 N. Y. 210.

But it is not error to permit a medical expert who has made a personal examination of a patient for the purpose of determining his mental condition to give his opinion as to that condition at the time of the examination, without in the first instance disclosing the particular facts upon which his opinion is based. *People v. Youngs*, 151 N. Y. 210; *Crockett v. Davis*, 61 Md. 134.

And a physician may give his opinion as to the sanity or insanity of a person on trial for homicide upon the basis of a hypothetical case, together with what he had learned from an examination of him. *State v. White*, 134 Mo. 404.

An expert witness in a will contest who is competent to give an opinion as to the testator's sanity may give one founded either upon his personal examination of or acquaintance with him, or upon a hypothetical case stated to the witness, so framed as to resemble as near as may be the case under consideration. *Boardman v. Woodman*, 47 N. H. 120.

But an expert witness in a prosecution for homicide, who has stated on a hypothetical case that in

Salmon, 16 Tex. 811; *Hubby v. Camplin*, 22 Tex. 582; *Sharp v. Baker*, 22 Tex. 306.

Mr. Mann Trice, for the State:

The determination as to whether a hypothetical question should be allowed is one for the court to determine. The form of the question, its length, as to what it should or should not contain, are all questions primarily vested in the discretion of the court.

Rogers, Expert Testimony, §§ 26-38; *Luning v. State*, 1 Chand. (Wis.) 178; *State v. Bowman*, 78 N. C. 509; *Hunt v. Lovell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697; *Dolz v. Morris*, 10 Hun, 202.

It is not the duty of an expert to reconcile conflicting evidence.

Davis v. State, 35 Ind. 496, 9 Am. Rep. 760; *Guetic v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464.

his opinion the defendant was insane, cannot be subsequently asked to state his opinion as to the condition of the defendant's mind at the time of the homicide judging from a personal examination which he had made since the homicide was committed, and the hypothetical case upon which he had already expressed his opinion, as to what had occurred since, is little or no evidence of the condition of his mind at the time of the homicide. *State v. Welsor*, 117 Mo. 570.

So, it is not necessary to the admissibility of the opinion of an expert witness in a criminal prosecution upon the question of the sanity of the accused that he should have heard all of the evidence where his opinion is based upon his own knowledge and observation aided by what was said to them by the accused of his feelings and symptoms. *State v. Hayden*, 51 Vt. 296.

And the opinion of an expert in a trial for murder in which insanity is alleged as a defense is not subject to objection, when offered in evidence, that he had not heard the testimony given with respect to the condition of the defendant's mind, where his opinion was given from his own personal knowledge. *State v. Gould*, 40 Kan. 258.

And it is not an abuse of discretion for the court to exclude medical experts from the court-room in a criminal prosecution in which insanity is alleged, where they were called, not to declare a scientific opinion based upon other testimony in the case, but simply as witnesses to give their own opinions of the condition of the mental capacity of the accused as derived from personal acquaintance. *Johnson v. State*, 10 Tex. App. 571.

A physician who had visited an invalid on consultation with his attending physician cannot give his opinion of the mental condition of such invalid at that time in an action brought to avoid a sale of property by him on the ground of insanity based upon representations made to him by the invalid's wife, the attending physician, and other attendants as to his previous symptoms or condition in connection with symptoms he discovered by professional observation and examination. *Heald v. Thing*, 45 Me. 362.

And a consulting physician cannot give his opinion in a will contest based in part upon his own examination but mainly upon what he was told on that question for the purpose of that examination, not in the patient's presence, of his previous symptoms and condition, by the attending physician. *Wetherbee v. Wetherbee*, 38 Vt. 454.

And while the family physician of a testatrix may express an opinion upon the actual condition of his patient, yet it is not competent for him to give one upon the direct question as to her capacity to make a will. *Hall v. Perry*, 87 Me. 569.

If the expert has not heard the testimony (as in this case) each side to the issue has a right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence, and if meagerly presented in the examination on one side, it may be fully presented on the other. The whole examination being within the control of the trial court, whose duty it is to see that it is fairly and reasonably conducted.

Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638; *Lovelady v. State*, 14 Tex. App. 545; *Buswell*, Insanity, § 263; *Rogers*, Expert Testimony, p. 65; *Whart. Crim. Ev.* 419; *Jones*, Ev. §§ 373, 374.

It is sufficient if the question fairly states such facts as the proof of the examiner tends to establish, and fairly presents his claim or theory. It cannot be expected that the interrogatory will include the proofs or theory of

So, refusal to allow a statement made by an expert called by the government in a prosecution for murder of his opinion of the defendant's mental condition to be read to the jury, but permitting defendant's counsel to use it to cross-examine the witnesses, furnishes no ground of exception. *Com. v. Pomeroy*, 117 Mass. 143.

And where the trial judge selects competent physicians as experts to make an examination of the mental condition of the accused in a criminal prosecution for the purpose of better preparing them to intelligently state his situation to the jury at the trial, it is not a condition precedent to the trial being proceeded with that they should make a written and detailed report of such examination to the court. *State v. Paine*, 49 La. Ann. 1092.

IV. From the evidence.

a. The general rule.

The general rule is that an expert witness in an action involving the question of insanity, who had heard all the testimony given on the part of the defendant on that question, may be asked his opinion upon the hypothesis that the testimony given by the witnesses is all true. *Negroes*, *Jerry v. Townshend*, 9 Md. 145; *State v. Windsor*, 5 Harr. (Del.) 512; *Schneider v. Manning*, 121 Ill. 376; *State v. Potts*, 100 N. C. 457; *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *Yardley v. Cuthbertson*, 108 Pa. 905, 56 Am. Rep. 218; *Pidcock v. Potter*, 68 Pa. 842; *Foster v. Dickerson*, 64 Vt. 233; *Rex v. Searle*, 1 Moody & R. 75; *Rex v. Wright*, *Russ. & R. C. C.* 456.

Though he has not seen the patient. *State v. Windsor*, 5 Harr. (Del.) 512.

And that men of medical skill, who have no personal knowledge of the facts, may be asked their opinions whether certain appearances detailed by other witnesses are symptoms of insanity. *Doe*, *Sutton v. Reagan*, 5 Blackf. 217, 33 Am. Dec. 406; *Rex v. Searle*, 1 Moody & R. 75; *Rex v. Wright*, *Russ. & R. C. C.* 456.

Thus, an expert witness on the question of insanity, who was present in court and heard all of the testimony claimed to indicate insanity, may be asked in a criminal prosecution as to whether in his opinion the accused was sane or insane at the time of the offense supposing all the facts he had heard testified to, to be true. *State v. Hayden*, 51 Vt. 296; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *People v. Barber*, 115 N. Y. 475.

Though he had made no personal examination and knew nothing of the actual facts. *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458.

In *State v. Hayden*, 51 Vt. 296, *Fairchild v. Bascomb*, 35 Vt. 298, *infra*, V. b, was distinguished upon the ground that in that case evidence bearing upon the question of the sanity of the testatrix

the adversary, since this would require a party to assume the truth of that which he generally denies. This is the universal rule in both criminal and civil cases.

State v. Hanley, 34 Minn. 430; *Ballard v. State*, 19 Neb. 609; *People v. Augsburg*, 97 N. Y. 591; *State v. Anderson*, 10 Or. 448; *Conway v. State*, 118 Ind. 482; *Baker v. State*, 30 Fla. 41; *McFall v. Smith*, 32 Ill. App. 463; Civil Cases: *Stearns v. Field*, 90 N. Y. 649; *Nave v. Tucker*, 70 Ind. 15; *Hathaway v. National L. Ins. Co.* 48 Vt. 335; *Daniels v. Aldrich*, 42 Mich. 58; *Meeker v. Meeker*, 74 Iowa, 352; *Woolner v. Spalding*, 65 Miss. 204; *Jackson v. Burnham*, 20 Colo. 532.

Counsel may frame the hypothetical question upon the hypothesis of the truth of all the evidence, or of certain facts assumed to be proved for the purpose of the inquiry. The

question is not improper simply because it includes only a part of the facts in evidence.

Rogers, Expert Testimony, p. 65; *Williams v. State*, 64 Md. 384.

Each side in an issue of fact has its theory of what is the true state of facts, and assumes that it can prove it to be so to the satisfaction of the jury, and, so assuming, shapes hypothetical questions to experts accordingly; and such is the correct practice.

Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Goodwin v. State*, 96 Ind. 550; *People v. Goldensohn*, 76 Cal. 328; *Coyle v. Com.* 104 Pa. 117.

When the hypothetical question has been improperly allowed, because not including certain facts it should have embraced, the error

was conflicting, while in the case at bar there was no conflict.

So, medical men who were present in court and heard the evidence in a criminal prosecution may be asked on the issue of the insanity of the accused whether, as a matter of science, the facts stated, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong. *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott, N. R. 595, 1 Car. & K. 130. But see Reg. v. Frances, 4 Cox, C. C. 57, *supra*, IV. b.

And testimony of medical experts as to the sanity or insanity of a testator is admissible though their opinions are based on facts proved in the case, and not upon facts known to the witnesses. *Vance v. Upson*, 66 Tex. 478; *Kempsey v. McGinnis*, 21 Mich. 123.

A proper question to a medical expert on the question of insanity in a criminal prosecution is, "Assuming the facts to be true which you have heard testified to what is your opinion as to the prisoner's sanity or otherwise?" *People v. Kleim*, 1 Edm. Sel. Cas. 12.

Or, if the symptoms and indications testified to by other witnesses are proved, and if the jury are satisfied of the truth of them, whether in his opinion the party was insane, and what were the nature and character of that insanity, what state of mind they indicated, and what he would expect would be the conduct of such a person in any supposed circumstance. *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458.

The opinion of an expert witness upon the question of the sanity or insanity of the accused in a criminal prosecution, however, must be based upon the evidence taken upon the trial then pending, and cannot be based, either in part or in whole, upon newspaper reports of evidence taken at a former trial, as that is nothing but hearsay. *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 687.

And it is not admissible in evidence where he had heard only a part of the testimony given by one of several witnesses, and the opinion was based upon the testimony thus read and upon a newspaper account of the other testimony. *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 687.

And a medical witness in a criminal prosecution in which insanity is alleged, who states that he had heard all the evidence as published in the newspapers with a view to make up his mind as to the person's sanity, cannot express an opinion on that subject; only a hypothetical question can be put unless the witness had been in court and heard all the evidence. *Macfarland's Trial*, 8 Abb. Pr. N. S. 57.

So, medical experts will not be allowed to determine from the evidence what the facts are, and give

their opinions from them. *Dexter v. Hall*, 82 U. S. 15 Wall. 9, 21 L. ed. 73.

And an expert witness on the question of sanity in a criminal prosecution cannot be asked his opinion from the whole evidence where it is conflicting. The question put to him should state specifically particular facts in evidence hypothetically assuming them to be true, so worded that the jury can see upon what particular assumed facts his opinion is based. *Coyle v. Com.* 104 Pa. 117; *United States v. McGlue*, 1 Curt. C. C. 1.

Questions put to an expert witness on the question of sanity or insanity in a criminal prosecution on direct examination must be formed hypothetically unless there is no conflict of evidence as to the facts, or unless the expert is personally acquainted with them. *State v. Maier*, 36 W. Va. 757.

So, a medical expert cannot be asked his opinion respecting the sanity or insanity of a grantor in an action involving the validity of his deed, forming it from the symptoms detailed in the evidence, where the evidence on the subject is conflicting. *Dexter v. Hall*, 82 U. S. 15 Wall. 9, 21 L. ed. 73.

And while medical witnesses may give their opinions in a will contest as to the sanity of a testator they must be predicated upon the facts proved, and when the facts are doubtful they may give their opinions upon cases hypothetically stated. *Tingley v. Cowgill*, 48 Mo. 291.

And if an expert witness who has heard all the testimony of a particular witness, or of all the witnesses, is permitted to give his opinion upon such evidence, if there is any conflict of evidence, or any doubt as to what the evidence is, he should be required to state fully his understanding as to what facts are established thereby. *Bennett v. State*, 57 Wis. 69, 46 Am. Rep. 28.

The facts upon which their opinions are founded must be stated, and the jury must be left to determine, not only the truth of the facts, but of the opinions founded upon them. *Kempsey v. McGinnis*, 21 Mich. 123.

Medical or other professional witnesses called upon to testify as to the sanity of the accused in a criminal case are not to judge of the credibility of the witnesses or of the truth of the facts detailed by them; it is for the jury to decide whether such facts are satisfactorily proved. *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458.

So, a medical expert cannot give his opinion on the evidence as to the state of the prisoner's mind at the time, or whether he was conscious that he acted contrary to law or was laboring under a delusion, as such question involves the determination of the question which the jury is called upon to decide. *M'Naghten's Case*, 10 Clark & F. 200, 8 Scott, N. R. 595, 1 Car. & K. 130.

And medical witnesses in a criminal prosecution

is cured if the cross-examination has supplied the omission and placed before the witnesses all the facts necessary to the formation of an opinion.

Rogers, Expert Testimony, p. 67; *Van Hoesen v. Cameron*, 54 Mich. 609.

It is not the province of the expert to act as judge or jury. Hence all questions calling for his opinion should be so framed as not to call upon him to determine controverted questions of fact, or to pass upon the preponderance of testimony.

Jones, Ev. § 374; *Page v. State*, 61 Ala. 16; *State v. Cole*, 94 N. C. 958; *Reed v. State*, 62 Miss. 405; *Bennett v. State*, 57 Wis. 69, 46 Am. Rep. 26; *M'Naughten's Case*, 10 Clark & F. 200; *Inland & Seaboard Coasting Co. v. Tolson*, 189 U. S. 551, 85 L. ed. 270.

The truth of facts assumed by the question is in doubtful cases a question for the jury,

cannot give their opinions as to the sanity or insanity of the accused based upon the facts and circumstances stated by other witnesses and upon the defendant's conduct at the trial, as this would practically put him in the place of the jury. *State v. Felter*, 25 Iowa, 67.

The giving of an opinion by an expert witness in a will contest, who had heard all the evidence as to the habits, conduct, etc., of the testator, as to whether the testator was of sound mind from a consideration of all the evidence in the case, is not an assumption of the province of the jury however, where there does not appear to have been any substantial dispute as to the facts upon which the testimony was predicated. *Hutchinson v. Hutchinson*, 50 Ill. App. 87.

So, a medical witness upon the question as to the sanity or insanity must hear the whole evidence in order to qualify him to give an opinion based upon it. *Webb v. State*, 9 Tex. App. 491.

And a medical expert in a criminal case cannot give his opinion as to the sanity of the accused where he has heard only a part of the testimony, and his opinion is based upon the part heard by him. *Lake v. People*, 1 Park. Crim. Rep. 495, 12 N. Y. 358; *People v. Thurston*, 2 Park. Crim. Rep. 49; *Brown v. Com.* 14 Bush, 398.

Medical experts on the question of sanity or insanity must state their opinions upon the whole evidence if they have heard it, or upon a hypothetical statement which is in conformity with the whole evidence. *Webb v. State*, 9 Tex. App. 491.

But error which will warrant a reversal will not be predicated upon the admission upon cross-examination of the opinion of a medical expert as to the sanity or insanity of another based upon the testimony of a single witness, where the expert had heard all the testimony in the case, and had given his opinion, founded upon the whole testimony including such single witness. *Webb v. State*, 9 Tex. App. 491.

And the opinion of an expert in a trial for murder in which insanity is alleged as a defense, which does not purport to be based on all the evidence in the case, but only on so much of the same as he had heard, is not subject to objection that he had not heard all the evidence. *State v. Gould*, 40 Kan. 258.

And it has been held that an expert witness upon the question of sanity or insanity may express an opinion upon a defined portion of the testimony in the case assuming its truthfulness, where he is first made acquainted with the whole of it upon which he is to pronounce his opinion. *Yardley v. Cuthbertson*, 106 Pa. 365, 56 Am. Rep. 218.

And that an expert witness in a will contest may be asked his opinion as to the sanity of the testator, 39 L. R. A.

and if they find that the assumed facts are not proved they should disregard the opinions based upon such hypothetical questions.

Rogers, Expert Testimony, § 378; *People v. Foley*, 64 Mich. 148; *Turnbull v. Richardson*, 69 Mich. 400; *United States v. McGlue*, 1 Curt. C. C. 9; 1 Greenl. Ev. § 640; 1 Whart. Ev. § 452.

The trial court should allow testimony to be introduced at any time before the argument is concluded, if it appear to be necessary to the due administration of justice.

Farris v. State, 26 Tex. App. 105; *Nalley v. State*, 28 Tex. App. 887; *Hendricks v. State*, 28 Tex. App. 416; *Malton v. State*, 29 Tex. App. 527; *Laurence v. State*, 31 Tex. Crim. Rep. 601; *Gonzales v. State*, 32 Tex. Crim. Rep. 611; *Malcek v. State*, 33 Tex. Crim. Rep. 14.

No error is shown by the refusal to permit the introduction in evidence of excerpts from

based upon the testimony of a witness to which he first listened assuming the testimony to be true. *Foster v. Dickerson*, 64 Vt. 238.

And the rule has been laid down that the trial court in a will contest in which insanity is alleged may, in its discretion, allow or refuse to allow an expert witness, who has testified that he had heard the testimony of certain witnesses as to symptoms and indications of the testator, to state whether, assuming the statements of such witnesses to be true, the testator was of sound mind. *Re Storer*, 28 Minn. 8.

So, the better and more satisfactory practice is to allow witnesses summoned as experts on the question of insanity in an action involving that issue to remain in the court-room and hear the testimony of all the other witnesses, in order that from the whole testimony they may be enabled to determine from the evidence itself the matter upon which their opinion is desired. *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 688; *Johnson v. State*, 10 Tex. App. 571.

But where this has not been done a hypothetical case embracing the facts in evidence may be submitted to them. *Johnson v. State*, 10 Tex. App. 571.

And refusal to permit an expert witness in a prosecution for homicide, who had heard all the evidence, to give his opinion on the facts stated by the witness as to the state of the mind of the accused at the time of the homicide, is not error where the court decided that the witness might be asked his opinion upon a hypothetical case corresponding to the testimony, or that the testimony might be read and his opinion asked upon it on the supposition that the facts were true. *People v. McCann*, 3 Park. Crim. Rep. 272.

And an expert witness in a criminal prosecution may be asked for his opinion upon the facts hypothetically stated, and the court is not obliged to have the testimony taken down and read over to him to enable him to express an opinion upon the question of the sanity or insanity of the accused. *Choice v. State*, 31 Ga. 424.

b. The contrary rule.

The contrary rule has been adopted by a few of the cases which hold the doctrine that the opinions of expert witnesses on the question of sanity or insanity, founded on testimony already in the case, can only be given on a hypothetical case. *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 662.

Within this rule an expert witness should give his opinion as to the sanity of the accused in a criminal prosecution upon a hypothetical statement of the case, and not upon the evidence. *McCarty v. Com.* 14 Ky. L. Rep. 285.

And expert witnesses should not be asked, in a

works on medical jurisprudence, and on the refusal of the court to permit counsel to read same as the views of the authors, as a part of his speech.

Com. v. Wilson, 1 Gray, 838; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41; *Ashworth v. Kittredge*, 13 Cush. 193, 59 Am. Dec. 178; *Mutual L. Ins. Co. v. Bratt*, 55 Md. 200; *Jones, Ev.* p. 594.

The extent to which counsel may, in argument, be permitted to read from books, whether legal or scientific, is a matter confided to the sound discretion of the court, and one which this court will not revise, unless it is made to appear that this discretion has been abused to the prejudice of the defendant.

Cross v. State, 11 Tex. App. 87; *Hines v. State*, 3 Tex. App. 483; *Bowen v. State*, 3 Tex.

App. 617; *Bingham v. State*, 6 Tex. App. 169; *Foster v. State*, 8 Tex. App. 248.

No abuse of discretion is shown in this case. *Queen v. Crouch*, 1 Cox, C. C. 94; *Reg. v. Taylor*, 18 Cox, C. C. 77; *Rogers, Expert Testimony*, § 179; *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *Ashworth v. Kittredge*, 59 Am. Dec. 178, and notes.

The evidence obtained by observation of defendant was in no sense a confession, therefore admissible, although he was not warned.

Hunt v. State, 83 Tex. Crim. Rep. 252; *Adams v. State*, 34 Tex. Crim. Rep. 472.

The circumstances of enormity, cruelty, and deliberate malignity suffice to call for the charge, and to show that the killing was done with express malice, therefore murder in the first degree.

criminal prosecution, to give their opinions on the prisoner's sanity from the evidence given, but may be asked their views generally or with reference to a similar case hypothetically stated. *State v. Coleman*, 20 S. C. 441.

And a medical man conversant with insanity cannot give his opinion in a will contest as to the sanity or insanity of the testator founded upon the evidence given at the trial in his hearing. *Doe, Bainbrigg, v. Bainbrigg*, 4 Cox, C. C. 454.

And a witness testifying as an expert should state to the jury the facts upon which he gives his opinion; he can state what insanity is, or what causes insanity, but must assume hypothetical facts when he tells the jury his conclusions. *Price v. Richmond & D. R. Co.* 38 S. C. 199.

And it is not proper on the trial of an appeal from a decree allowing the probate of a will to ask an expert witness who had heard all of the testimony whether, supposing such testimony to be true, the testator was laboring under an insane delusion or was of unsound mind; the facts upon which his opinion is asked should be put to him hypothetically. *Woodbury v. Obeare*, 7 Gray, 467.

So it has been held that the opinion of an expert witness in a criminal prosecution, founded upon the testimony upon the general question of sanity or insanity of the accused, is not competent; he should merely give an opinion as to what the facts proved or claimed to be proved indicate as to the mental condition of the accused. *People v. Lake*, 12 N. Y. 358.

And that a physician called as a witness in a criminal prosecution, who had heard evidence given as to the insanity of the accused, should not be asked his opinion upon the evidence whether or not the accused was of unsound mind, the proper mode of examination being to take particular facts, and, assuming them to be true, to ask the witness whether in his judgment they were or were not indicative of insanity. *Reg. v. Frances*, 4 Cox, C. C. 57; *Overruling M'Naughten's Case*, 1 Car. & K. 130, note, 10 Clark & F. 200, 8 Scott, N. R. 595.

Error in permitting an expert witness to give his opinion as to the mental condition of the accused in a criminal prosecution, instead of a hypothetical statement, however, is not a ground for reversal, where the answer to the question did not prejudice the substantial rights of the accused. *McCarty v. Com.* 14 Ky. L. Rep. 235.

V. On hypothetical statements or questions.

a. Admissibility.

Witnesses who are experts upon the question of mental condition may give their opinions on an issue as to sanity or insanity upon a hypothetical question or statement of facts established by other evidence. *Pittard v. Foster*, 12 Ill. App. 132; *Masie v. Com.* 15 Ky. L. Rep. 522; *Choice v. State*, 31 89 L. R. A.

Ga. 424; *Lake v. People*, 1 Park. Crim. Rep. 495; *People v. Thurston*, 2 Park. Crim. Rep. 49; *Pidcock v. Potter*, 68 Pa. 342, 5 Am. Rep. 181; *Hathaway v. National L. Ins. Co.* 48 Vt. 338; *Dexter v. Hall*, 82 U. S. 15 Wall. 9, 21 L. ed. 73. And see cases cited in the following subdivisions of this section.

And an expert witness in a proceeding *de lunatico inquirendo* may answer a hypothetical question based in part upon proved facts and in part upon the testimony of the other witnesses. *Re Mason*, 60 Hun. 46.

And refusal to permit all the testimony given in a case to be read as a hypothetical question put to a medical expert in a criminal prosecution is not error where counsel was told that he might assume certain facts and put the usual hypothetical question, which was finally done. *People v. Golden-son*, 76 Cal. 323.

Nor is refusal to permit an expert witness on the question of testamentary capacity to answer proper hypothetical questions reversible error where he had been permitted to answer other proper hypothetical questions covering the whole case, including everything covered by the questions he was not permitted to answer. *Kerr v. Lunsford*, 81 W. Va. 680, 2 L. R. A. 668.

So, an objection to evidence of a physician in a criminal prosecution as to the sanity or insanity of the accused, based upon a hypothetical case and an examination, that it is incompetent and immaterial, is worthless. *State v. Wright*, 134 Mo. 404.

And where a medical witness is subject to a long and minute examination with respect to the sanity of another, and his opinion is elicited upon groups of assumed facts which the evidence indicates, and carefully formed hypothetical questions are put to him without repeating such facts in terms but referring to them as a basis for an additional inquiry, and a long and critical cross-examination is had following the same method, a question on re-examination which does not include the hypothesis should be treated and considered as resting upon the hypothesis assumed in the cross-examination. *McGinnis v. Kempey*, 27 Mich. 363.

It is not error for the court to require the defendant in a criminal prosecution to submit his hypothetical case to medical experts before the state's rebutting evidence on the question of insanity is given to the jury, and is not ground for reversal where no application was made after the state had finished its rebutting proof to examine the medical experts with the additional evidence of the state before the jury. *Dove v. State*, 3 Heisk. 348.

b. Hypothesis; upon what based.

A hypothetical question as to mental condition, addressed to an expert witness, should embrace all the facts of the case when there is no dispute as

Clark v. State, 29 Tex. App. 357; *Cook v. State*, 30 Tex. App. 607; *Lewis v. State*, 15 Tex. App. 647; *Swofford v. State*, 3 Tex. App. 76; *Gailean v. State*, 11 Tex. App. 544; *Spearman v. State*, 34 Tex. Crim. Rep. 279.

There must be a total want of reason and power to distinguish between right and wrong in order to excuse crime.

Rex v. Arnold, 16 How. St. Tr. 764; *Earl Ferrer's Trial*, 19 How. St. Tr. 947.

The law presumes that all men are sane, and if insanity of any person be alleged it is incumbent on the party alleging it to prove such insanity. Therefore, the correlative rule obtains that the burden of proof rests upon the party alleging insanity.

Best, Presumptions of Law & Fact, 57-70;

to such facts, and the witness should take them all into consideration in giving his answer. *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Lake v. People*, 1 Park. Crim. Rep. 495; *Re Miller*, 26 Pittsb. L. J. N. S. 428; *Webb v. State*, 9 Tex. App. 490; *Hathaway v. National L. Ins. Co.* 48 Vt. 336.

And a hypothetical case submitted for the opinion of the expert on the question of insanity in a will case containing only a partial statement of the material evidence adduced should be excluded. *McCullough's Will*, 35 Pittsb. L. J. 169.

But a hypothetical case is not subject to objection when it substantially embodies the facts relating to this subject as disclosed by the evidence. *State v. Baber*, 74 Mo. 232, 41 Am. Rep. 314. See also *BURT v. STATE*.

Where the facts are in dispute, however, the question should be based upon the facts which the evidence tends to prove. *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Kelly v. Perrault* (Idaho) 43 Pac. 45.

It need not be based upon all the evidence. *People v. Hill*, 116 Cal. 562; *Gueltig v. State*, 66 Ind. 94, 32 Am. Rep. 99.

All the facts upon both sides in a will contest upon the issue of insanity should not be incorporated in one question asked an expert witness where the facts on one side conflict with the facts on the other, but attention should be called to their opposing tendencies, and if his skill or knowledge can furnish the explanation which harmonizes them, he is at liberty to set it up. *Fairchild v. Baascomb*, 35 Vt. 393.

In putting hypothetical questions to expert witnesses on the question of testamentary capacity counsel may assume the facts in accordance with their theory, and it is not essential that they state the facts as they exist, but the hypothesis should be based on a state of facts which the evidence tends to prove. *Kerr v. Lunsford*, 31 W. Va. 630, 2 L. R. A. 668; *Bever v. Spangler*, 93 Iowa, 576.

And counsel may assume the facts in accordance with their theory of them. *Bever v. Spangler*, 93 Iowa, 576.

Keeping within the range of the relevant testimony, they need not embody in the question all the matters of which there is any evidence. *Goodwin v. State*, 96 Ind. 550; *People v. Hill*, 116 Cal. 562.

They cannot be based on mere conjecture. *Kelly v. Perrault* (Idaho) 43 Pac. 45.

And opposing counsel may on cross-examination add to such hypothetical case such facts as he deems the evidence to have established, or subtract from it such facts as he supposes to have been disproved or not to have been proved. *Goodwin v. State*, 96 Ind. 550; *Grubb v. State*, 117 Ind. 277.

And the attention of an expert witness on the question of sanity may be called to such facts as are claimed by one party to show sanity, and his opinion taken as to whether the existence of these facts, together with those claimed to have been

Greenl. Ev. §§ 42, 372, 378, 689; 3 Starkie, Ev. 404, 405; 4 Starkie, Ev. 1284, 1244, 1246; *Shelford*, Lunacy, 50; 1 Collinson, Lunacy, 51; *Whart. Crim. Ev.* 340; *Whart. Homicide*, 688; *Russell, Crimes*, p. 20; *Buswell, Insanity*, 159, 162, 170 et seq.; *Jackson, Van Dusen, v. Van Dusen*, 5 Johns. 158, 4 Am. Dec. 330.

To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

Russell, Crimes, p. 19; *M'Naughten's Case*, 10 Clark & F. 200; Penal Code, art. 52.

proved by the other party, was inconsistent with the claim of insanity. *Prentiss v. Bates*, 93 Mich. 234, 17 L. R. A. 494.

Hypothetical questions put to experts upon the question of sanity or insanity should be based upon facts which the evidence tends to prove, but it is not required that they should be based upon conceded facts, nor is technical accuracy required in framing them, but if they are entirely without the support of evidence they should be excluded. *Meeker v. Meeker*, 74 Iowa, 352; *Gueltig v. State*, 66 Ind. 94, 32 Am. Rep. 99.

A hypothetical question asked an expert witness upon the question of insanity with a view to eliciting an opinion thereon should include only such facts as are admitted or are established, or which there is evidence tending to show; but it is not a question as to the weight of the evidence, but whether there was any evidence tending to prove the facts. *Re Norman*, 72 Iowa, 84.

And answers to hypothetical questions put to medical experts on the question of sanity or insanity are not objectionable because they include considerations not referred to in the questions as constituting the basis of the opinion given, where they are such as the testimony tends to prove, and as might have been properly included in the questions. *Hathaway v. National L. Ins. Co.* 48 Vt. 336.

The question to an expert witness testifying as to a person's mental condition, about which he has no personal knowledge, should contain such assertions of fact, and such only, as counsel may fairly claim that the evidence in the case justifies. *Re Barber*, 63 Conn. 363, 22 L. R. A. 90.

The hypothesis upon which experts are examined must be based upon facts admitted or established by the evidence, or which, if controverted, the jury might legitimately find on weighing the evidence. *People v. Augsburg*, 97 N. Y. 501; *Re Mason*, 60 Hun, 46.

Contestants of a will cannot introduce contradictory evidence upon a given point, and then base hypothetical questions to experts upon the theory that some of their witnesses are correct and some of them mistaken. *Prentiss v. Bates*, 93 Mich. 567.

And it is not competent to predicate a hypothetical question put to an expert upon the question of the insanity of a person accused of a crime upon all the evidence in the case, whether he has heard it all or not, upon the assumption that he recollects it, as it would then be impossible for the jury to determine the facts upon which the witness based his opinion, and whether such facts were proved or not. *People v. McElvaine*, 121 N. Y. 250.

In *People v. McElvaine*, 121 N. Y. 250; *People v. Lake*, 12 N. Y. 358, *supra*, IV. a, was distinguished, the court saying that in that case the error was in permitting physicians who did not hear all the evidence relating to mental capacity to give their opinions as to sanity founded upon the portion

Where the defendant relies upon any substantive, distinct, independent matter as a defense, such as insanity, nonage, license to do the act, or the like, then it devolves upon him to establish such defense by a preponderance of the evidence, and it would not be error to instruct in such case that the burden of proving such defense devolves upon the accused.

Jones v. State, 13 Tex. App. 1; *Thomas v. State*, 14 Tex. App. 200; *Donaldson v. State*, 15 Tex. App. 25; *Lane v. State*, 16 Tex. App. 173; *Smith v. State*, 18 Tex. App. 69; *Smith v. State*, 19 Tex. App. 96; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638; *Stinnett v. State*, 32 Tex. Crim. Rep. 526; *Smith v. State*, 31 Tex. Crim. Rep. 18; *Giebel v. State*, 28 Tex. App. 151; *Smith v. State*, 22 Tex. App. 317;

heard by them. And *Sanchez v. People*, 22 N. Y. 147, *infra*, VIII. a, was distinguished, the court saying that the opinion there delivered did not secure the concurrence of the court, and the decision had no reference to the question under consideration here. And *People v. Thurston*, 2 Park. Crim. Rep. 49, *supra*, IV. a, was criticised, the court saying that the decision failed to secure the concurrence of the court on the ground upon which it was decided, and that no rule was therefore legally formulated by it.

So, in putting hypothetical questions to expert witnesses in a will contest upon the issue of insanity all facts should be excluded which the jury can interpret as well as the expert. *Prentiss v. Bates*, 88 Mich. 567.

And hypothetical questions cannot be based on conclusions of fact which can only be found by a jury. *Ballard v. State*, 19 Neb. 610.

And when a medical expert is asked to give his professional opinion upon an issue of insanity with reference to matters not within his own knowledge, and upon a hypothetical case founded upon the testimony of witnesses previously examined in the case, the question put to him must be so shaped as to give him no occasion to mentally draw his own conclusion from the whole evidence or a part thereof, and from the conclusion so drawn express his opinion, or to decide as to the weight of evidence or the credibility of witnesses. His answer must be such as not to involve any such conclusion so drawn or any opinion of the witness as to the weight of the evidence or credibility of the witnesses. *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

c. Evidence in support of hypothesis.

A witness cannot testify as an expert in answer to a hypothetical question on the issue of mental soundness, unless there is evidence tending to prove the matters stated in the hypothetical question. *Bomgardner v. Andrews*, 55 Iowa. 638; *Meeker v. Meeker*, 74 Iowa. 362; *Re Ames*, 51 Iowa. 596; *Hovey v. Chase*, 52 Me. 305, 83 Am. Dec. 514; *State v. Hanley*, 34 Minn. 430; *Re Lyddy*, 24 N. Y. S. R. 607; *Prather v. McClelland*, 76 Tex. 574.

The hypothesis submitted to an expert witness for an opinion must be based upon the proof, and must not go outside of the facts as to which some evidence has been given, and which therefore could be assumed as the possible truth. *People v. Smiler*, 125 N. Y. 717; *Ballard v. State*, 19 Neb. 610.

Thus, expert witnesses in a criminal action in which insanity is alleged cannot be asked questions which assume that a delusion existed in the mind of the defendant in the absence of evidence to support the assumption. *State v. Scott*, 41 Minn. 335.

And an opinion of a medical expert upon the question of sanity or insanity of a person accused

Boren v. State, 82 Tex. Crim. Rep. 637; *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 687; *Whealy v. State* (Tex. Crim. App.) 39 S. W. 672; *Hurst v. State* (Tex. Crim. App.) 40 S. W. 264; *Webb v. State*, 9 Tex. App. 512.

To seek to prove insanity from the character of the act would be regarded as nothing less than begging the question.

Ray, Medical Jurisprudence, § 12; Russell, Crimes, p. 23; *Reg. v. Stokes*, 3 Car. & K. 185.

Hurt, P. J., delivered the opinion of the court:

W. E. Burt was convicted in the district court of Travis county of murder in the first degree, the jury assessing his punishment at death. The evidence in this case, though cir-

of crime, based upon a hypothesis wholly incorrectly assumed or incorrect in its material facts, is of little or no weight. *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99.

So, in *Cornwell v. Riker*, 2 Dem. 354, the evidence as to mental incapacity of a testatrix, of distinguished alienists who had never seen her and only pronounced her demented on the assumption of the truth of certain hypotheses touching her character and conduct, was rejected upon the ground that the hypotheses were not proved to be well founded.

But while hypothetical questions put to experts upon the question of insanity should be based upon facts which the evidence tends to prove, technical accuracy is not required, and the questions need not be based upon conceded facts. *Meeker v. Meeker*, 74 Iowa. 352.

And an instruction in a prosecution for homicide, that the opinions of experts upon the question of the sanity or insanity of the accused rests wholly upon the hypothetical questions proposed to them, and the jury must believe from the evidence that the supposed facts stated in the hypothetical question are true to entitle the answer thereto to any weight, is objectionable upon the ground that their opinions may be founded upon other grounds than the assumed truth on the hypothetical question, and that the question of weight is one for the jury. *Guiteau's Case*, 10 Fed. Rep. 161.

The jury is not to take it for granted that the statements contained in a hypothetical question upon the question of sanity or insanity which had been propounded to a medical expert are true, but must carefully scrutinize the evidence, and from that determine what, if any, of such statements are true, and what, if any, are not. *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99.

Whether a hypothetical case on which the opinions of expert witnesses are based in a prosecution for crime in which insanity is alleged as a defense corresponds with the evidence in the case must be determined by the jury in the light of the testimony presented, and whenever it supposes facts not given in evidence it should be disregarded. *State v. Pagels*, 92 Mo. 300.

And whether the facts assumed in a hypothetical case put to an expert witness have been proved is a question for the jury. *State v. Baber*, 74 Mo. 282, 41 Am. Rep. 314; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 700; *Lake v. People*, 1 Park. Crim. Rep. 495; *People v. Thurston*, 2 Park. Crim. Rep. 49.

And if it is feared that questions contain statements of alleged facts which were not proved, and that the jury might be led to accept them simply because they are incorporated in the hypothesis, the adverse party should ask for an instruction that the facts be not taken for granted, but that the jury should carefully scrutinize the evidence and determine what, if any, of the averments are

cumstantial, establishes beyond all controversy that appellant killed his wife and two little children. This being the case, under the circumstances attending the homicide, he was evidently guilty of murder of the highest degree, if sane. The defense was insanity.

First error assigned: It appears that counsel for the state submitted to the expert Dr. Wooten, a hypothetical case, and then asked his opinion as to the sanity or insanity of the defendant. Dr. Wooten answered that he believed him sane. Counsel for state then submitted to the expert a case based on all of the evidence, and received the same answer. Counsel for defendant then submitted his hypothetical case, and obtained from Dr. Wooten the answer that in his opinion the defendant was insane. As appears from the bill of exceptions, full opportunity was given defendant to ob-

tain the opinion of the expert upon any hypothesis supported or inferable from any evidence in the case. Notwithstanding appellant submitted his case to the expert, and counsel for state submitted its case, yet appellant objects, because the opinion was obtained before a full case had been submitted. What, therefore, are the rules governing this proceeding? The supreme court of Indiana, speaking through Coffey, J., in the case of *Davidson v. State*, 185 Ind. 261, says: "In the examination of expert witnesses, counsel may embrace in his hypothetical question such facts as he may deem established by the evidence, and if opposing counsel does not think all the facts established are included in such question he may include them in questions propounded on cross-examination. Any other course would result in endless wrangles over the question as

true. *Grand Lodge I. O. of M. A. v. Wieting*, 168 Ill. 408.

d. Form of question.

An opinion of a medical expert on an issue of sanity or insanity, based on testimony already in the case and the hypothesis, must be clearly stated so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion. *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

Thus, a question asked an expert in a criminal action, whether, if the defendant having delusions as to his wife's fidelity, and as a reason for such delusions bases his action upon the action of a man rapping upon his bedroom window, that would indicate a derangement of mind upon that subject, is too indefinite to justify an expert opinion upon the issue of insanity. *State v. Scott*, 41 Minn. 365.

So, after enumerating a great number of facts as the basis for a hypothetical question to an expert on the question of sanity or insanity, it is improper to incorporate the entire testimony of the witnesses without stating that it is to be considered in connection with the other facts and propositions named. *Re Barber*, 63 Conn. 393, 22 L. R. A. 90.

And a hypothetical question addressed to an expert, seeking his opinion upon the question of sanity or insanity, must be so framed as to fairly reflect the facts admitted or proved by other witnesses. *Burgo v. State*, 26 Neb. 639; *Ballard v. State*, 19 Neb. 610.

And such a question is objectionable where it assumes that when the testator said he had a sister and if he knew where she lived he would visit her he referred to a sister whom he knew to have been dead for nearly thirty years, rather than to his living sister. *Carpenter v. Bailey*, 94 Cal. 406.

So, while a question put to a medical expert on the question of another's mental condition, about which he has no personal knowledge, may not be improper because it includes only a part of the facts in evidence, it would be so if by reason of omission it manifestly failed to present facts which were in evidence in their just and true relation, and caused them to appear in one that is untrue and unjust. *Re Barber*, 63 Conn. 393, 22 L. R. A. 90.

And a hypothetical question in a will contest covering many things of which there was no proof or offer of proof, including conditions necessarily indicating insanity as well as facts which might be co-existent with sanity, and going into the history, eccentricities, and physical condition of the testator and the personal traits of his relatives, is objectionable as tending to lead the jury to suppose that each of the enumerated circumstances indicated insanity, and to leave them to decide whether the will was suitable and proper. *Fraser v. Jennison*, 42 Mich. 206.

89 L. R. A.

But such a question as to the sanity or insanity of a testatrix, based upon the hypothesis that she would keep picking at her dress, and continuously pecked on the arms of the chair where she was sitting, or on the stove, is not subject to the objection that it was not based on the evidence, where the evidence shows that she did so as a habit or unusually, but did not do so continuously. *Re Fenton*, 97 Iowa, 192.

And one based upon the hypothesis that she would not engage in any conversation, but appeared to be in a study, is not subject to the objection that it is not based upon the evidence, where it appears from the evidence that she would answer questions and talk some, but would not engage in familiar intercourse and the exchange of thoughts and sentiments. *Re Fenton*, 97 Iowa, 192.

So, in a hypothetical question to an expert as to his capacity to form an opinion regarding the sanity of a testator, which is attacked because of an insane delusion as to the illegitimacy of his children, which is based on their being disinherited, the true value of the estate and the amount given the children should be stated, and not the inventory value and counsel's statement that the children's share was inconsiderable, amounting to practical disinheritance. *Re Barber*, 63 Conn. 393, 22 L. R. A. 90.

And a medical expert may be asked, in a will contest upon the ground of mental incapacity, to suppose a man to start suddenly from his tea table under an impression that someone is at his door, when there has been no sound and the door is closed, and he seizes his gun, makes out and afterwards asserts that he chanced from his door a near relative of the family who lived close by, and that he finally disappeared in a corn field, and supposing him to be honest in his belief and that no one was in fact at his door, what he thought of his mental condition. *Rush v. Magee*, 36 Ind. 69.

It has been held, however, that the proper mode of examining an expert witness upon an issue of insanity is to ask what are the symptoms of insanity, and to take particular facts assuming them to be true and ask whether they indicate insanity upon the part of the person whose sanity is questioned. *Reg. v. Frances*, 4 Cox. C. C. 57, Overruling *M'Naughten's Case*, 1 Car. & K. 130, note, 8 Scott, N. R. 595, 10 Clark & F. 200.

And that a medical witness testifying as an expert on the question of mental capacity may be asked his opinion upon a hypothetical statement of facts, and to state what are the symptoms of insanity, the question whether such facts exist or such symptoms are proved belonging exclusively to the jury. *Lake v. People*, 1 Park. Crim. Rep. 495.

The fact that a hypothetical question is so

to what facts were, and what were not, established,"—citing *Goodwin v. State*, 96 Ind. 550; *Rogers, Expert Testimony*, 39; *Stearns v. Field*, 90 N. Y. 640.

The proposition asserted in *Stearns v. Field*, 90 N. Y. 640, is as follows: If "testimony of an expert is proper counsel may ask a hypothetical question, assuming the existence of any state of facts which the evidence fairly tends to justify. An error in the assumption does not make the interrogatory objectionable, if it is within the possible or probable range of the evidence. It seems that such a question is not improper, because it includes only a part of the facts in evidence,"—citing, among other cases, *Cowley v. People*, 83 N. Y. 464, 38 Am. Rep. 464. In *Cowley v. People*, 83 N. Y. 464, the learned judge says: "Another question raised is as to the admissibility of the hypothetical questions put to medical ex-

perts sworn as witnesses. The claim is that a hypothetical question may not be put to an expert unless it states the facts as they existed. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and, so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice,"—citing *Brickson v. Smith*, 2 Abb. App. Dec. 64; *People v. Lake*, 12 N. Y. 358; *Seymour v. Fellows*, 77 N. Y. 178.

Counsel for appellant do not contend that the state did not submit to the expert a full

framed as to apply to the party by name instead of a supposititious person does not render it objectionable when it must have been understood by the jury to have reference to him, and it cannot be seen that the adverse party was prejudiced thereby. *Grand Lodge I. O. of M. A. v. Wieting*, 168 Ill. 408.

VI. Qualifications of experts.

A general knowledge as a medical man at least is required to enable one to testify as an expert on questions pertaining to insanity. *State v. Crisp*, 126 Mo. 605.

Only persons of scientific training upon the subject, and medical men, are to be regarded as experts. *Com. v. Brayman*, 136 Mass. 428.

The asking of hypothetical questions upon an assumed state of facts for the purpose of eliciting an opinion of a witness upon an issue of sanity or insanity can be justified only upon the theory that the witness is so familiar with the general characteristics of the subject under consideration as to be able to form opinions worthy of consideration, though wholly ignorant of the particular transaction in controversy. *Russell v. State*, 53 Miss. 367.

And expert evidence in a criminal prosecution on the question of insanity is only entitled to importance when fairly given by one who through experience, study, and scientific eminence is properly accredited to give it, and upon a hypothesis which is true in the relation of all its parts to the whole case upon the subject of inquiry. *People v. Kemmler*, 119 N. Y. 530.

Thus, a minister of the gospel who had read some authorities on moral and intellectual science, but nothing on insanity or medical jurisprudence, is not qualified as an expert to give his opinion in a criminal prosecution as to the sanity or insanity of the accused. *BURT v. STATE*.

And testimony of a witness in a prosecution for homicide that he had had experience with men claimed to be insane, and had taken charge of them and taken care of them, does not show a sufficient qualification to authorize him to give an opinion as to mental capacity as an expert. *State v. Crisp*, 126 Mo. 605.

Nor does a witness in a criminal prosecution qualify himself to give his opinion as to the sanity of the defendant as an expert by testimony that he had observed his eyes while in court, and that he had been a good deal with insane persons and noticed their eyes, noticing a difference in his eyes and those of insane persons, where it does not appear in what capacity he came in contact with insane people, or what opportunities for observation he had. *McLeod v. State*, 31 Tex. Crim. Rep. 381.

But a Catholic priest who was regularly educated 89 L. R. A.

and had officiated as a priest for ten years, a part of whose preparatory education was to become competent to pass upon the mental condition of communicants in his church to the end that the rights of his church administered to invalids or dying persons might be administered to persons ascertained to be in a proper state of reason, and who was daily required to exercise and pass his judgment upon the mental condition of such persons, is an expert who may give his opinion in evidence as to the sanity or insanity of a testator in a will contest. *Toomes's Estate*, 54 Cal. 509, 35 Am. Rep. 83.

And proof that a witness in a will contest had been a nurse in an insane asylum for many years, and had had extended experience in nursing the insane in private houses and in large institutions, and that she had conversed with the testatrix for an hour or two at a time on three different occasions, is sufficient to lay a foundation for her opinion as to the sanity or insanity of the testatrix. *Foster v. Dickerson*, 64 Vt. 233.

So, physicians who are in general practice, and nurses, are competent witnesses in a will contest on the question whether pulmonary diseases, nervous derangements, and general debility would in the progress of the disease as indicated by the facts impair the mental powers at the time the will was executed two hours before testatrix's death. *Fairchild v. Bascomb*, 35 Vt. 368.

And physicians who have been practising their profession for a number of years, and have given the subject of medical jurisprudence some attention by reading works on the subject and by attending lectures, may testify on the question of the existence of the disease of insanity. *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760.

A regular and continuous practice by a physician in his profession for thirty years entitles him to be regarded as an expert on questions of mental soundness or unsoundness. *Flynt v. Bodenhamer*, 80 N. C. 205.

And a practising physician of twenty-eight years' standing, in charge of an institution for the feeble minded, who had studied the disease of insanity sufficiently to give a medical opinion as to such disease and diagnose a case of insanity, is a competent witness in a trial for murder on the question of the insanity of the accused, the extent of his experience and learning going to his credibility, and not to his competency. *Montgomery v. Com.* 88 Ky. 509.

And the evidence of a physician called as a witness on a question as to the mental soundness of a decedent by both parties, who showed that he has been in practice for seventeen years prior to the death of such decedent, who gives evidence on behalf of the defendant, cannot be objected to when called upon by the plaintiff upon the ground that

case as the basis of his opinion, and, if this contention is made, it is not true. The contention is that counsel for the state submitted a case based upon its testimony, exclusive of that for the defense, and obtained the opinion of the expert, and then proceeded to submit to the expert a case based upon all the evidence, and that the opinion should not have been given until a full case had been submitted. Not that a full case was not submitted, but that it was not submitted until after an answer was given by the expert. Nor is it contended that counsel for defendant did not submit a full case to the expert, and obtain his opinion thereon. The bill of exceptions shows that this was done. Now, then, a case based upon all the evidence was presented to the expert by counsel for the defendant, as well as counsel for the state. This being so, we cannot hold

that the answer which was obtained under the above circumstances should be held error for which this judgment should be reversed. Suppose counsel stating the hypothetical case should, unintentionally or through ignorance, omit to embrace therein a fact relevant to the question of sanity, and the opposing party should object, because all the facts are not embraced within the hypothetical case, calling attention to no fact omitted; would he be permitted to complain? Should the judgment be reversed because of such error, if this should be error? Certainly, no. If every fact which is relevant must be included in the hypothetical case to authorize an answer from the expert, then, we assert, there are but few lawyers, if any, in this state or elsewhere, who have the capacity to correctly submit a hypothetical question of this character. Take a case in

he was not proved to be an expert. *Wheelock v. Godfrey*, 100 Cal. 578.

So, a physician and surgeon of fourteen years' practice and experience, who had studied psychological medicine and had experience with mental diseases, may give his opinion in a criminal action whether the manner in which the alleged criminal act was done, the circumstance of the absence or presence of apparent motive, and the whole details of the transaction would be considered by scientific men in determining the question of sanity or insanity, though it was not shown that he had made diseases of the mind a special study. *State v. Reddick*, 7 Kan. 143.

And a physician of experience who had been the medical adviser of a testator and practised for many years in his neighborhood, and who saw and conversed with him a short time before the making of his will, is competent to give his opinion as to the testator's sanity, in a will contest, though he had not made mental diseases a special study. *Baxter v. Abbott*, 7 Gray, 71; *Hastings v. Rider*, 90 Mass. 624.

And an experienced physician who treated a wound on the neck of a person accused of homicide about four hours after the commission of the act, and conversed with him at the time, is competent to testify as to his opinion of his state of mind at that time. *State v. Larkins* (Idaho) 47 Pac. 945.

So, the rule has been laid down that physicians and surgeons of practice and experience are experts upon the question of sanity or insanity, and that it is not necessary that they should have made the particular disease involved in the inquiry a specialty to render their testimony admissible as that of an expert. *Hathaway v. National L. Ins. Co.* 48 Vt. 836.

Within this rule physicians who knew the accused in a criminal prosecution personally, and had observed him in jail since the commission of the offense, may be permitted to give opinions as to his mental condition where in the course of their practice they had a fair proportion of cases of mental diseases under treatment, though they did not profess to be experts in such diseases. *Phelps v. Com.* 17 Ky. L. Rep. 706.

And the evidence of an expert witness in mental diseases in a will contest that the testator was insane is not rendered incompetent by the fact that he had testified that he was ignorant of the effect of a certain disease included in the facts assumed in questioning him upon a person's mental condition. *Nash v. Hunt*, 118 Mass. 237.

And the testimony of a testator's family physician in a will contest describing the testator's apparent physical condition and that he appeared as if in the last stages of second childhood is admissible, though he was not an expert in mental diseases and had

not attended him for ten years previous to his death, and had only seen him a few times for two or three years previous to that time, and had had his last interview with him five years before his death. *Lewis v. Mason*, 109 Mass. 169.

Upon the other hand, however, it is held that to render an opinion admissible in evidence on the question of sanity or insanity it is essential that the witness should be an expert on the general subject under consideration; and that no acquaintance with cognate pursuits will suffice unless the matter inquired about is common to both. *Russell v. State*, 53 Miss. 367.

And that the opinion of a witness called as an expert on the question of sanity or insanity may be excluded where he testifies that he has not made diseases of the mind a special study, only as a general practitioner. *Hutchins v. Ford*, 82 Me. 263.

Within this rule, a physician cannot give an opinion as to the sanity or insanity of another, where he had previously stated that though a practising physician of twenty years' standing he had never made the subject of mental disease a study, and was not an expert in such matters, and was not an expert in psychological medicine. *Russell v. State*, 53 Miss. 367.

And a graduate in medicine and a practising physician who was not conversant with insanity in any of its various forms, and who never had had the care and superintendence of insane persons or made the subject of mental disease a study, is not competent to express his opinion in a prosecution for crime, based on the evidence which he had heard, as to the sanity or insanity of the accused. *Reed v. State*, 62 Miss. 406.

And the opinion of physicians on the question of the sanity or insanity of a person cannot be given in a criminal prosecution where their testimony discloses that they are not experts in insanity, and they did not have sufficient opportunity for examination to express an opinion. *State v. Crisp*, 126 Mo. 605.

So, the rule that skillful and reputable physicians may testify to the mental condition of their patient when they have had adequate opportunity of observing and judging of their mental qualities does not apply to one who was not an attending physician and had made a single examination *pendente lite* in order to inform himself as a witness. *Fayette v. Chesterville*, 77 Me. 23, 62 Am. Rep. 741.

And the opinion of a physician of twenty years' standing on the question of sanity or insanity of another is not admissible in evidence where he had previously stated that although he had several years before been for a short time such person's physician he had not seen him for a considerable period and had no knowledge of his condition at the time in question. *Russell v. State*, 53 Miss. 367.

which there are a great number of witnesses, each swearing to acts and conversations of the accused covering a great number of years, to all manner of social and business transactions, to his facial expression, etc. Who would be able to cull from this huge mass of testimony that which was relevant to the question of sanity, and submit it to the expert, without omitting some fact that perhaps would be pertinent to the issue of sanity? Failure would be inevitable, and to permit the opposing party to object, because all of the facts were not embraced in the hypothetical case, and on appeal reverse the judgment on this account, would result in the reversal of all judgments in this character of cases, or altogether deprive the party of the benefit of expert testimony on a hypothetical case. This being the probable result of such a rule, with much greater reason should we

hold, where, as in this case, a full case has (whether by the state or the defendant) been submitted as the basis for an answer, that there would be no error, and especially no reversible error. We are not treating of a case in which the expert gave an opinion without hearing all of the evidence. This was the question discussed in *Webb v. State*, 9 Tex. App. 490, and in *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 688, referred to by counsel for appellant. Judge White, in his opinion in the latter case, says: "Where the expert has not heard the evidence, each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence, and, if meagerly presented in the examination on one side, it may be fully presented on the other; the whole examination being within the control of the court, whose duty it is to see that

So, twenty years of medical experience confined to the ordinary business falling within the range of a country practitioner is not ordinarily sufficient to qualify one to testify as an expert upon questions of insanity upon hypothetical questions as to supposed facts of which he has no personal knowledge. *Russell v. State*, 53 Miss. 387.

And a physician who had not made a special study of insanity, and had considered the matter only so far as to determine whether a patient was in such a condition of mind as to require a treatment for insanity and if so to call in the services of a physician who had made a special study of the subject or recommend the removal of the patient to a hospital for the treatment of the insane, cannot be interrogated as an expert in a criminal action concerning the sanity or insanity of the defendant's mind upon a hypothetical case as arising out of the testimony. *Com. v. Rich*, 14 Gray, 335.

And the extent of a witness's acquaintance with the subject upon which he testifies as an expert may always be inquired into to enable the jury to weigh his evidence. *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760.

So, in *Fairchild v. Bascomb*, 35 Vt. 396, the competency of a physician and surgeon who for more than thirty years had devoted his attention almost exclusively to the treatment of patients suffering from mental maladies, to testify as to the effect of disease in its last stages in impairing the mental powers of persons of sound mind, was questioned upon the ground of his want of experience in that particular line, but the point was not passed upon.

Whether an expert witness on the question of mental soundness is competent or not to testify as an expert is a question for the court. *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Eggers v. Eggers*, 57 Ind. 461; *Fayette v. Chesterville*, 77 Me. 28; *Boardman v. Woodman*, 47 N. H. 120; *Flynt v. Bodenhamer*, 80 N. C. 205.

And it is not affected by the witness's own opinion as to his own qualification or competency. *Boardman v. Woodman*, 47 N. H. 120.

And its decision is usually final, though it may be reviewed in extreme cases where a serious mistake has been committed through some accident, hindrance, or misconception. *Fayette v. Chesterville*, 77 Me. 28, 52 Am. Rep. 741.

And one who gave testimony in a court of law as an expert upon the question of soundness of mind will be presumed on appeal to have been properly qualified where nothing appears to the contrary. *Melendy v. Spaulding*, 54 Vt. 517.

So, after a lapse of thirty years it will be presumed that visits required by statute to be made to a lunatic asylum by medical attendants were duly made, and that the examinations were properly conducted; and the opinions

of such attendants, formed on such visit, as to the sanity of a party then residing in the asylum visited with reference to testamentary capacity are admissible on that issue though the scope of their official duty was rather as to hygiene than as to sanity. *Martin v. Johnston*, 1 Post. & F. 122.

VII. Basis of facts or reasons for opinion.

Facts which are properly admitted to establish the mental condition of a testator in a will contest may be considered by an expert in arriving at his opinion as to the testator's condition of mind. *Bever v. Spangler*, 93 Iowa, 576.

The jury should know upon what basis of facts the opinion of an expert as to mental capacity is founded as its pertinence depends upon whether they find the truth of the facts upon which it rests. *Wetherbee v. Wetherbee*, 38 Vt. 454.

And in making hypothetical questions in regard to insanity a rule should not be laid down which will excuse any portion of the actual history of the case of which evidence has been given on the ground that these matters have no tendency of themselves to support the claim of insanity. *Prentiss v. Bates*, 93 Mich. 234, 17 L. R. A. 494.

To entitle the opinion of a medical expert on the question of sanity or insanity to the regard of the jury it should be satisfied by the other evidence in the cause that the symptoms did exist in the particular case under consideration. *Harrison v. Rowan*, 3 Wash. C. C. 580.

An opinion is not evidence unless the jury find the facts proved upon which it is based, and when such facts are found the opinion is a fact for the jury to consider in connection with the other evidence. *Foster v. Dickerson*, 64 Vt. 233.

Unless the jury in a will contest treat physical or mental manifestations given in evidence as faults they cannot treat as evidence the opinions of professional witnesses based thereon. *Kempsey v. McGinniss*, 21 Mich. 123.

So, expert witnesses cannot be asked questions which call for their conclusions upon facts not stated. *Van Deusen v. Newcomer*, 40 Mich. 90.

And an expert witness on the question of sanity or insanity may be asked by either party as to the reasons on which his opinion is based, or he may with leave of court give such explanation on his own account. *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 688.

And the particular facts stated by each of several expert witnesses upon the question of the sanity or insanity of another must be taken alone as the basis of the proposed opinion of that witness, and if they are found in themselves inconclusive in their nature, or of such a neutral character as to be consistent with either soundness or unsoundness, they cannot be assumed as the basis of an

it is fairly and reasonably conducted." It would seem that the learned judge below had this case in mind in the trial of the case now before us.

Miss Carrie Sparks testified for the state that she knew where defendant lived on the 24th day of July, 1896; that, about seven o'clock P. M. of said day, she was passing said house, and heard a voice,—a woman's voice,—pitched high, saying, "I am not going to stand this thing any longer;" that she was positive as to the day and the high tone of the voice. Counsel asked the court to note their exception to this evidence, because the same was not in rebuttal. The court replied that no objections had been made. Counsel for defendant then moved to exclude the evidence, because not in rebuttal. This the court refused to do. In this there was no error, because the court had

the discretion to receive evidence until the argument was concluded, whether in rebuttal or not.

O. H. Gibson was permitted to relate to the jury a business transaction which he had with the defendant. The transaction occurred a few days before the homicide. Counsel for defendant objected, because the predicate laid by the testimony of the witness was not a sufficient basis to authorize an expression of opinion as to the sanity of defendant. This objection was overruled, and witness answered that, in his opinion, defendant was then sane; that is, at the time of the transaction. To this bill of exceptions the learned judge appends the following explanation: "That said witness was asked his opinion as to defendant's sanity at the time of his conversation with him about the check on Wednesday before July 24,

opinion. *First Nat. Bank v. Wirebach*, 106 Pa. 37.

A medical expert upon the question of sanity or insanity need not give all the details upon which his opinion is based, however, as the opinion sometimes depends upon the looks and gestures connected with acts, conduct, or conversation, which would be difficult if not impossible for the witness to intelligently describe. *State v. Lewis*, 20 Nev. 333.

But a question asked an expert witness in a will contest in which insanity is alleged is incompetent where it refers to facts which, standing alone or in connection with other things, has no tendency to show insanity or incompetency at any time. *Prentiss v. Bates*, 88 Mich. 567.

And the fact that persons who observed the conduct of a testator advised his wife that it was unsafe for her to remain alone with him is not a proper one upon which to base a hypothetical question to an expert as to his capacity to form an opinion regarding the testator's sanity,—at least where his conversations are not stated and his conduct detailed. *Re Barber*, 68 Conn. 303, 22 L. R. A. 90.

And the fact that many persons after conversations with a testator and observing his conduct believed him to be insane is not a proper one upon which to base a hypothetical question to an expert as to his capacity to form an opinion regarding the testator's sanity,—at least where the conversations are not stated and his conduct not described. *Re Barber*, 68 Conn. 303, 22 L. R. A. 90.

So, proof that a testator made remarks to the effect that his son-in-law was a terrible man and a scoundrel, that he spoke bitterly against him and complained because his daughter had gone back to live with him, does not tend to show that he believed his daughter was trying to deprive him of his liberty and had been slandering him, so as to support a hypothetical question asked an expert witness based upon such an hypothesis. *Bomgardner v. Andrews*, 55 Iowa, 638.

And testimony as to the effect of hypnotism upon persons subject to such influence is not admissible in a criminal prosecution where there was no evidence which tended to show that the defendant was subject to hypnotism; merely showing that she was told to kill another, and that she did it, not establishing hypnotism. *People v. Worthington*, 106 Cal. 166.

But testimony of an expert witness in an action against a railroad company for a personal injury in which the person injured had given a receipt and release of all claim shortly after the accident, that his mind might have been dazed or confused as the result of the injury, is admissible in evidence, though the testimony did not go so far as to show

that that result was probable. *Bliss v. New York, C. & H. R. R. Co.* 160 Mass. 447.

And the testimony of a deputy sheriff in charge of a person accused of crime as to the acts and conduct of such person while in jail, and that he read letters written by him while there, and that from his acts and conduct and said letters in his opinion the defendant was at the time of sound mind, is not subject to the objection that he was a prisoner and under arrest and was not warned by the officer that his acts and expressions would be used against him, or that such letters were not produced or their loss accounted for. *Adams v. State*, 34 Tex. Crim. Rep. 470. And see *BURT v. STATE*.

So, the opinion of an expert on the question of the sanity of a person whose sale is sought to be avoided on that ground cannot be given in evidence where it is based on incompetent evidence. *Heald v. Thing*, 45 Me. 302.

And declarations of a person accused of crime who interposes the defense of insanity as to the condition of his mind some time previous to the making of the declarations are not competent as evidence of his actual condition at that time, and cannot be made the basis of an opinion as to whether he was sane or insane at that time. *People v. Hawkins*, 109 N. Y. 408.

The jury in a criminal prosecution is entitled to the facts on which an insanity expert bases his opinion, however, and where these facts are the result of his own interviews with the defendant it is not only competent but necessary that they should be laid before the jury. *People v. Nino*, 149 N. Y. 317.

And facts assumed in propounding a hypothetical question to an expert witness in a will contest upon the ground of insanity, which are a part of the testator's history, and which, taken in connection with other circumstances, are proper to be considered as showing his condition of mind, are not subject to objection that they are irrelevant and immaterial and have no tendency to show unsoundness of mind. *Bever v. Spangler*, 93 Iowa, 576.

And a medical expert who has made an independent examination of the accused in a criminal prosecution while confined in jail awaiting trial in order to determine the question of his sanity, may testify to conversations had with the accused in the course of such professional examination, all that the accused said and did during such examination being competent as bearing upon his mental condition at the time he was examined. *People v. Nino*, 149 N. Y. 317.

In *People v. Nino*, 149 N. Y. 317, *People v. Hawkins*, 109 N. Y. 408, and *People v. Strait*, 143 N. Y. 566, *intra*, were distinguished upon the ground that

1896, and witness detailed at length the facts upon which he based his opinion, as is set out in statement of facts much more fully than in this bill, and answered that, upon the facts detailed, defendant was, in his opinion, at that time, sane." We are not required to consult the statement of facts to verify the judge's statement. If counsel for the accused was not satisfied with this statement, they should have inserted in the bill of exceptions all that Gibson stated. But, if the testimony of this witness is looked at, it will be found that, though not an expert, he was qualified to give an opinion as to the sanity of the defendant. This is not like the *Williams Case*, 37 Tex. Crim. Rep. —, 39 S. W. 687. In that case no facts were stated by the nonexperts as the basis of their opinion. Here the witnesses gave a full detail of such facts.

this is not the case of a man claimed to be insane at the time of the criminal act and admitted to have been sane ever since, but one in which it is asserted that the accused had been continuously insane from a period of some months before the crime up to the time of the trial.

So, a question asked an expert witness calling for his opinion on the question of the soundness of mind of another based on conversations had with him and their character and his actions at that time is not subject to the objection that it is too narrow and should have included all of his observations during the entire period of his acquaintance, where counsel did not attempt to modify the evidence by cross-examination. *People v. Borgetto*, 99 Mich. 336.

But interrogatories in a will contest should not be so framed as to allow the deponent to express opinions as to the sanity of the testator on hearsay. *Conely v. McDonald*, 40 Mich. 150.

And the opinion of a physician, based in part at least on representations made to him by the defendant or others prior to his trial on the question of his insanity, cannot be considered in a criminal prosecution. *United States v. Faulkner*, 35 Fed. Rep. 730.

And representations made by an attending physician to a consulting physician as to the previous symptoms and condition of the testator are not admissible in a will contest after the death of the attending physician on the question of what the symptoms were or as a basis for the opinion of the consulting physician. *Wetherbee v. Wetherbee*, 36 Vt. 454.

And an expert witness in a criminal prosecution cannot give his opinion as to the sanity or insanity of the accused at the time of the criminal act based upon the story told by the accused himself which is not in evidence,—especially where the statements were made by the defendant long after the criminal act. *People v. Strait*, 148 N. Y. 596.

And the narration by a person whose sanity is in question, of what he said or did, or of his feelings or bodily ailments upon a former occasion, furnishes no foundation for an opinion as to his actual state or condition at that time. *People v. Hawkins*, 109 N. Y. 408.

So, an expert witness upon the question of insanity in a will contest cannot repeat an account which he had received from a monomaniac as to the development of his own disease or an account received by him from an unprofessional nurse of another insane person in support of his opinion. *Wood v. Sawyer*, Phill. L. 251.

And a physician who had visited an invalid in consultation with his attending physician cannot give evidence in an action brought to avoid a sale of the invalid's property made a short time

R. A. Rutherford was permitted to give his opinion as to the sanity of the appellant. Counsel for appellant made the same objection to this witness as he did to the testimony of Gibson, above, and the learned judge gives the same explanation to the bill of exceptions. In regard to this bill we make the same observations as with reference to Gibson's testimony above, holding that he very clearly qualified himself to give an opinion on the sanity of the accused.

Counsel for appellant proposed to read certain excerpts from standard works on medical jurisprudence and the disease of insanity. The state objected, and the court sustained the objections, and defendant reserved his bill of exceptions. We have carefully read the brief of appellant on this phase of the case, and, while counsel seem very confident that the

afterwards upon the ground of insanity, of declarations made to him at that time by the vendor's wife, physician, or other attendant as to his previous symptoms or condition. *Heald v. Thing*, 45 Me. 362.

And the superintendent of an insane asylum called as a witness in a will contest cannot give an opinion as to what must have been the condition of a patient in the asylum from the time of her admission to her death, where he had never seen her and knew nothing except what the records of the asylum showed, and he based his answer upon the absence from the record of those things which he says would undoubtedly have been noted if they had existed. *Prentiss v. Bates*, 88 Mich. 567.

A record of the condition and treatment of a patient in a hospital produced at a trial forty years after its date by the superintendent as part of a series of records of which he is the official custodian, purporting to have been contemporaneously made by the attending physician of all cases there treated, and which it was their duty to make, however, is admissible in evidence as a foundation for the opinion of an expert as to whether it indicates mental disease of the patient without identifying the person who made it. *Townsend v. Pepperell*, 90 Mass. 40.

And the opinion of an expert witness on a hypothetical question as to a testator's mental soundness is not affected or rendered inadmissible by the fact that the hypothesis was based upon a state of facts describing the testator's physical condition as testified to by the medical expert himself and known to him. *Re Flint*, 100 Cal. 891.

And an opinion of a medical expert examined at a former trial of the same cause is not rendered inadmissible in an action upon a promissory note in which the insanity of the maker is alleged as a defense by the fact that new and unexpected matters had been introduced at the second trial upon which no cross-examination was conducted. *First Nat. Bank v. Wirebach*, 108 Pa. 37.

So, a statement in a certificate by a physician upon which a lunatic was confined, that he had formed his opinion from the fact that she had labored under delusions of various kinds and that she was dirty and indecent in the extreme, is sufficient under 8 and 9 Vict. chap. 100, § 46, requiring the physician to specify therein any facts upon which he has formed his opinion. *Re Shuttleworth*, 11 Jur. 41, 2 New Sess. Car. 470, 9 Q. B. 651, 16 L. J. M. C. N. S. 18.

VIII. Scope.

a. General considerations.

A question asked a medical expert in a will contest on the issue of insanity is objectionable when

court committed an error in rejecting these excerpts, they cite no authority in support of their contention. We have no statute on this subject. The rules of evidence known to the common law of England must therefore prevail. What is the common law upon this question? In *Queen v. Crouch*, 1 Cox, C. C. 94, the prisoner was indicted for the wilful murder of his wife, and the defense set up was insanity. We quote the case in full: "Clarkson, for the prisoner, in his address to the jury, attempted to quote from a work entitled 'Cooper's Surgery,' the author's opinions on the subject. Alderson, B., thought that he was not justified in doing so. Clarkson.—I quote it, my lord, as embodying the sentiments of one who has studied the subject, and submit that it is admissible in the same way as opinions of scientific men on matters apper-

taining to foreign law may be given in evidence. Alderson, B.—I should not allow you to read a work on foreign law. Any person who was properly conversant with it might be examined, but then he adds his own personal knowledge and experience to the information he may have derived from books. We must have the evidence of individuals, not their written opinions. We should be inundated with books if we were to hold otherwise. Clarkson.—I shall prove the book to be one of high authority. Alderson, B.—But can that mend the matter? You surely cannot contend that you may give the book in evidence, and, if not, what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course? Clarkson.—It was certainly done, my lord, in *M'Naughten's Case* [10 Clark & F.

it assumes a state of facts upon which no medical or expert opinion should be based. Thornton v. Thornton, 39 Vt. 122.

And the doubt of an expert upon the question of insanity is not admissible in evidence in a prosecution for homicide. Sanchez v. People, 22 N. Y. 147.

So, medical experts in a prosecution for homicide in which insanity is alleged cannot give their opinions as to the value of the opinion on such a matter of a witness not an expert. People v. Webster, 60 Mun. 386.

And an expert witness upon the question of soundness or unsoundness of mind cannot be asked whether he regards another expert witness in the same case as good authority, as his opinion on such question might be based upon mere reputation. People v. Holmes (Mich.) 3 Det. L. N. 689.

But a question asked an expert witness in a will contest as to whether in his opinion the testatrix might have recovered her sanity assuming her condition to have been as stated by another expert calls for his opinion upon the facts stated by the other expert, and not upon such facts combined with his opinion, and is therefore competent. Foster v. Dickerson, 64 Vt. 233.

So, a medical expert who had been asked whether the headaches of a person whose sanity is in question were neuralgic or proceeded from a disordered stomach, and who declined to give any medical opinion thereon, cannot be asked what impression was made on his mind by interviews had by him with such person, as it was the medical opinion of the witness alone which was admissible; his opinion, unless based upon his professional knowledge, being no more admissible than that of any other man. Higbee v. Guardian Mut. L. Ins. Co. 66 Barb. 466.

A question asked an expert witness on the question of sanity or insanity of another should be so framed as to require him to state the measure of such person's capacity in his own language by such ordinary terms or forms of expression as may best convey his own ideas. Hall v. Perry, 87 Me. 569; Fairchild v. Bascom, 35 Vt. 298.

A proper form of a question asked an expert in a prosecution for homicide in which insanity is alleged is, Was the accused of sound or unsound mind? Pannell v. Com. 86 Pa. 260.

And a question asked an expert witness in an action involving the validity of a gift whether the mind of the donor was in such a condition that he could understandingly dispose of \$5,000 worth of government bonds, is objectionable only as being leading. Melendy v. Spaulding, 64 Vt. 517.

So, an expert witness in an action for the recovery of property alleged to have been disposed of while insane cannot be asked to state facts tending

to show the state of the vendor's mind as to soundness; he can only be permitted to state how a party appeared in respect to soundness or unsoundness of mind. Wyman v. Gould, 47 Me. 159.

b. Symptoms and causes.

A medical expert on the question of sanity or insanity may be asked what are the symptoms of insanity. Lake v. People, 1 Park. Crim. Rep. 495.

And the question whether a certain trait was an indication of insanity involves the question of its nature, and an expert witness on the subject of insanity in a criminal case may be permitted to state whether such trait was a vice or a disease. United States v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247.

So, an expert witness in a prosecution for homicide in which epileptic insanity is alleged as a defense may give an opinion where he had seen the accused within an hour after the offense, as to whether there were any indications in his appearance of a recent epileptic attack. Com. v. Buocieri, 158 Pa. 535.

And it is not improper to ask an expert witness in a prosecution for homicide if he had discovered anything that led him to think that the accused was insane, though it is not claimed that his insanity was of that type which is manifested in the paroxysm of frenzy characteristic of a maniac. Pannell v. Com. 86 Pa. 260.

And a medical witness examined as an expert on the question of insanity in a criminal prosecution may be asked his opinion upon a hypothetical statement of facts and what the symptoms of insanity are, the question as to whether such facts existed or such symptoms are proved being left exclusively for the jury. Lake v. People, 1 Park. Crim. Rep. 495.

The proper mode of examining an expert witness in a criminal prosecution upon the question of insanity is first to inquire as to the particular symptoms of insanity, asking whether all or any, and which, of the circumstances spoken of by the witness upon the trial should be regarded as such symptoms, and then to inquire of them whether any, and what, combination of these circumstances would in his opinion amount to proof of insanity. McCann v. People, 3 Park. Crim. Rep. 272.

Questions asked an expert witness in a will contest in which insanity is alleged, as to whether certain specified symptoms in connection with testimony, which is not specified, indicate unsoundness of mind, however, are improper. *Re Storer*, 28 Minn. 9.

So, in *Anderson v. State*, 42 Ga. 9, refusal of the trial court to allow a physician called as a witness on an issue as to mental soundness to explain to the jury the structure of the brain, what changes were produced upon it by bodily disease, and how its

200]. Alderson, B.—And that shows still more strongly the necessity for a stringent adherence to the rules laid down for our observance. But for the noninterposition of the judge in that case, you would not probably have thought it necessary to make this struggle now." The case of *Reg. v. Taylor*, 13 Cox, C. C. 77, was another murder case. The deed was done by cutting the throat of the deceased in the presence of only a child about nine years old. Counsel for the defense, in addressing the jury, set up insanity on the part of the prisoner, and proposed to read a case from Taylor's Medical Jurisprudence. Brett, J., says: "That is no evidence in a court of justice. It is a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present. I cannot allow it to be read." In line with this common-law rule will be found the cases following: *Ash-*

irritation and inflammation were calculated to present to the mind unreal images upon which a person with a diseased brain might be induced to act as though the imaginary impressions really existed, was upheld on appeal.

But to what extent and in what manner the mind of the testator was affected by disease, or what was his mental condition, is a question of fact upon which it is competent for professional witnesses to express their opinions in a will contest. *Kempsey v. McGinniss*, 21 Mich. 123.

And a medical expert in a criminal prosecution in which insanity is alleged may be properly asked if, supposing a man had inherited a predisposition to insanity, great mental anxiety, loss of property, or the honor of one's family, and losses of other kinds would be likely to develop the disease. *De Jarnette v. Com.* 75 Va. 367.

And evidence on a trial for larceny in which it appeared that the defendant was addicted to the habitual and excessive use of opium in some of its forms, and that at the time of the alleged commission of the act he had been deprived of his accustomed supply of the drug, as to what effect such deprivation would have upon his mental condition, is admissible as tending to show whether or not he was in such a condition mentally as to be able to commit larceny. *Rogers v. State*, 33 Ind. 543.

So, an expert witness in a prosecution for homicide who has stated that the facts assumed in a hypothetical question indicate mental unsoundness may be asked in regard to the state and degree of mental soundness then indicated, and how far it will disqualify the person for business or render him unconscious of the nature of his conduct; and he should be inquired of as to whether the facts are explainable in any other mode than upon the theory of insanity, and with what degree of certainty they indicate the inference drawn by the witnesses. *Reed v. State*, 62 Miss. 405.

And evidence by a medical expert that persons asleep sometimes act as if awake, and walk and talk and answer questions, and do a great many things, and yet are unconscious, and that with many there is a period between sleeping and waking in which they are unconscious though they seem to be awake, and that loss of sleep and other causes which produce nervous depression or mental anxiety may produce such a state of unconsciousness between sleeping and waking, and evidence that the children of the accused had been sick and he had in consequence lost much sleep, is admissible in a prosecution for homicide in having killed a person who suddenly awoke him from a sound sleep. *Fain v. Com.* 78 Ky. 183, 39 Am. Rep. 213.

A medical expert called in a prosecution for 89 L. R. A.

worth v. Kittridge, 12 Cush. 193, 59 Am. Dec. 178; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41; *Com. v. Wilson*, 1 Gray, 337. We quote from *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, as follows: "Medical books cannot be introduced in evidence, nor can an expert witness be permitted to testify as to statements made therein. And it is equally inadmissible to permit the reading of such book to the jury by counsel." "In the trial of a criminal case, where the defense relied on is the insanity of the defendant, neither books of established reputation on the subject of insanity, whether written by medical men or lawyers, nor statistics of the increase of insanity, as stated by the court or counsel on the trial of another case, can be read to the jury." *Com. v. Wilson*, 1 Gray, 337.

Counsel proposed to read the same excerpts from these standard works in explanation and

homicide on behalf of the accused cannot be asked on his examination in chief, however, what he considered some of the commonest and most frequent causes both of epilepsy and insanity. *Hall v. Com.* 22 W. N. C. 26.

And a medical expert cannot be asked on a criminal trial in which insanity was pleaded as a defense, whether certain domestic troubles would constitute a sufficient cause to produce insanity, the issue being whether the defendant was insane at the time of the commission of the offense, and not what would be a sufficient cause to produce insanity. *Carter v. State*, 56 Ga. 463.

Nor can a medical expert be asked on an issue as to the validity of a will in which the sanity of a testatrix is in question, and evidence of her insanity has been given, and it appears that she had a paralytic attack shortly before the execution of the alleged will, whether in nine cases out of ten paralysis does not produce any effect upon the mind, the existence of the phenomenon not being affected by any dispute as to its cause. *Landis v. Landis*, 1 Grant, Cas. 248.

c. Comparison; illustration; speculation.

A witness in a will contest on the question of sanity or insanity may compare the mind and memory of the testatrix with regard to the amount of property she was worth and the disposition she wished to make of it with that of an average child seven or eight years of age. *Richmond's Appeal*, 59 Conn. 223.

But it is not competent for an expert witness in a criminal prosecution in which the accused is claimed to have become insane from an injury received to show that another had received an injury bearing some analogy to the injury inflicted upon the accused, and to show the effect it had upon his mind. *People v. Holmes* (Mich.) 3 Det. L. N. 689.

And refusal to permit an expert witness who had declared his opinion in a prosecution for homicide that the defendant was suffering from recurrent insanity at the time, to give illustrations of recurrent insanity which had come within his own personal experience, if erroneous, could not materially affect the defendant's rights, and would be error without prejudice. *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 633.

So, an expert witness in a prosecution for homicide in which epileptic insanity is alleged as a defense, called to give his opinion as to the effect of epilepsy upon the memory, may give as an illustration of a sound memory an opinion as to the prisoner's power of memory from the nature and accuracy of his narrative on the witness stand. *Com. v. Buccieri*, 153 Pa. 535.

elaboration of his argument. The court refused to allow this to be done, and defendant reserved his bill of exceptions. The authorities cited on the preceding question are in point, and, in addition, we cite *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70; *Mutual L. Ins. Co. v. Bratt*, 55 Md. 200; *Rogers, Expert Testimony*, § 179.

Dr. Davis was placed upon the stand as a witness for the state, and, after proving his acquaintance, etc., with the defendant, he was permitted to testify that the defendant was simulating, that is, playing a part, and not acting naturally. This was objected to by defendant, "because immaterial, and it would throw no light to the jury by which to read a solution of the question of guilt or no guilt in defendant as to the issue before the jury, to wit, sanity or no sanity in the defendant on the 24th of July, 1896, the day of the

alleged offense for which defendant was on trial; that simulation or no simulation at this time, and in the present surroundings of defendant, would not help to aid the jury in determining whether this defendant was sane or insane on the 24th day of July, 1896, when the offense for which he is on trial was alleged to have been committed. All objections were overruled, and the exception reserved." The learned judge qualifies this bill of exceptions by stating "that the witness testified that he had carefully observed the defendant and his demeanor during the trial which had lasted about seven days; that he had qualified himself as an expert previously; and that the defendant himself had offered in evidence the manner and appearance of the defendant, the way he demeaned himself during the trial, as an evidence of his insanity at the time of the trial. The defendant had demeaned himself

One who has testified as a medical expert, and stated all that he had seen or heard, and given his own opinion thereon concerning the sanity of a person, however, need not be allowed to be asked what mental science teaches on the subject. *Davis v. United States*, 165 U. S. 873, 41 L. ed. 750.

And a medical expert who has testified as to his opinion on the question of insanity cannot be asked on direct examination as to whether the theory in question is supported by the authorities, the medical works themselves being the best evidence as to what they teach; though he might be inquired of as to the teachings of the authorities on cross-examination to test the accuracy of his knowledge. *State v. Winter*, 72 Iowa, 627.

And the counsel for the accused in a prosecution for murder cannot be permitted to read to an expert witness on the question of sanity what had been said by an eminent authority in a medical journal and then ask him whether he concurred in the views there expressed, but he may use such journal to assist him in framing questions for the witness as to his own opinions, and read from standard authorities upon medical jurisprudence to the jury. *State v. Coleman*, 20 S. C. 441.

And refusal to permit a medical expert who had given his opinion on the question of insanity as such to answer a question as to whether he had read an article in a medical journal written by a prominent physician, and as to whether the same agrees and accords with his knowledge and experience on the subject, is not an abuse of discretion, as it would have been but a reiteration in another form of the opinion he had already expressed. *State v. Winter*, 72 Iowa, 627.

d. Questions of law for the court.

Expert witnesses on the question of sanity or insanity should not be asked to define words which have a fixed and well-known signification, such as monomania, except perhaps on cross-examination. *Goodwin v. State*, 96 Ind. 580.

And questions in a prosecution for homicide, asked a medical expert, extending over an almost unlimited field of inquiry, involving a discussion of the law of insanity in all its complicated and mysterious phases, are objectionable as consuming the time of the court and tending to confuse and mislead the minds of the jury. *Dejarnette v. Com.* 75 Va. 867.

And a medical expert in a will contest upon the ground of mental incapacity cannot be asked if rational conduct and coherent conversations are not the best evidence of the existence of a lucid interval, especially if such conduct and conversations relate to the subject of a delusion; he should be asked whether a given state of facts tends to

prove delusion or insanity. *Rush v. Megee*, 36 Ind. 69.

So, evidence of an expert witness in a criminal prosecution that a man suffering from delirium tremens has no more control over his actions in that respect than a man suffering from delirium produced through any other cause, but that he still is sane, is inadmissible as directly opposed to the established legal rule upon the question. *French v. State*, 38 Wis. 325.

But evidence of a medical expert in an action upon a life insurance policy conditioned to be invalid in case of death resulting from intentional injuries where the insured was killed by a person alleged to be insane, that insanity is the result of a diseased mind, and that an insane person may have no power to resist an insane impulse although he knows it is wrong, and that he will sometimes hide and conceal the evidence of his crime with more particularity and ingenuity than a sane person would use, offers no ground for a reversal because it contradicts the rule of insanity established by the supreme court of the state, as the witness testifies in the abstract to a certain phase or kind of insanity, and his evidence is not addressed to the mental condition of the person whose sanity is in question. *Marceau v. Travelers' Ins. Co.* 101 Cal. 338.

And the admission in evidence in a will contest of a statement by a medical expert that the fact that a testatrix told those around her she wanted to get someone to make a will would be evidence of delirium, is harmless error as it is common knowledge that the condition referred to is not evidence of delirium but of its absence. *McHugh v. Fitzgerald*, 103 Mich. 21.

e. Questions of fact for the jury.

Inferences from facts proved are to be drawn and found by the jury, and cannot be proved as facts by the opinions of witnesses. *People v. Barber*, 115 N. Y. 475.

Thus, inferences to be derived from general peculiarities in the manner, speech, behavior, and letters of an alleged lunatic on the question of insanity should be drawn by the jury themselves, and not from the opinions formed by medical witnesses. *Morrison v. Macilaine*, 24 Scotch Sess. Cas. 625.

So, it is not for an expert witness to testify in a criminal action whether particular conduct not in itself irrational is prompted by an insane delusion. *State v. Scott*, 41 Minn. 365.

Nor can he state whether in his opinion the accused was competent to apply the rules of right and wrong to any state of circumstances concerning which he was under high excitement or the influ-

quite unusual to an ordinary individual on such a trial, and under these circumstances the evidence as to whether or not he was then intentionally trying to play a part or simulate insanity was admitted, and this question was put to witness after the hypothetical question stated in other bills had been answered by him." From this explanation it appears that the appellant entered this field of evidence by offering testimony of his manner and appearance and demeanor during the trial, as evidence of insanity at that time. Unquestionably, the state could follow him, and introduce evidence as to this same matter. It was evidently the purpose of the appellant, when introducing this evidence, to convince the jury that, as he was then insane, the probability was that he was insane at the time of the homicide. The court was clearly right in admitting this testimony.

ence of an uncontrollable impulse. *Com. v. Rich*, 14 Gray, 335.

And refusal to ask a nonexpert witness in a criminal prosecution in which the question of insanity is involved whether the accused could control his appetite for intoxicating liquor, is not error. *Goodwin v. State*, 96 Ind. 550.

So, the question whether a change in a testator's life purpose to provide for a sister, occurring upon his deathbed and without apparent motive and reason, and unexplained, indicates any change in his intellect, is not one for the opinion of an expert. *Re Nelson*, 39 Minn. 304.

And the admission of evidence of a physician in a will contest that it is the duty of a physician when called upon to treat a patient to examine into his mental condition is erroneous, the material question being what examination was in fact made, and it being for the jury to determine the weight to be given to the testimony of the physician. *Maynard v. Vinton*, 59 Mich. 129, 60 Am. Rep. 276.

And medical witnesses in an action for a personal injury to an employee against his employer, who is alleged to have been an epileptic to the knowledge of his employer, who was injured from being required by such employer to work in a dangerous place, who had testified that unconsciousness on the part of the epileptic that he was subject to epilepsy was one of the ordinary symptoms, and fully described all of the characteristics and symptoms of the disease to the extent that the plaintiff was affected by it, and to circumstances showing his condition developed by their examination, cannot be asked whether he would be likely to understand that he had epilepsy, as it would be in effect asking for the plaintiff's assertion that he did not know it, which is a question of fact for the jury. *Crowley v. Appleton*, 148 Mass. 98.

But the opinion of an expert witness as to whether the person whose sanity is in question knows moral good from evil and right from wrong is not objectionable as calling for the opinion of a witness as to the moral insanity of such person. *State v. Leehman*, 28 D. 171.

And a medical expert may give his opinion as to the mental condition of a grantor in an action involving his capacity to execute a deed with regard to his usual and ordinary capacity for doing business. *Poole v. Dean*, 152 Mass. 589.

And an expert witness in an action involving the capacity of a person to make a gift may give his opinion as to such person's capacity to dispose of and manage property to the value of several hundred dollars in one transaction. *Melendy v. Spaulding*, 54 Vt. 517.

So, it is proper in a prosecution for homicide in 39 L. R. A.

The hypothetical question was also submitted to this witness, and he answered that, in his opinion, the defendant was sane on the 24th day of July, 1896. The objections here raised are the same as those presented with reference to the hypothetical question submitted to Dr. Wooten, and treated in this opinion above, and therefore we will not go over this discussion again.

It appears from a bill of exceptions that, at the request of appellant, Dr. Wooten and others went to the jail, and took the dimensions of the skull of the defendant, and, while there, examined the defendant, talked to him, looked at him, and observed him. The state proved by Dr. Wooten that it was his opinion that defendant was sane at that time. This bill of exceptions refers us to the statement of facts. When we consult the statement of facts, we are clearly of the opinion that the

which insanity is interposed as a defense to ask a medical expert if there is any known form of insanity where the mind at fits comes, and then there is a blank, and it goes, as it calls for a fact, and is not of a nature which makes hypothesis necessary. *People v. Osmond*, 138 N. Y. 80.

And a question addressed to a family physician in an action upon an insurance policy where the insured had committed suicide, what effect, if any, he would say, from his experience and reading and from his acquaintance with her mental condition, the disease of melancholia would have upon her as to her power to control her actions or to resist any impulse with which she might be seized, and his answer that the impulse and will in a majority of cases becomes uncontrollable, and that he thought that the impulse was uncontrollable in this case, is admissible in evidence. *Koenig v. Globe Mut. L. Ins. Co.* 10 Hun, 558.

In *Koenig v. Globe Mut. L. Ins. Co.* 10 Hun, 558, *Van Zandt v. Mutual Ben. L. Ins. Co.* 55 N. Y. 169, 14 Am. Rep. 215, in note to *Brown v. Mitchell* (Tex.) 36 L. R. A. 64, was distinguished upon the ground that in the case at bar the question was not based on any supposed fact, but upon the actual knowledge of the witness, who was the family physician of the deceased, and that it did call for a fact particularly within the knowledge of an expert,—that is, the effect of a certain disease upon the power to control actions and resist impulses.

So, any expression of opinion by a medical expert which will aid the jury on the question of soundness of mind necessarily involves the consideration of questions which are similar to that in issue, but that alone does not render the evidence incompetent if the witness is not permitted to express opinions upon the evidence, and if the questions are so framed as to confine him to a statement of his conclusions as an expert, and not to submit to him the precise issue which is presented to the jury. *Poole v. Dean*, 152 Mass. 589.

An opinion as to the sanity or insanity of another may not be given upon a point which it is the duty of the jury to determine. And the distinction between opinions which may or may not be given lies in permitting opinions as to what capacity is as a question of fact, and rejecting opinions as to what is legal capacity as a question of law or mixed law and fact. *Hamrick v. State*, *Hamrick*, 184 Ind. 324.

f. The question at issue.

See *Brown v. Mitchell* and note, *Right of witness to give an opinion on the exact issue to be tried in respect to sanity or mental capacity*, 36 L. R. A. 64. And see *Hall v. Perry*, 87 Me. 550, *supra*, 111.

observations of defendant by Wooten were amply sufficient to warrant him in giving an opinion, and there was no error in admitting his testimony. Another bill of exceptions was reserved to the testimony of Dr. Wooten as an expert as to the sanity of the defendant, but when considered in the light of the explanation of the trial judge, it presents no error whatever.

Jack Hughes was placed on the stand for the state, by whom it was shown that he had noticed the fact that the defendant had struck his head against the window frame the day before, as he passed through the window, and that it was the only time the defendant had done so in the many times he had passed through said window during the trial. It appears that defendant had offered in evidence the appearance of himself during the trial, his manner of coming in and going out of the

court room, etc., as shown by the statement of facts. This presents the same question that we have discussed above in relation to the defendant simulating insanity. We find no error in this matter.

After proving by Dr. Smoot that he was fifty years of age, a minister of the gospel, and, as such, serving the Presbyterian Church in the city of Austin for twenty years, and that he had read some authors on moral and intellectual science, but nothing on insanity or medical jurisprudence, the appellant proposed to prove by him that, in his opinion, the defendant was insane on the 24th of July, 1896, the day the offense is alleged to have been committed; and the state objected, because Dr. Smoot was not an expert. The court refused to permit the witness to testify on this phase of the case, and we think the ruling was correct. This witness was of-

IX. Cross-examination; contradiction, redirect examination.

An expert witness upon an issue of mental soundness, who has expressed an opinion based upon facts assumed by the party calling him to have been proved, or upon a hypothetical case put by such party, may be cross-examined by taking his opinion based on any other state of facts assumed by the cross-examiner to have been proved upon a hypothetical case. *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Grubb v. State*, 117 Ind. 277; *People v. Lake*, 12 N. Y. 358.

And the proponents of a will are not confined to the use of the same hypothetical questions which the contestants had used, as the proponents might judge that some of the facts included in such questions used by the contestants would not be found by the jury. *Foster v. Dickerson*, 61 Vt. 233.

But error in refusing to permit the defense in a criminal prosecution to examine an expert witness on the question of sanity or insanity introduced by the prosecution, and who had given an opinion based upon facts assumed by the party introducing him by taking his opinion based on another set of facts assumed by the defense to have been proved, is cured where the defense calls the same witness on its behalf, and examines him fully as to matters which would have been elicited by the questions put on cross-examination. *Grubb v. State*, 117 Ind. 277.

So, expert witnesses on the question of insanity may be cross-examined on purely imaginary and abstract questions assuming facts and theories which have or have not foundation in the evidence. The allowance of such questions rests within the sound discretion of the court. *Bever v. Spangler*, 98 Iowa, 576; *People v. Augsburg*, 97 N. Y. 501.

And a witness who has testified as an expert, on behalf of the accused in a prosecution for homicide, as to his mental condition, may be asked on cross-examination if from his experience and conversations with him he thinks the accused killed the man because he threatened his life. *Davis v. United States*, 165 U. S. 373, 41 L. ed. 750.

So, it is proper upon cross-examination in a proceeding in the nature of a writ de lunatico inquiring to show that an expert witness testifying against the alleged lunatic, in order to qualify himself as a witness, obtained admission to her house by fraudulent means without the consent and against the will of those present and in the absence of her attending physician. *Re Mason*, 60 Hun, 46.

And a medical expert who has been examined in support of another witness who had had a paralytic attack, and testified that he knew her well and had seen her about fifteen months subsequent to such

attack, and that he could then discover no impairment of her faculties, may be asked on cross-examination if paralysis did not have a tendency to impair the mind of old persons, where the evidence of such person was in direct conflict with the testimony of a witness upon the other side. *Lord v. Beard*, 79 N. C. 5.

And where it appears in a prosecution for homicide that an expert witness had examined the defendant for the people while in jail awaiting trial upon a previous charge, and evidence of the former trial and conviction were introduced into and made a part of the hypothetical question asked him, intended to array the facts for the opinion of the defendant's insanity, it is not incompetent to elicit upon his cross-examination the facts about such previous examination. *People v. Hoch*, 150 N. Y. 291.

So, after expert witnesses in a criminal prosecution in which insanity is alleged as a defense have given their opinions on the direct examination, inquiries may be put to them on cross-examination tending to test their skill and capacity and the correctness of their conclusions, and they may be asked whether certain facts already sworn to did not furnish evidence of insanity. *People v. Lake*, 12 N. Y. 358; *Lake v. People*, 1 Park. Crim. Rep. 496.

And a medical expert called by the defendant in a prosecution for murder in which insanity is relied upon as a defense may be asked on cross-examination, for the purpose of testing his competency, as to whether or not certain hypothetical facts would indicate insanity. *People v. Sutton*, 73 Cal. 243.

And a physician called as a witness in a trial for murder in which insanity is interposed as a defense, who has stated on direct examination that in his opinion the person was insane, may be asked on cross-examination, in order to test the accuracy and value of his opinion, whether in his opinion the accused knew right from wrong and that it would be wrong for him to commit the crime in question. *Clark v. State*, 12 Ohio, 488, 40 Am. Dec. 481.

So, a witness in a criminal prosecution who had testified to certain events in the history of the person having a tendency to bring on a diseased condition of the brain may be asked by the state on cross-examination what would be the effect in his opinion of the injuries described, both as a means of testing his capacity and for the purpose of eliciting further facts. *State v. Reddick*, 7 Kan. 143.

But refusal to permit a medical expert on the question of sanity or insanity to be asked whether he had ever examined a designated person for the purpose of showing that the same symptoms existed in the case of such person, and that he had been

ferred as an expert when in fact he was not an expert. It was not proposed to prove his opinion as to whether defendant was sane or insane from what he knew of the defendant, his associations with him, etc., but simply to obtain his opinion as an expert.

We are not informed of any case holding that because a prisoner is in jail, unwarned, therefore his conduct cannot be observed, so that the expert can give an opinion as to his sanity. It would be a remarkable case, indeed, in which the accused, if insane, would simulate sanity. We cannot comprehend how the fact that he was in jail could affect his conduct in this particular in any manner, and therefore the ruling of the court in regard to the testimony of Dr. M. M. Smith was correct. See *Adams v. State*, 34 Tex. Crim. Rep. 470.

The matters contained in the bill of exceptions in reference to the testimony of Dr. Good-

all Wooten have been disposed of in treating of the bill of exceptions relating to the testimony of Dr. Wooten, hereinbefore discussed.

The objection to the testimony of R. E. White, sheriff, is not well taken. He had warned the defendant, and after being warned, anything that the defendant stated to him was admissible, and he had a right to give his opinion as to the sanity of the defendant. Having stated detailed conversations, facts, acts, and his observations of the defendant, he was qualified to give an opinion. In addition to this, we will not be forced to peruse the statement of facts in order to ascertain whether the witness qualified himself or not. As before stated, it is the duty of counsel for appellant to set forth the facts in the bill of exceptions. But, to satisfy ourselves that the learned judge acted properly, we have examined the testimony of this witness in the state-

ment to an asylum upon a doctor's certificate, cannot be held erroneous where there was no offer to show that he had been sent to the asylum upon the same indications existing in the case on trial and upon those alone, or that the witness observed or knew of any such symptoms in such case; in order to render the question competent on cross-examination as a basis of impeachment it should have appeared from the offer that the witness made a certificate or statement in another case contradictory to or inconsistent with his testimony on the trial. *People v. Youngs*, 151 N. Y. 210.

So, expert witnesses in a prosecution for homicide cannot be asked hypothetical questions upon cross-examination upon the question of the sanity of the accused where the hypothesis is wholly unsupported by evidence. *Kearney v. State*, 68 Miss. 233; *State v. Hanley*, 34 Minn. 430. But see *Bever v. Spangler*, 93 Iowa, 576; *People v. Augsburg*, 97 N. Y. 501, *supra*.

And it is improper in the examination of an expert witness who has testified in a will contest to the mental incapacity of the testator, to select a few facts which tend naturally to show competency and sanity and ask him whether they change his opinion. All the facts bearing upon the question should be included. *Prentiss v. Bates*, 88 Mich. 567.

And an expert witness in a proceeding to set aside a deed, whose testimony on direct examination was confined to a contradiction of the theory of another expert witness called by the other side, cannot be asked on cross-examination a hypothetical question in all respects similar to the questions propounded by the cross-examination to his own witnesses. *Gridley v. Boggs*, 62 Cal. 190.

So, an expert witness on insanity called by the prosecution on a trial for murder, who had examined the prisoner, cannot be asked on cross-examination why and for what purpose he made the examination. *Hall v. Com.* 22 W. N. C. 25.

And refusal to permit an expert witness in a criminal prosecution, who has declared his opinion that the defendant at the time of the criminal act was suffering from recurrent insanity, to state whether he could give any illustration of recurrent insanity which had come within his own personal experience, is not reversible error. *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638.

And a statement of his opinion, made by a medical expert in a criminal prosecution, as to the mental condition of the accused, at the instance of the attorney general, which is placed in the hands of the prisoner's counsel by the attorney general for use in framing questions on cross-examination, will not be permitted to be put in evidence against the objection of the attorney general, especially where the counsel for the accused acquiesces in and

avails himself of the offer of the attorney general by using it in cross-examination. *Com. v. Pomeroy*, 117 Mass. 143.

A physician introduced as a witness by the commonwealth in a prosecution for murder, who testifies as an expert to the effect that in his opinion the accused was sane at the time of the killing, may be contradicted by the accused, however, after laying the proper foundation, by showing that a month after the killing he expressed his opinion that the accused was insane when he did it. *Montgomery v. Com.* 88 Ky. 509.

But a medical book stated by an expert witness upon the question of sanity or insanity to be an authority cannot be read in evidence for the purpose of contradicting the evidence of an expert witness given upon cross-examination. *Macfarland's Trial*, 8 Abb. Pr. N. S. 57.

So, a question asked an expert witness upon re-examination, in a will contest in which insanity is alleged, without repeating, and which does not include the hypothesis stated upon the direct and cross-examination, is within the legitimate limits of re-examination, and will be understood to rest upon that hypothesis, where carefully formed hypothetical questions had been put to him and these without being repeated in terms were subsequently referred to as a basis for numerous additional inquiries bearing upon the question during the direct and cross examination. *McGinnis v. Kempey*, 27 Mich. 363.

And error in permitting a medical expert to give his opinion in a criminal prosecution on redirect examination as to whether the accused so far lost control of himself as to commit the act involuntarily, based upon his acts immediately before and immediately after the act and what he said immediately after, will be considered as immaterial and without prejudice where the facts occurring immediately before and immediately after were practically uncontroverted and the witness had several times expressed a like opinion in answering hypothetical questions upon his antecedent examination. *Jones v. People*, 23 Colo. 276.

The opinion of an expert witness that from the facts adduced the accused was sane, produced by the people in rebuttal, does not constitute new matter which will entitle the accused to the privilege of calling experts for the purpose of procuring contrary opinions. *People v. Hill*, 116 Cal. 562.

But evidence of a qualified expert in a prosecution for murder in which insanity is alleged, as to whether alcohol taken internally acts upon the brain and is a direct brain poison and is regarded as a cause of insanity, offered by the defense on redirect examination, is not objectionable as a reopening of the case where the prosecution had intro-

ment of facts, and find him qualified as a witness.

Objection was made to the charge of the court. We think the charge is an admirable one. It was the duty of the court, in defining murder in the first degree or murder upon express malice, to charge the jury: "Do the facts and circumstances in this case show such a reckless disregard of human life as necessarily includes a formed design against the life of the person slain? If they do, the killing, if it amounts to murder, would be upon express malice." This charge is amply supported by a number of authorities. If sane, it would be almost morally impossible for the homicide to be committed, under the circumstances in this case (the prisoner having slain his own wife and two little children), without it being upon express malice. This homicide, with its attending circumstances, evinces a reckless dis-

regard of human life, which is the conclusive evidence of express malice. There was no passion attending this homicide, and the defendant's mind was in the same condition when he killed his wife as it was when he killed the two little children. We are of opinion that the charge is eminently correct when viewed as a whole.

A number of methods, modes, and instruments were alleged to have been used in the perpetration of the crime. The indictment alleges that it was "by then and there striking, beating, and wounding the said Anna M. Burt upon her head and face, with a hatchet and some heavy instrument, a better description of which the grand jurors are unable to give, thereby fracturing the skull and the bones of the face of the said Anna M. Burt, and by then and there tying tightly around the throat and neck of said Anna M. Burt a handkerchief,

duced evidence tending to show, and the opinions of witnesses to the effect, that all the conduct and conditions shown by the defense to establish insanity might be attributed to intoxication rather than insanity, the purpose being to disprove the theory of the prosecution. *People v. Straff*, 154 N. Y. 165.

X. Weight.

a. Generally.

Scientific evidence is not necessarily required to satisfy a jury of the insanity of a person accused of crime; it is sufficient if the evidence of facts was such as to indicate an insane state of mind. *Reg. v. Dart*, 14 Cox, C. C. 143; *People v. Finley*, 38 Mich. 482.

And there is nothing in the nature of inquiries concerning mental capacity in will contests which requires juries to be informed as of necessity, by other than ordinary witnesses, as in case of natural decay from age or weakness. *Beaubien v. Clootte*, 12 Mich. 459.

So, while the opinions of medical experts upon an issue of sanity or insanity should be considered by the jury in connection with all the other evidence in the case, they are not bound to act upon them to the exclusion of the other testimony. *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99.

When permitted to testify they stand substantially on the same footing as any other witness as to credibility. *Eggers v. Eggers*, 57 Ind. 461.

Thus, the opinions of medical men as to sanity or insanity are not conclusive in a criminal prosecution, but are to be weighed by the jury as other testimony. *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180; *Williams v. State*, 50 Ark. 511; *Choice v. State*, 31 Ga. 424; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99.

Though such testimony is all on one side, *Williams v. State*, 50 Ark. 511.

And if the whole evidence does not satisfy their minds that insanity existed at the time the act was done, they should convict the prisoner although the medical witnesses were of the opinion that he was insane. *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180.

But expert evidence is intended to aid the jury in coming to a correct conclusion, and when the experience, honesty, and impartiality of the witness is undoubted, it is entitled to great weight. *Choice v. State*, 31 Ga. 424.

So, the opinions of medical experts are not conclusive in a will contest on the ground of mental incapacity, but must be weighed as any other evidence. *Chandler v. Barrett*, 21 La. Ann. 58, 90 Am. Dec. 701; *Re Kledalsch*, 2 Connolly, 438.

And the opinion of the attending physician and nurse of a testator that he was incompetent to

make a will, unaided by any circumstances to show that when his attention was aroused or called to the subject of the will his mind did not run in the same even and reasonable channel, is not conclusive but may be outweighed by circumstances tending to show his competency. *Tompkins v. Tompkins*, 1 Ball. L. 92, 19 Am. Dec. 656.

So, the court will not be controlled by the opinions of experts in passing upon the question of mental capacity in an action for interdiction, but will give them a respectful consideration, and also give legitimate weight to every act bearing on the issue, and form its decree from its own conclusions. *Francke v. His Wife*, 29 La. Ann. 302.

The court upon an inquisition of lunacy does not merely consider the medical evidence to ascertain whether the irregularities and defects do or do not amount to insanity, but is governed by a regard to the well being and happiness of the alleged lunatic and the condition and security of his property. *Re Hoblyn*, 29 L. T. 305.

And the opinion of medical men who gave certificates upon which a party to a contract was confined as an insane person at or about the time of the making of the contract is evidence only upon the question of his insanity at that time, but is not conclusive, and the jury must judge of the grounds upon which such opinion is formed. *Lovatt v. Tribe*, 3 Fost. & F. 9.

It is within the province of the jury in an action involving the question of sanity or insanity to reject each and every opinion uttered by experts. *People v. Barberi*, 47 N. Y. Supp. 168.

The opinions of professional men on the question of sanity or insanity, however, are frequently entitled to great weight. *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Pannell v. Com.* 86 Pa. 260; *Choice v. State*, 31 Ga. 424; *Nicholas v. Kershner*, 20 W. Va. 251.

Particularly where they had special opportunities for observation. *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Montague v. Allan*, 73 Va. 522, 49 Am. Rep. 384.

Or where they attended him and were with him constantly during the time the weakness of mind was charged. *Jarrett v. Jarrett*, 11 W. Va. 564.

And the opinion of the court as to the mental capacity of a party alleged to be incapable of contracting a marriage by reason of insanity should be formed from the testimony of witnesses who have long been acquainted with him, and that of medical experts, in preference to any personal examination. *Thayer v. Thayer*, 9 R. I. 377.

And the court in a habeas corpus proceeding to discharge a person from an asylum will not reject as erroneous the uncontradicted opinions of unprejudiced experts of high standing that the party

thereby strangling and suffocating the said Anna M. Burt, and by then and there wrapping around the head and body of said Anna M. Burt a blanket, and securely tying the same thereon with rope, and then and there throwing said Anna M. Burt so wrapped and tied, in a cistern partially filled with water, sufficient to submerge the body of said Anna M. Burt." This indictment is correctly drawn. Where there is doubt about how the death was produced, it is well to put every means suggested by proof in the indictment; and, if proof be made of one of the means, it is unnecessary to prove them all. It is not necessary to cite any authority to sustain this proposition.

If there was any error in the charge of the court, it consists in the fact that the court submitted murder in the second degree to the jury. We believe this practice, however, to be correct, prudent, and safe. The charge upon this subject

is the law, not obnoxious to any objection.

The court gave the usual charge in regard to the burden of proof applicable to a case in which the accused relies upon insanity, charging that the burden was upon the accused to show his insanity. My opinion upon this subject has been expressed, and I can add nothing to what I have said, in the *King Case*, 9 Tex. App. 515; but the majority of this court hold that the charge upon this subject as submitted to the jury in this case is correct. The rule in Texas is unbroken in support of the charge as given in this case upon the question of insanity. If the burden is upon the defendant to establish insanity, he is not entitled to reasonable doubt upon this proposition. If the burden be upon the state, then he might claim that the state should be required to establish sanity beyond a reasonable doubt; but, being upon him, he must discharge the burden, and

is insane simply because of its inability to detect the existence of mental disorder. *Re Sherman*, 17 R. 1, 366.

But the evidence of a medical expert called by the defendant in a criminal prosecution will not justify a return of a verdict of insanity where he gives his opinion that the defendant was in a measure able to distinguish right from wrong. *State v. Kalb*, 2 Ohio Legal News, 364.

And a will will not be refused probate on the opinion of a medical expert against testamentary capacity where in order to do so it would be necessary to find as a fact that each of the subscribing witnesses had committed wilful perjury. *Re Lyddy*, 4 N. Y. Supp. 468.

So, where there is considerable conflict between the opinions of expert witnesses on the question of testamentary capacity, their opinions are entitled to but little, if any, weight. *Jamison v. Jamison*, 3 Houst. (Del.) 108.

And where there is a disagreement in the testimony of expert witnesses in a prosecution for homicide on the question of the sanity of the accused it is not error for the court to refuse to charge that the opinions of those who had not had practical experience on the subject should be disregarded, where nothing is said to the jury calculated to mislead them. *People v. Montgomery*, 13 Abb. Pr. N. S. 207.

So, in *Burgo v. State*, 26 Neb. 639, it was said by Maxwell, J., that in his opinion ordinary medical expert testimony in regard to insanity, particularly where graduates of different schools of medicine are pitted against each other, is of the most unreliable character.

But an instruction in a will contest upon the ground of mental incapacity of the testator, that no medical experts have testified, and that the findings as to testamentary capacity must be based upon the testimony of neighbors and intimate friends of the deceased, is erroneous where physicians did testify as to the testator's mental condition, though their opinions were conflicting. *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433.

So, in *Russell v. State*, 53 Miss. 367, it was said that medicine not being exact science, the testimony of a medical witness on the question of sanity or insanity of another is at best of an exceedingly unsatisfactory character, and is often as much calculated to mislead as to guide to a correct conclusion.

b. *As affected by facts and opportunity to observe.*

The reliance to be placed upon the opinion of an expert witness on a question of sanity or insanity depends upon the means of judging of the true mental condition of the person and the facts upon which his opinion is based. *People v. Lake*, 2 Park.

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Crim. Rep. 215; *Gray v. Union Mut. L. Ins. Co.* 9 Blatchf. 142.

The most important evidence where medical experts have been examined on an issue as to soundness of mind is the facts to which they depose upon which their opinions are based, rather than the opinions themselves. *Prinsep v. Dyce Sombra*, 10 Moore, P. C. C. 232.

The opinion of a medical expert upon a question of mental capacity can be of no value when the facts upon which it is predicated are not established. *First Nat. Bank v. Wirebach*, 106 Pa. 37.

And an opinion of an expert based upon an hypothesis wholly incorrect or incorrect in its material facts to such an extent as to impair the value of the opinion is of little or no weight. *Gueltig v. State*, 66 Ind. 94, 32 Am. Rep. 90.

Medical evidence on the question of insanity should be received with the utmost caution and like opinions of neighbors and acquaintances should be regarded as of little weight if not well sustained by reasons and facts that admit of no misconstruction, and supported by authority of acknowledged credit. *Clark v. State*, 12 Ohio, 483, 40 Am. Dec. 481.

Thus the fact that a person is unable to discriminate between right and wrong is best ascertained, not by any medical theory, but by the acts of the individual himself. *United States v. Shults*, 6 McLean, 121.

And acts and conduct of a person accused of crime showing conclusively that he had sufficient reason to contemplate the act he did and its consequences at the time he did it are of more value as evidence on the question of capacity than the opinions of witnesses however learned or experienced they may be. *State v. Thomas*, Houst. Crim. Rep. (Del.) 511.

So, the abstract opinions of witnesses, whether professional or otherwise, will not justify a decision against the capacity of a testator to make a will; opinions of witnesses must be brought to the test of facts that the court may judge what weight the opinion is entitled to. *Stackhouse v. Horton*, 15 N. J. Eq. 202.

Where the mental capacity of a testator is thoroughly established by the evidence other than hypothetical reasoning of experts, their mere speculation on the subject would be entitled to but little weight. *Rankin v. Rankin*, 61 Mo. 235.

And a will will not be declared invalid against strong affirmative testimony in its favor upon the bare opinion of medical men that there was want of testamentary capacity at the time it was made, based upon the argument that the testator's disease was one that more or less affects the brain. *Palmer's Estate*, 5 W. N. C. 542.

satisfy the jury that he was insane. He need not do this beyond a reasonable doubt, but this must be done.

Counsel for appellant insist that, notwithstanding the enormity of the acts imputed to appellant, yet he was entitled to a fair and legal trial, and that, if he has not had such trial, the judgment should be reversed. We indorse this proposition to the fullest extent, and, if we believed that any error had been committed in this trial in the least calculated to prejudice the rights of the accused, we would not hesitate to say that the judgment should be reversed; but we are of opinion, after a careful examination of this record and close attention paid to the argument of the learned counsel for the defense (than whom we have no superior), that the appellant has received a fair and legal trial. The question of fact whether the appellant was sane or insane was

submitted to the jury. The evidence is conflicting. We are of opinion, however, that the great weight of the testimony is in favor of the sanity of defendant; but, be this as it may, the jury has settled the question, and we think they have settled it properly.

We are of opinion that the judgment should be affirmed, and it is accordingly so ordered.

A motion for rehearing having been filed, **Hurt, P. J.**, on December 2, 1897, handed down the following response:

The judgment in this case was affirmed at the Austin term, 1897, of this court, and the case comes before us now on motion for rehearing by the appellant. In the original opinion we discussed the question as to whether or not expert opinion could be obtained upon a partially stated hypothetical case, this question being discussed with reference to the bill of excep-

And evidence of physicians as experts in a will contest with reference to the effect of pulmonary consumption, with which the testator was afflicted, and the medicines administered, on the mind of the patient, is of but little, if any, weight as against the testimony of attesting witnesses and others showing clearly that she was possessed of testamentary capacity. *Re Andrews*, 33 N. J. Eq. 614.

So, letters of a testator written at about the time he made his will, evidencing a sound, discriminating mind, competent to give historical details of matters of domestic and family interest with details of mathematical calculation and intelligent information which only a sound mind could perform, are more reliable in a will contest than speculations and opinions of witnesses, expert or nonexpert, as to testamentary incapacity. *Harper v. Harper*, 1 Thomp. & C. 354.

Evidence that a married woman, fondly attached to her children and apparently most happy in her family, had poisoned two of them with some evidence of deliberation and design, and that there was insanity in her family, and that her demeanor after the act, though not wholly irrational, was strangely erratic and excited, and that the medical witnesses based their opinion upon her recent antecedents and the presence of certain exciting causes of insanity and her own account of her sensations, and that in their opinion she was laboring under acute cerebral disease and was in a paroxysm of insanity at the time however, is sufficient to warrant a finding by the jury of not guilty upon the ground of insanity. *Reg. v. Vyse*, 3 Fost. & F. 247.

And in *Reg. v. Southey*, 4 Fost. & F. 864, which was a prosecution for homicide in which there was no evidence of the insanity of the accused previous to the act, and all the evidence of insanity consisted of that of the medical men who had seen him since the act, and their opinion that his insanity was chronic and therefore that he was insane at the time of the act because insane at the time of the examination, but all of the circumstances showed great premeditation, preparation, and design with a view to disguise the act and effect an escape, and his subsequent conduct showed consciousness that he had violated the law, the whole of the circumstances were left to the jury with a strong direction that if they were not satisfied that he did not know the nature of his act and did not understand the nature of the proceedings he should be found guilty.

So, the court in a will contest is not bound by the opinion of an expert as to the mental capacity of the testatrix, where such opinion is founded on reasons which are absurd or not well founded. *Crockett v. Davis*, 81 Md. 184.

And expert testimony in a prosecution for crime

which is made up largely of mere theory and speculation, and which suggests mere possibilities ought never to be allowed to overcome clear and well-established facts. *State v. Hockett*, 70 Iowa, 442.

And the opinion of a distinguished alienist upon the probable mental condition of the patient years before such patient had come under his observation, though entitled to respect should be carefully scrutinized before acceptance, where the opinion is contingent upon the correctness of hypotheses which have not been established by the evidence. *Bristed v. Weeks*, 5 Redf. 529.

And a person will not be interdicted on the ground of idiosyncrasy and imbecility on the evidence of two medical witnesses neither of whom had ever conversed with him until the day before the filing of their report, and who had not had any opportunity to test his mental condition. *Watson's Interdiction*, 81 La. Ann. 757.

So, testimony of a physician as to the insanity of a party in an action to annul a marriage is entitled to but little weight where he did not know her at the time in question. *Slais v. Slais*, 9 Mo. App. 98.

And the opinion of an expert in a proceeding to set aside a will, that the testator was insane, founded upon the fact stated by him that he was in a dying condition and much the same as any other man in such a condition, and that he judged his mental from his physical condition, is entitled to but little weight as against proof of facts which show mental capacity. *Burley v. McGough*, 115 Ill. 11.

And the testimony against mental capacity in a will contest of a physician who formed his opinion from her condition, and not from conversations with her, and who at first had many opportunities of forming such opinion but later his interviews with her were not oftener than once a month, will not warrant the rejection of the testimony in favor of mental capacity of all those who were about her deathbed and whose intercourse was frequent, and who had conversations with her on many occasions and saw business transacted by her and were the witnesses to a codicil to her will. *Crollins v. Stark*, 64 Barb. 112.

But evidence that a person whose sanity was questioned was subject to insane delusions, and in the opinion of several competent and expert medical witnesses who had excellent opportunities for observing him was so insane as to be unfit to manage his affairs, is sufficient to justify the setting aside of the return to a commission of lunacy that he was not of unsound mind to such a degree as to incapacitate him for the management of himself and his estate. *Re Fitzgerald*, 80 N. J. Eq. 59.

And testimony of an expert witness in an action brought to set aside a deed upon the ground of the

tions in regard to the testimony of Dr. T. D. Wooten. The same subject was presented in a bill of exceptions in regard to the testimony of Dr. Davis. We disposed of the question presented in the bill of exceptions with reference to the testimony of Dr. Davis by reference to what we had said in regard to the bill of exceptions as to Dr. T. D. Wooten's testimony. Counsel for appellant, on motion for rehearing, insists that there is a very material difference in the bills of exception. From the record it appears that Dr. Wooten was introduced by the state, and a hypothetical case submitted to him, and that this question did not include all of the evidence bearing upon the question of sanity. Dr. Wooten answered the question that, in his opinion, defendant was sane. Afterwards the state asked the witness his opinion based upon a hypothetical case embodying all the evidence in the case, upon

which the witness expressed the same opinion as upon the state's first question; that is, that appellant was sane. Appellant then put a hypothetical question to the witness based upon his theory of the case, and upon which the witness answered that the defendant was insane. A full opportunity was allowed to get the opinion as to the defendant's sanity based upon any hypothesis to be inferred from any evidence in the case. The objection to this procedure was that the state obtained the witness's opinion upon an incomplete hypothetical case. Let us concede for the argument that the full case, containing all the testimony, offered either by the state or the defendant, must be embraced in the hypothetical case; still, if this was not done, no complaint can be urged by appellant in regard to the testimony of Dr. Wooten, because, after the defendant had submitted his hypothetical case, the wit-

mental incapacity of the grantor that he had privately examined the grantor, and that he did not know whether he had made a deed, a will, or a lease, and that in his opinion the grantor was not competent to make a sale of his land and protect his own interest, is sufficient to uphold a decree setting aside the deed. *Sponable v. Hanson*, 87 Mich. 204.

c. As affected by character, bias, and nature of the question.

Where opinions of witnesses are received on the question of sanity or insanity, from the necessity of the case their weight will not depend so much upon the number as upon the intelligence of the witnesses and their capacity to form correct opinions, their means of information, and the unprejudiced state of their minds, and the nature of the facts testified to in support of their opinions. *Clark v. Fisher*, 1 Paige, 171, 19 Am. Dec. 402.

Thus, while medical witnesses may testify as to the effect of disease on the mind, and give their opinions on the question of testamentary capacity, and their opinions are usually entitled to consideration and respect, the value of such testimony depends upon the professional character, integrity, skill, and standing of the witness. *Jamison v. Jamison*, 3 Houst. (Del.) 108; *People v. Lake*, 2 Park. Crim. Rep. 215; *Gay v. Union Mut. L. Ins. Co.* 9 Blatchf. 142.

Expert evidence on the question of insanity is only entitled to importance when fairly given by one who through experience, study, and scientific eminence is properly accredited to give it. *People v. Kemmler*, 119 N. Y. 580.

And the opinion of a physician who has not studied the progress of the disease of the accused, and who has limited opportunities for observing his personal habits and conduct, is of very little if of any value. *State v. Kalb*, 2 Ohio Legal News, 764.

And the extent of an expert witness's acquaintance with the subject of insanity may be always inquired into to enable the jury to estimate the weight of the opinion given by him on that question. *Davis v. State*, 35 Ind. 498, 9 Am. Rep. 780.

So, in *Van Horn v. Keenan*, 28 Ill. 448, in which the question of insanity was involved, and no one who had made this branch of medical jurisprudence a special study had been examined in the case, and the opinions given by the witnesses were generally crude, the court declared itself not satisfied with them, and sought the opinion of the eminent head of an asylum for the insane.

For legal purposes incapacity, either criminal or civil must be judged by manifestations in conduct and language, and the circumstances and symp-

toms as to which a physician alone can perceive outward mental disorder may aid in understanding the manifestations subsequently appearing, but can have little further value. *Fraser v. Jennison*, 42 Mich. 206.

So, the jury in a will contest upon the ground of mental incapacity should consider whether the testimony of expert witnesses is partisan in its character or biased by any leanings for or against any of the parties. *Rush v. Megee*, 36 Ind. 69.

But the opinions of experts on the question of the sanity or insanity of a person accused of crime when their honesty and impartiality are not doubted are entitled to great weight, but the jury is not bound to be governed by them. *Choice v. State*, 31 Ga. 424.

So, when an expert witness on the question of mental capacity states precise facts in science as ascertained and settled, or states the necessary or inevitable conclusion which results from the facts stated, his opinion is entitled to great weight; but where he gives only the probable inference from the facts stated his opinion is of less importance, and when it is speculative, theoretical, and states only the belief of the witness, while yet some other opinion is consistent with the facts stated, it is entitled to but little weight. *Gay v. Union Mut. L. Ins. Co.* 9 Blatchf. 142; *People v. Barberi*, 47 N. Y. Supp. 168.

So far as medical opinions bear upon the degree of cerebral diseases indicated by apoplexy, paralysis, loss of speech, convulsions, and other physical symptoms, they are to be regarded as the opinions of experts; but so far as they rest upon evidence going to show a want of intellect directly, and not merely as the result of disease of the brain, they derive little, if any, additional force from the professional education of the witness. *Delafield v. Parish*, 26 N. Y. 115.

d. As compared with other expert opinions.

The opinion of a physician who attended a testator during his last illness is entitled to more weight on the question of testamentary capacity than the opinions of physicians who had not this advantage. *Harrison v. Rowan*, 3 Wash. C. C. 580.

And the opinion of a medical expert that a testator was insane and incompetent to make a will, and had been so for some time, will not be held to invalidate the will, though he was an expert of high authority, where his opinion seemed to be that any insanity would be sufficient to invalidate it, and the testator's family physician, who visited him many times during such period, saw no indication of unsoundness of mind or mental disorder, and he attended to his own affairs then and after-

ness answered that, in his opinion, the appellant was insane. Upon no ground of reason or common sense could appellant be heard to complain of this matter in the shape presented by this bill. Appellant was permitted to form a hypothetical case, not alone upon his testimony, but upon any and all the testimony introduced upon the trial. When the whole case was put, the witness answered that his opinion was that defendant was sane. When the defendant's case, based upon the testimony offered by him, was put to the witness, he answered that defendant was insane. But it will be observed that the bill shows that the state submitted the whole case, and upon which the witness answered that defendant was sane. We cannot comprehend how appellant can complain of this. As to the contention of appellant that the opinion was only upon a partial or incomplete statement of the case, we

will treat of this subject when we reach the bill of exceptions pertaining to the testimony of Dr. Davis.

It occurs by a bill of exceptions that Dr. Davis was introduced as an expert; that the state submitted a hypothetical case, based upon its testimony bearing upon the question of sanity, and obtained the answer that appellant was sane. The defendant objected, because all the testimony bearing upon the question of sanity was not embraced in the hypothetical case put by the state; but the bill further shows that the defendant then put a hypothetical case to the witness, based upon the assumption that all reasonable inferences to be drawn from his testimony were true, including the fact that defendant, without reason, motive, or cause, killed his wife and children, upon which question the witness answered that upon such hypothesis, he would say that the

wards in an intelligent manner. *Re Blakely*, 48 Wis. 294.

So, a statement by the judge in a will contest that he relied with more confidence upon the opinion of an intelligent attending physician than he did upon the subsequent opinions of four physicians who had not seen the testator during his lunacy, and based their opinions as to his sanity upon the nature of the disease, is not reversible error. *Kirkwood v. Gordon*, 7 Rich. L. 474, 62 Am. Dec. 418.

And in *Whelpley v. Loder*, 1 Dem. 368, which was a will contest upon the ground of testamentary capacity, the court attached more value to, and relied and acted upon, the testimony of the testator's attending physician than that of an alienist, who was rejected while admitting his ability and skill.

The evidence of experts in a will contest who knew the testator and had treated him, however, cannot be said to be entitled to greater weight, as matter of law, than that of experts who founded their opinions simply upon hypothetical questions. *Bever v. Spangler*, 98 Iowa, 576.

c. As compared with nonexpert opinions.

The rule has been laid down that on questions of sanity or insanity proof made by expert witnesses who have devoted their time and attention to cases of mental derangement is of much greater value than that of other persons who have no scientific or experimental knowledge of the subject, and who can only speak from observation from outward signs and appearances. *State v. Reidell*, 9 Houst. (Del.) 470; *Watson v. Anderson*, 18 Ala. 203.

And that in marshaling evidence of insanity the greater weight should be given to the judgment of medical experts and those closely associated with the party claimed to be insane than to other witnesses; and, next to this, great respect should be accorded to lay witnesses whose intercourse and public relations with men enable them from experience and observation to form an opinion of men's motives from their speech and actions. *Com. Helmbold*, v. *Kirkbride*, 11 Phila. 427.

And professional opinions in the absence of overruling facts are entitled to credence on the question of capacity to make a testamentary disposition as against mere opinions of nonexperts unsupported by concurrent facts which have any legitimate weight. *Hendrix v. Money*, 1 Bush, 303.

And the opinions of unprejudiced medical witnesses that a person is insane is sufficient to overcome the presumption in favor of sanity when supported by testimony of nonexpert witnesses none of whom had seen him more than once during the period covered by the alleged insanity on an application. *L. R. A.*

for discharge from a hospital on a habeas corpus. *Com. Helmbold*, v. *Kirkbride*, 11 Phila. 427.

So, evidence in a criminal prosecution, of insanity in the family of the accused, and testimony of his family physician and persons who had known him for years tending to show insanity, preponderates over evidence given by a person who had known him but a short time and whose opinions were not substantiated by reason, and the opinions of witnesses as experts who were not specially qualified as experts on insanity. *McLeod v. State*, 31 Tex. Crim. Rep. 331.

And an instruction in a will contest that the testimony of medical men of large experience on the question of insanity as a general rule is entitled to more weight than that of nonprofessional men, but that the question of weight is for the jury, is not error where the medical men testifying were not mere experts whose testimony was founded upon facts testified to by other witnesses, but who had made a personal examination of the decedent for the very purpose of ascertaining his mental capacity. *Blake v. Rourke*, 74 Iowa, 519; *Meeker v. Meeker*, 74 Iowa, 362.

And in *Forman v. Smith*, 7 Lans. 443, the testamentary capacity of the testator was held sufficiently proved, though a large number of witnesses testified that he had not sufficient capacity to comprehend and understand ordinary business transactions, and he disinherited most of his nearest kindred and relatives, where a larger number of witnesses, including his pastor, his family physician, and the subscribing witnesses to the will, gave evidence which established or tended to prove his competency. *Forman v. Smith*, 7 Lans. 443.

But it is the duty of the jury to weigh the whole evidence and decide according to their conviction, although the medical witnesses were of a different opinion. *Watson v. Anderson*, 18 Ala. 202.

And an instruction in a criminal prosecution that the opinions of medical experts are to be considered in connection with all the other evidence in the case, and that the jury is not bound to act upon them to the exclusion of other evidence, and that they are to determine the question of the whole evidence, is not subject to the objection that it informs the jury that the testimony of experts is not entitled to greater weight than that of nonexpert witnesses. *Goodwin v. State*, 98 Ind. 550.

Jurors are not bound to give more weight to the testimony of medical experts on the question of insanity than to that of nonexpert witnesses who state facts within their own knowledge; it is not for the court to pronounce, as matter of law, which of the two classes shall receive the greater weight. *Sanders v. State*, 94 Ind. 147.

defendant was insane; that all of the testimony bearing upon the question of sanity was embraced in the state's hypothetical question and the defendant's hypothetical question combined.

We have presented to us the question discussed in the original opinion, in treating of the bill of exceptions pertaining to the testimony of Dr. Wooten, which is: Can the state submit a hypothetical case which does not include all the testimony bearing upon the question of sanity, and obtain an opinion from the expert; or must the question propounded contain all the evidence bearing upon the question of sanity whether introduced by the state or the defendant, and whether believed to be true or false by the state? We hold, as we did in the original opinion, that the state can formulate a hypothetical case embracing such facts bearing upon the question of sanity as it deems

proper and competent, and obtain the opinion of an expert. We hold that, if the defendant is not satisfied with the hypothetical case submitted by the state, he has the privilege of submitting his case, not only as embraced in his testimony, but upon any and all testimony introduced on the trial. Of course, if the case submitted by the state is unfair and unjust to the appellant, the court will correct this; and if the court fails to do so, and the defendant proposes to submit a case embracing all the facts bearing upon the question, and he is denied this right, error would be patent.

Recurring to the bill of exceptions pertaining to the testimony of Dr. Wooten; if the last proposition be correct, the state was under no obligation and was not required to submit the full case, but had the right to submit the case which it thought was supported by the testimony, and was not bound to submit a case in-

And the testimony of experts, although always admissible on the question of testamentary capacity in a will contest, and a great aid in discovering where the truth lies, is not conclusive and controlling against the testimony of persons of intelligence who saw the testator daily and who had transactions with him of a social character and in business. *Re Kiedaisch*, 2 Connoly, 438; *Brook v. Luckett*, 4 How. (Miss.) 459.

So, an instruction in a will contest that, all other things being equal, the jury should give greater weight to opinions of physicians on the subject of testamentary capacity than to other witnesses, is improper. *Carpenter v. Calvert*, 83 Ill. 62.

And one that opinions of expert witnesses are entitled to great weight, and so are those of persons who associated and lived with the person whose sanity is in question, is erroneous; it being safer and better to leave all these matters to be weighed by the jury. *Ryder v. State* (Ga.) 88 L. R. A. 721.

And one assigning more weight to the testimony of nurses and attendants than to the opinions of the subscribing witnesses to the will is erroneous, as the jury, and not the court, must judge of the weight to be given to each part of the proofs in the case. *Brown v. Rargin*, 94 Ill. 560.

The opinion of a physician as to the mental competency of a testator is entitled to no greater consideration than that of a layman having equal facilities for observation, however, where no claim is made that the testator was insane. *Maynard v. Vinton*, 59 Mich. 120, 60 Am. Rep. 276.

And the opinions of the neighbors of the testator, who are men of good common sense, are of more value than those of medical experts in a will contest, upon the question whether the mental disease with which the testator was afflicted had reached such a stage at a given time before it had developed itself as to render him incapable of making a will or contract, or irresponsible for his acts. *Rutherford v. Morris*, 77 Ill. 397.

And evidence of subscribing witnesses to a deed, and of persons who are familiar with the grantor and the transaction involved, are entitled to great weight, while the opinion of an expert witness is entitled to little weight as against such evidence. *Kelly v. Perrault* (Idaho) 48 Pac. 45.

1. A question for the jury.

The opinion of an expert witness as to the sanity of another is a fact bearing upon that question, the proper weight of which falls within the province of the jury to determine. *Kempsey v. McGinnis*, 21 Mich. 123; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Goodwin v. State*, 96 Ind. 550; *Gay v. Union Mut. L. Ins. Co.* 9 Blatchf. 142.

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The court must decide whether a witness called to testify as to his opinion on an issue of mental soundness had the necessary experience to enable him to testify as an expert; but the value of his opinion when admissible must be determined by the jury alone, and depends upon the opportunities he has had for acquiring skill and knowledge, and the use he has made of these opportunities. *Flynt v. Bodenhamer*, 80 N. C. 205.

And to charge that expert witnesses speaking merely as to matters of opinion and basing their opinions upon hypothetical questions are entitled to more credit than witnesses who had knowledge of facts gathered from personal observation, and who based their opinions on actual facts, would be an invasion of the province of the jury. *Goodwin v. State*, 96 Ind. 550. And see *Brown v. Rargin*, 94 Ill. 560; *Carpenter v. Calvert*, 83 Ill. 62; and *Sanders v. State*, 94 Ind. 147, *supra*, X., e.

Thus, the jury in a criminal prosecution in which insanity is alleged should not be told that expert witnesses speaking merely as to matters of opinion and basing their opinions on hypothetical questions are entitled to more credit than witnesses who have knowledge of facts gathered from personal observation, and who base their opinions on actual facts, and not supposed cases. *Goodwin v. State*, 96 Ind. 550.

And an instruction in a criminal prosecution that the testimony and opinions of medical witnesses should be received with caution, and are entitled to but little weight unless sustained by reasons and facts that admit of no misconception, and that they are not binding upon the jury, is objectionable as a comment upon the sufficiency and weight of the evidence, which is prohibited by 2 *Wagner's* (Mo.) Stat. 1106, § 20. *State v. Hundley*, 46 Mo. 414.

So, it is error for the court in a prosecution for homicide to question in the presence of the jury whether they will realize much, if any, valuable aid from the testimony of experts in coming to a correct conclusion with reference to the criminal responsibility of the accused, where evidence has been given of their observation, experience, and skill, sufficient to enable them to form intelligent opinions which they have given. *Pannell v. Com.* 86 Pa. 260.

And a jury in a will contest in which the question of sanity or insanity is at issue should not be told that common experience has shown, and the courts have often remarked, that opinions of professional witnesses upon the question of insanity have become of little practical value from the almost universal conflict between those called upon the different sides as compared with testimony consisting of acts and sayings of the testator.

volving testimony believed by the state to be false. And we repeat that the disposition of the bill of exceptions as to Dr. Wooten's testimony disposes of the bill of exceptions as to the testimony of Dr. Davis; for if the state is not bound to embrace all the testimony bearing upon the subject, then it was not required to do so in reference to Dr. Wooten, but after having done so, appellant had no right to complain.

Now, we have this question: Is it necessary, in submitting a hypothetical case, for the state to include every particle of the evidence bearing upon the question of insanity, in order to obtain a legal answer from the expert? If so, the contention of the appellant in the Davis bill of exceptions is well founded; for that bill shows that the opinion was obtained from the expert upon a hypothetical case that did not embrace the theory of the defense, and did not embrace all the testimony bearing upon the question of sanity. The question therefore

is: Must the hypothetical case submitted to the expert include all the testimony bearing upon the question of sanity, in order to obtain a legal and proper answer from the expert? In the original opinion we discussed this very question, and held that it was not necessary. We have seen nothing to change our opinion upon this subject. The authorities are just that way. But it is contended by counsel for appellant that we have settled the law to the contrary in *Webb v. State*, 9 Tex. App. 490; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638; and in *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 687.

Now, we assert that the question here discussed has never been presented in any case before either the court of appeals, court of criminal appeals, or the supreme court of this state. The counsel for appellant cites no case decided by the supreme court, but relies upon the cases of *Webb v. State*, 9 Tex. App. 490; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep.

Burney v. Torrey, 100 Ala. 157; *Eggers v. Eggers*, 57 Ind. 461.

And a remark by the judge in charging the jury in a criminal prosecution in which insanity was interposed as a defense and in which expert witnesses had been examined, that in his experience and observation doctors can be gotten to swear on both sides of any question is objectionable as adding the testimony derived from the experience of the judge, and as a statement of convictions and conclusions created by listening to the testimony of that class of persons in other cases. *People v. Webster*, 59 Hun. 395.

But an instruction in an action to contest the validity of a will upon the ground of unsoundness of mind of the testator, that the evidence of an expert was of little value, is not reversible error as against the plaintiff, where he was called by and testified strongly in favor of the deceased. *Bundy v. McKnight*, 43 Ind. 502.

And an instruction in an action in which an expert had testified upon an issue of sanity or insanity, that the law attaches peculiar importance to the opinions of medical men who have the opportunity of observation upon a question of mental capacity, as by study and experience they become experts in the matter of bodily and mental ailments, is not objectionable as an expression of opinion as to the weight of the evidence. *Flynt v. Bodenhamer*, 80 N. C. 205.

And an instruction in a criminal prosecution that the opinion of medical experts on the question of insanity are to be considered in connection with the other evidence, but that the jury is not bound to act upon them to the exclusion of other evidence, is not subject to the objection that it informs the jury that the testimony of experts is not entitled to greater weight than that of nonexperts. *Goodwin v. State*, 96 Ind. 550.

Nor is an instruction in a will contest in which insanity is alleged that the testimony of medical men of large experience as a general rule is entitled to more weight than that of nonprofessional men, but that the question of weight is one for the jury, erroneous where the physicians examined were not mere experts whose testimony was founded upon facts testified to by other witnesses, but had each made a personal examination of the testator for the very purpose of ascertaining his mental capacity. *Meeker v. Meeker*, 74 Iowa. 352.

So, whether the facts upon which the opinion of a medical expert on a question of mental capacity are established or not is a question for the consideration of the jury. *First Nat. Bank v. Wirebach*, 106 Pa. 37.

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And the jury in a criminal action in which insanity is interposed as a defense are not to take for granted that the statements contained in the hypothetical questions propounded to experts are true but are to carefully scrutinize the evidence and determine from it what, if any, of such facts are true, and what not true. *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99.

And where the opinion of a medical expert has been admitted in a criminal case in which the defense of insanity was interposed based on facts hypothetically stated, which vary somewhat from the facts proved on the trial, a charge that his opinion is entitled to but little weight is properly refused, as the question is purely one of fact for the jury. *Gunter v. State*, 33 Ala. 96.

So, a refusal to instruct the jury in a will contest upon the ground of insanity that no weight is to be given to the evidence of experts, when some of the facts upon which hypothetical questions are based are not found to be true, will not be regarded as prejudicial error where the court had instructed that the weight of such opinions was for the jury to consider in view of all the other testimony in the case. *Bever v. Spangler*, 93 Iowa. 576.

And an instruction in a will contest upon the ground that the testator was afflicted with senile dementia, that the jury ought to consider and weigh all the evidence, including the evidence of experts, tending to show the condition or state of mind of the testator, is not subject to the objection that it directs the jury that they might give more weight to the opinions of experts, though some of the assumed facts stated in the hypothetical questions might have been found to be untrue. *Bever v. Spangler*, 93 Iowa. 576.

The jury in a proceeding to inquire as to the lunacy of a party should be left at liberty to apply the same general rules to the testimony of experts that are applicable to the testimony of other witnesses when estimating its value. *Cuneo v. Bessoni*, 63 Ind. 524.

And a verdict against the validity of a will will not be disturbed on appeal though it was rational in its provisions and was written and attested by a physician without interest in the matter, who testified in favor of testamentary capacity, where the other attesting witness testified that the testator was not competent by reason of his physical and mental condition, that he signed the will to avoid offending the physician, and other witnesses, including another attending physician, testified against testamentary capacity. *Sydney v. Cunningham*, 13 Ky. L. Rep. 24.

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638, and *Williams v. State*, 37 Tex. Crim. Rep. —, 89 S. W. 687. What was the question before the court in *Webb v. State*, 9 Tex. App. 490? It was as to whether or not an expert could give his opinion unless he had heard all the testimony bearing upon the question at issue. It was not a case in which the hypothetical case was submitted to an expert who had not heard the evidence. The question arose in this manner: Dr. Stone, witness for the defendant, heard all the testimony introduced on the trial, and gave as his opinion that he had heard no evidence of the insanity of the accused that could not be explained by other causes, such as indulgence in drink or debauchery. The state, upon cross-examination of Dr. Stone, asked what his opinion was, based upon the testimony of the witness Pool. Dr. Stone answered that from the evidence of Pool alone he would have considered Webb insane, and believed the mind of defendant, at the time the particular offense was committed, to be more or less disturbed from some cause, but not to the extent to relieve him entirely from responsibility. In passing, the court says "that the witness had heard all the testimony in the case and did not believe the defendant insane. This opinion, founded upon the whole testimony, must have included, and did include, the testimony of the witness Pool. If it did, then how could any injury result to defendant by asking, and that, too, upon cross examination, the opinion of the witness upon the testimony of Pool alone, we confess we cannot conceive. It would have been otherwise if the expert had not heard and formed his opinion upon the whole case; for in that case the question and answer would have been, not only improper, but illegal and inadmissible." Now, it will be observed that in the *Webb Case*, the hypothetical question was not propounded to an expert who had not heard the testimony, but the expert had heard all the evidence. It may be insisted that, if it is necessary for the expert to hear all the testimony before giving an opinion, therefore it is absolutely necessary that the hypothetical case submitted to an expert who did not hear the testimony must embrace all the testimony bearing upon the question of sanity. We are not called upon to pass upon this question; but the reasons for the one rule will not apply to the other rule. Take the most enlightened expert, and let him hear all the testimony; he can arrive at a correct conclusion as to the sanity of the accused; and at the same time if called upon to state all the facts from which he makes the conclusion, he would most generally fail. The impression from the facts is made upon his mind, without the ability to produce the facts in the statement. But, be this as it may, the question involved in the *Webb Case* is not the question before us. Now, it is true that Presiding Judge White in that case states that the full case must be submitted, and he asserts that all the authorities support this proposition. We find to the contrary,—that the overwhelming weight of authority supports the proposition "that the state has the right to submit its hypothetical case, and, if the accused is not satisfied with it, he can state his hypothetical case." This proposition is conclusively established by the authorities cited in the original

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opinion; and, in addition to those, we desire to cite the elaborate opinion in the case of *Coyne v. Com.* 104 Pa. 117. To be more explicit: "Each side had the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence; and, if meagerly presented in the examination on one side, it may be fully presented on the other; the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted." Now, the question presented to us is one in which the state presented its theory of the hypothetical case to the expert. (We are now treating of the bill of exceptions in reference to Dr. Davis's testimony.) The state had a right to select its theory of the evidence, and to base a hypothetical case upon that state of facts which the state thought to be true. The defendant had a right to submit a hypothetical case upon the state of facts which he believed to be true. Of course, if the statement of the hypothetical case for the state was unfair and unjust to appellant, and objections had been raised, the court would have controlled this matter; but that does not appear in this case. It would be almost impossible for the state to embrace all the testimony introduced in evidence in the hypothetical case, without impressing the jury with the fact that the state believed that all of the evidence and circumstances embraced in the case were in fact true. This would be a great injury to the state. It would be in the nature of a concession of facts which the state proposed to controvert. Nor would it be just to the defendant to require him to embrace all the facts in his statement,—those which tended to show sanity as well as insanity,—when he did not believe the testimony, and in fact proposed to impeach the witnesses swearing to the facts tending to show sanity in some manner, or to show that they were unreasonable and not in fact true. The record shows that a very full statement was made by the state presenting its theory of facts believed to be true; and the record also shows that the defendant presented his theory of the case. This being so, the expert was in possession of the whole case as effectually as can be presented practically upon a trial of the case.

In the *Leache Case*, 22 Tex. App. 279, 58 Am. Rep. 638, the question was in regard to placing the experts under the rule. It appears from the record that the experts were placed under the rule, and did not hear the testimony of the other witnesses. Leache contended that this was reversible error; that he had the right to have the experts present, so that they might hear the testimony in order to give an opinion. Presiding Judge White states, "that it is not shown that the hypothetical method of obtaining the opinion of the experts was either defective in not submitting all the facts essential to an intelligent opinion, nor that the opinions were such as would have been given differently had the evidence been heard directly by these witnesses and their conclusions drawn from it, and not from a hypothetical statement of it. We cannot perceive that the discretion of the trial judge was abused in the matter to the prejudice of the defendant;" that is, that, in placing the experts under the rule, no prejudice therefrom was shown to have resulted to.

the appellant. That was the only question in judgment. The remarks of Judge White in regard to the rule were not called for or necessary to the disposition of the question raised; but he states, relying upon *Coyle v. Com.* 104 Pa. 117, "that, where the expert has not heard the evidence, each side had the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence; and if meagerly presented in the examination on one side, it may be fully presented on the other, the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted." The question involved in the *Leache Case*, 22 Tex. App. 279, 58 Am. Rep. 638, was simply the action of the court in putting the experts under the rule, and all of the observations made by the presiding judge in regard to the rules which control in submitting hypothetical cases to an expert were *dicta*. But he concedes that each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence. This concession is made in the face of the assertion that all authorities agree that it is inadmissible to permit an expert to give his opinion upon anything short of all the evidence in the case, whether he has personally heard it, or it is stated to him hypothetically.

In the *Williams Case*, 37 Tex. Crim. Rep. —, 30 S. W. 687, the only question before the court was as to the admissibility of the testimony of Dr. Armstrong, an expert, who testified that he had heard but a part of the testimony, but had read the newspaper account of the testimony of the witnesses on the question of insanity on the previous trial of the case. The court thereupon stated that the testimony was the same in the present trial, and permitted the witness, over the objections of appellant, to give an opinion as to the sanity of the defendant. We held in that case that the newspaper report was nothing but hearsay testimony, and that it was not competent for the judge to put such a hypothetical case to the witness. We stated, further, that if the newspaper statement was eliminated, the witness was not authorized to give his opinion based only on having heard a part of the testimony of the witnesses. So the question here presented was not raised in said case, and what was said by us in referring to the *Webb Case*, 9 Tex. App. 490, and the *Leache Case*, 22 Tex. App. 279, 58 Am. Rep. 638, was not at all necessary to that decision.

We misunderstood the bill of exceptions reserved to the testimony of Carrie Sparks. We thought that the only objection urged to this testimony was that it was not in rebuttal; but, since our attention has been called to the bill in the motion for rehearing, we find that the appellant moved to exclude the evidence upon the grounds, condensely stated, of irrelevancy, that appellant was not shown to have been in the house, and a number of other objections. We therefore have the question as to whether or not, under the circumstances of this case, the evidence of this witness was admissible. When we look to the record we find that the circumstances strongly tended to show that the appellant was at home. The evidence places Mrs. Burt there, as well as defendant, a short

time after the expression was heard. This being the case, we are of opinion that the testimony was admissible, and have no doubt of its relevancy. It was conceded in the argument of appellant's counsel that defendant killed his wife and two children. About this there is no question. But it is contended that the evidence of this witness bears strongly on the question of sanity. We do not understand it in that way. The testimony shows that Mrs. Burt exclaimed, "I will stand this thing no longer!" To what "thing" she alluded is not disclosed. Whether it was the ill treatment of the husband, or whether it was the insane conduct of the defendant, is not shown. The exclamation may have been made because of the strange and unnatural conduct of an insane man, or might have been induced by the ill treatment of appellant towards his wife. We are left in the dark upon this subject. This exclamation could not have been made by the servant, for she was not at home; and the evidence shows no other female there except Mrs. Burt. Appellant insists, however, that the evidence fails to show that Burt was at home. The witness heard the exclamation after 7 o'clock in the evening. It is shown that defendant was there between 8 and 9 o'clock. The exclamation was made at his home, and the conclusion is reasonable that it was made by his wife to him. Be this as it may, appellant concedes, and the unquestioned facts of the case demonstrate, that he killed his wife and children. We might admit, but we do not, the incompetency of this evidence; and yet no possible injury could have resulted to appellant. It is a strained conclusion that the remark made by the female in the house tended to show the sanity of defendant, for, as before stated, it might have resulted from the insane act of the appellant. If the jury believe, as they had a right to believe, that the exclamation was made by appellant's wife to defendant, clearly the evidence was admissible. If they did not so believe, then no harm resulted to the appellant. If the jury believed that the appellant was insane, or had a doubt about it, they may have concluded that the exclamation was made by the wife, because of some misconduct of her deranged husband, or, if they did not believe he was insane, that the remarks were made because of the ill treatment of the defendant. We are left in a field of speculation, but we cannot perceive, conceding the inadmissibility of the testimony for the argument, how, under the facts of this case, appellant could have been injured; that he killed his wife and children being a conceded fact. Now, it must reasonably appear that the exclamation testified to by the witness Sparks tended to show sanity, and nothing else; and, unless this is made to appear, no injury could have resulted. But we are of opinion that the evidence was admissible, independent of these considerations.

The court instructed the jury upon the subject of express malice as follows: "(6) Express malice, which is absolutely essential to constitute murder in the first degree, exists where one, with sedate, deliberate mind and formed design, unlawfully kills another. (7) When an unlawful killing is established, the condition of the mind of the party killing, at

the time, just before and just after the killing, is an important consideration in determining the grade of the homicide; and in determining whether murder has been committed with express malice or not, the important questions for a jury to consider are: Do the facts and circumstances in the case at the time of the killing, and before and after that time, having connection with or relation to it, furnish satisfactory evidence of a sedate and deliberate mind on the part of the person killing, at the time he does the act? And do these facts and circumstances show a formed design to take the life of the person slain, or to inflict on him some serious bodily harm, which, in its necessary and probable consequences, may result in his death? Or do the facts and circumstances in the case show such a general reckless disregard of human life as necessarily includes the formed design against the life of the person slain? If they do, the killing, if it amounts to murder, will be upon express malice. (8) In order to warrant a verdict of murder in the first degree, malice must be shown by the evidence to have existed; that is, the jury must be satisfied from the evidence, beyond a reasonable doubt, that the killing was a consummation of a previously formed design to take the life of the person killed, and that the design to kill was formed deliberately with a sedate mind,—that is, at the time when the mind of the person killing was self possessed and capable of contemplating the consequences of the act proposed to be done. There is, however, no definite space of time necessary to intervene between the formed design to kill and the actual killing. A single moment of time may be sufficient. All that is required is that the mind be cool and deliberate in forming its purpose, and that the design to kill is formed while the mind is in such calm and sedate condition. (9) When the evidence satisfies the mind of the jury, beyond a reasonable doubt, that the killing was the result of a previously formed design by the defendant to kill deceased, and that the design was formed when the mind was calm and sedate, and capable of contemplating the consequences of the act proposed to be done by him, and such killing is further shown to have been unlawful and done with malice, then the homicide is murder in the first degree, and your verdict should be rendered accordingly. (10) To warrant a conviction of murder in the first degree, the jury must be satisfied by the evidence, beyond a reasonable doubt, that the defendant, before the act, deliberately formed the design with a calm and sedate mind to kill the deceased; that he selected and used the weapon or instrument or means reasonably sufficient to accomplish the death by the mode and manner of its use. The act must not result from a mere sudden, rash, and immediate design, springing from an inconsiderate impulse, passion, or excitement, however unjustifiable and unwarrantable it may be. (11) Now, if you believe from the evidence, beyond a reasonable doubt, that the defendant, Eugene Burt, in Travis county, state of Texas, on or about July 24, 1896, as charged in the indictment, unlawfully, with malice aforethought, with a sedate and deliberate mind and formed design to kill, did kill Anna M. Burt, by then and there striking, beating,

and wounding the said Anna M. Burt upon her head and face with a hatchet and some heavy instrument, thereby fracturing the skull and the bones of the face of said Anna M. Burt, and by then and there tying tightly around the throat and neck of said Anna M. Burt a handkerchief, thereby strangling and suffocating the said Anna M. Burt, and by then and there wrapping around the head and body of said Anna M. Burt a blanket, and securely tying same thereon with rope, and then and there throwing said Anna M. Burt, so wrapped and tied, in a cistern partially filled with water, sufficient to submerge the body of said Anna M. Burt; or if the said defendant did, with malice aforethought, so kill said Anna M. Burt, by either one or by all of the means above enumerated,—you will find the defendant guilty of murder in the first degree, and so state in your verdict, and fix his punishment at death or confinement in the state penitentiary for life, as you may determine and state in your verdict."

Counsel for appellant objects to that portion of the charge which reads as follows: "If the said defendant did, with malice aforethought, so kill said Anna M. Burt, you will find the defendant guilty of murder in the first degree." It is insisted that this charge authorized a verdict of murder in the first degree, upon a state of case which demanded a verdict of murder in the second degree. We do not so understand the charge. It has reference directly to the preceding portions of the charge, which in a remarkably clear and explicit manner define murder in the first degree. No juror with the least degree of intelligence, under the charge given in this case, could conclude that the verdict of murder in the first degree could be rendered unless it was established beyond a reasonable doubt by the evidence that the accused, with a calm mind and formed design, deliberately killed his wife. This portion of the charge has reference to the charge preceding it, and, when it says "so kill," it means, and of necessity means, in the manner and condition of mind as set forth in the preceding portions of the charge. However, there was no objection to the charge; and this being the case, the rule is that it must have been calculated to injure the rights of the accused. This proposition is supported by any number of cases, the leading case being *Bishop v. State*, 43 Tex. 390. Tested by this rule, was appellant injured? As we said in the original opinion, there is no murder in the second degree in this case. The learned counsel of appellant, in argument, admitted that, if the accused was sane, he was guilty of murder upon express malice. If this be true,—and it is absolutely true,—then no possible injury could have resulted from this charge, if the appellant's construction be correct.

It is insisted by counsel for appellant that, if we affirm this judgment, it will be contrary to law, and contrary to the previous decisions of this court. If contrary to law, this judgment ought not to be affirmed. If contrary to previous decisions, and those decisions are wrong, being correct in all other respects, the judgment ought to be affirmed. It is not contended by counsel that a change of opinion has wrought a legal injury to appellant, in mislead-

ing him so as to deprive him of a legal defense. Nothing of this sort is intimated. We have discussed the cases referred to by appellant in which he insists that we have laid down a different rule in regard to the testimony of an expert. We have shown that no case contains the question here raised. We have shown that in the *Webb, Leache, and Williams Cases, supra*, the observations of the court were mere dicta. But concede, for the argument, that this court has changed its opinion (which is not the case); if we are correct now, the appellant has no right to complain, he having been misled in no manner calculated to deprive him of a legal defense. But, as we have before observed, the question in regard to the manner of obtaining the opinion of an expert has never been presented to this court in the shape presented in this case. There has been no change of opinion, but there have been dicta, which are not supported by the authorities. We have given this record a most careful examination, in the light of the consequences of the verdict, and are thoroughly aware of the fate pending over the appellant, and would not hesitate to reverse the judgment if we thought appellant had been deprived of a legal right; but we have found nothing in the record tending remotely to show that appellant has been deprived of a legal right. The evidence is amply sufficient, in fact conclusive, of the guilt of the accused; the verdict of the jury is supported beyond all question by the evidence; and we have found nothing in the record authorizing this court to reverse the judgment. The motion for rehearing filed by appellant is overruled, and the judgment affirmed.

Davidson, J., concurring (Filed December 15, 1897):

I concur in the conclusions reached by the presiding judge. As to whether the bill of exceptions in regard to the testimony of the expert witness Dr. Davis is complete, so as to raise the question at issue, I simply quote the qualification of the trial judge to said bill: "The evidence in the case was very voluminous, and in part contradictory. The fact of the killing itself, relied on by the defense as one of its strongest, if not only, ground showing insanity, was one of the disputed facts in the case, provable only by circumstances, and it was impossible to form a hypothetical case assuming all the evidence in the case to be true, because there was no direct evidence of the killing, and said testimony was contradictory in part; and the court stated to counsel that the state would be allowed to state a hypothetical case based upon the assumption that her testimony was true, and embracing all the evidence for the state, and to ask the opinion of the witness based upon such hypothesis; and that the defendant would be allowed to state a hypothetical case based upon the assumption that his testimony was all true, and on all reasonable inferences to be drawn from such testimony, and to express his opinion based upon such hypothetical case. The state embraced all its testimony in its hypothetical question, and, upon the assumed truth of said question, the witness stated his opinion that defendant was sane. The defendant then put its hypothetical case to wit-

ness based on the assumption that all his testimony was true, and based on the assumption that all reasonable inferences to be drawn from his testimony were true, including the fact that defendant, without reason, motive, or cause, killed his wife and children, upon which question witness answered that upon such hypothesis he would say the defendant was insane. All the evidence was embraced and included in the state's hypothetical question and defendant's hypothetical question combined." It will be seen from this statement of the judge that two hypothetical questions were stated,—one based upon the evidence for the state, and the other based upon the evidence for the defendant. The expert witness answered upon the state's hypothetical question that the defendant was sane, and upon the hypothetical question put by the defendant that he was insane. Taking these answers, we are forced to the conclusion that the testimony was not only incongruous and contradictory, but led the mind of the expert to two different conclusions. Under such a state of case, it is evident that a hypothetical case embracing all the facts adduced on the trial in this respect could not be answered by the witness without first having decided in his own mind the credibility of the witnesses testifying to such facts. This, of course, he could not do. The credibility of the witnesses and the weight to be given their testimony in this state is entirely within the province of the jury. Then, we have the question as stated in the opinion of the presiding judge sharply presented, because no hypothetical question was put to the witness covering the entire testimony adduced in relation to insanity. The question, then, is as to whether the expert witness can be asked hypothetical questions involving the different theories, without requiring him in one question to pass upon all the testimony adduced. It is conceded by Judge Henderson that, if the testimony is incongruous and contradictory, hypothetical questions can be asked, presenting the different theories, and the witness be required to state his opinion on each. I agree with the presiding judge that this can be done in either event, whether the facts are disputed or not. If this were not true, there would be endless confusion and interminable discussion as to what are the facts, or whether the facts are incongruous or not. That the hypothetical questions may be put to the witnesses in this manner is sustained by the weight of authority, and is the sounder rule. In support of this proposition, I refer to *Shirley v. State* (Tex. Crim. App.) 36 S. W. 267; *Jones, Ev.* § 372, and notes for collated authorities; *Stearns v. Field*, 90 N. Y. 640; *Harnett v. Garcey*, 66 N. Y. 641; *Mercer v. Voss*, 67 N. Y. 56; *Fairchild v. Bascomb*, 35 Vt. 398; *People v. Augsburg*, 97 N. Y. 501; *Guilerman v. Liverpool, N. Y. & P. S. S. Co.* 88 N. Y. 358; *Coyle v. Com.* 104 Pa. 117; *Pidcock v. Potter*, 68 Pa. 342, 8 Am. Rep. 181; *State v. Klinger*, 46 Mo. 224; *State v. Hayden*, 51 Vt. 296; *Stephen, Dig. of Ev.* p. 105, note. Mr. Jones, in his work on Evidence (vol. 2, § 373), thus states the question: "The facts are generally in dispute; and it is sufficient if the question fairly states such facts as the proof of the examiner tends to establish, and fairly presents his claim or theory. It cannot be ex-

pected that the interrogatory will include the proofs or theory of the adversary, since this would require a party to assume the truth of that which he generally denies." He is here discussing the practice of putting hypothetical questions. If one side fails to include all the testimony in the hypothetical question, the other may go into the matter fully on cross-examination. This, under all circumstances, will get the matter fairly before the jury; and such a practice is commended by the authorities I have examined on the question. See also *Goodwin v. State*, 96 Ind. 550; and there are other cases in Indiana to the same effect.

Henderson, J., concurring:

I agree to the conclusion reached by a majority of the court in this case, but I disagree as to the rule of practice therein laid down with reference to propounding to an expert a hypothetical case. I do not concede, as contended for by counsel for appellant, that the rule has ever heretofore been laid down by this court. The question was more nearly involved in the case of *Webb v. State*, 9 Tex. App. 490, than in either the *Leache Case* or the *Williams Case*; but an examination of even the *Webb Case* fails to disclose that the question was properly before the court. Judge White, however, in rendering the opinion in that case, appears to have so conceived it, and discussed the question, and stated the rule to be that, in propounding a hypothetical question to an expert on the question of insanity, all the evidence developed on the trial should be embraced in the hypothetical question put to a party's expert witness. The opinion of the presiding judge discusses the matters involved in said cases, and I will no further refer to them, save to suggest that I cannot understand how counsel for appellant so strenuously insists in his motion for rehearing that he was misled by the decision in the *Williams Case* as to the rule laid down in propounding a hypothetical question to an expert, when the *Williams Case*, at the time the BURT CASE was tried, had not then been decided by this court. The question as to the proper interrogatory to be propounded to an expert witness was not before the court in the *Williams Case*, and what was said on the subject in that case, on a careful reading, would obviously appear to the legal mind to be merely *dicta*. Besides, as above stated, the BURT CASE was tried in the district court of Travis county on the 27th day of November, 1896, while the *Williams Case* was not decided by this court until March 27, 1897; so it is absolutely impossible that counsel could have been at all influenced by anything that was said in the *Williams Case*.

I would here call attention to the case of *Shirley v. State* (Tex. Crim. App.) 36 S. W. 267, decided by this court on the 10th of June, 1896. The opinion in said case would indicate that this very question had come directly before this court in the decision of that case, and the opinion would appear to lay down a different rule than that contended for by appellant. I quote from the opinion as follows: "Upon the trial, counsel for the state submitted to the two physicians, G. B. Beaumont, and C. M. Alexander, a hypothetical case. The physi-

cians gave as their opinion that the appellant was not only sane, but that he was feigning insanity. Counsel for appellant objected to this opinion, because the hypothetical case was not full, and did not introduce the testimony introduced by the appellant tending to show insanity. This objection was not well taken. If not satisfied with the hypothetical case submitted to the doctors by counsel for the state, it was the duty of the counsel for appellant to submit a case made up of all the testimony. Again, the opinion of the doctors was not based upon the testimony that they had heard alone; but they had made examinations of the appellant, had observed his conduct, and the opinion was based upon the evidence delivered by the witnesses and their personal observation of the conduct of the appellant." On an inspection of that record, it will appear, as suggested in the latter part of said opinion, that the experts were examined upon the hypothetical case put, in connection with their personal examination of the appellant and their observation of his conduct. I think it may be said that the question to be propounded to one's expert witness upon a hypothetical case was not fairly involved in the *Shirley Case*.

After an examination of all the authorities which are accessible, I think the true rule on this subject is simply this: that when the issue of insanity is gone into, and testimony is introduced upon that question, and an expert is introduced by a party, and a hypothetical question is propounded by such party to such witness, he should embrace in such hypothetical question all the facts that have been developed in the evidence bearing upon that issue which are not incongruous and which are not disputed. If any facts are incongruous or are disputed by him, of course he would be authorized to omit such facts; and, on cross-examination, the opposite party could, if he saw fit, in addition to the hypothetical question put by the party introducing the witness, propound a hypothetical case of his own, and add thereto such other facts as may have been omitted by the opposite party, and which might occur to him to be material. Either party should be authorized to propound hypothetical cases embracing the disputed facts; that is, each party would embrace the facts believed by him to be true which may be disputed by his adversary. Such a course seems to me to be fraught with fairness. See *Buswell, Insanity*, §263; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *Goodwin v. State*, 96 Ind. 550; *Fairchild v. Bascomb*, 35 Vt. 398; *Hathaway v. National L. Ins. Co.* 48 Vt. 335; *Stephen, Dig. of Ev.* p. 105, and note. Authorities can, of course, be found to the contrary, and some of them go to the extent of authorizing a hypothetical question to be presented to an expert embracing only such facts as a party desires to present. See *Coyle v. Com.* 104 Pa. 117, and *Sterns v. Field*, 90 N. Y. 640.

It occurs to me that the rule above stated is not only supported by the best-considered authorities, but that it is logical. All of the facts which are adduced in evidence bearing upon the issue of insanity are a part of the defendant's character in that respect. Certainly, all of the undisputed facts pertain to him, and serve to shed light upon his character with re-

spect to his sanity. Now, if the evidence contained a great many facts indicating eccentricity of character, and a few of these are culled out and put to an expert, he might say that they did not necessarily indicate insanity of the defendant; whereas, if all the eccentric facts are presented to the expert, he might say that they clearly indicate insanity. If, moreover, the record embraces a great number of facts, some indicating sanity and others insanity, and the facts indicating insanity alone are presented to an expert, he might say that the party was insane; whereas, if all the facts in combination are submitted to the expert in the hypothetical question, he might say that they indicated his sanity or insanity, as the case may be. What I mean to say is this: That when all of the facts in evidence bearing upon the issue of the insanity of the defendant are undisputed, and the expert is adduced by the state to respond to a hypothetical question put, that question should, in common fairness, embrace all the facts. This, in concrete form, alone constitutes his character for sanity or insanity, and the opinion based upon all the facts can alone shed any light upon the question or be of any service to the jury. While I believe this to be the correct rule, yet it by no means follows that a case ought to be reversed where this method of propounding a hypothetical case has not been followed; and I would not be understood as holding that any case ought to be reversed because a proper hypothetical question is not put in the first instance by a party calling an expert, where full opportunity is afforded the opposite party for cross examining that witness. Much less would I agree that the opposite party may object to a hypothetical question on the ground that it does not embrace all the facts, and conceal from his adversary, or refuse to state for the benefit of his adversary, such facts as are not embraced in the hypothetical question. In the case at bar, full opportunity was afforded the appellant on cross-examination to put a full case to the expert, or to put any character of hypothetical case arising from the evidence which he saw fit; and I do not believe that he could refuse to avail himself of this opportunity, and then ask a reversal of the case because a full hypo-

thetical case had not been put by the state. Further, I do not believe that the bill of exceptions in this case fairly raises this question. The authorities hold that the bill must be so full and certain in its statements that in and of itself it will disclose all that is necessary to emphasize the supposed error. It must sufficiently set out the proceedings and attending circumstances below to enable the appellate court to know certainly that error was committed. The judge must certify to the truth of the facts upon which the exception is predicated; and the taking of an exception, without the recitation of such facts in the certificate of the judge, will not be remedied by the allegation of the grounds upon which the exception was taken. The bill of exceptions must itself certify the ground, or it must reasonably appear from the bill itself.

With regard to the testimony of the witness Carrie Sparks, I think it sufficiently appears that the exclamation she heard was from the wife of the appellant, and was addressed to him. It was made on the evening of the homicide, about 7 o'clock. The evidence shows that the only inmates in said house were the appellant, his wife, two small children, and the nurse. At that particular time the nurse and children were absent, and there is no testimony suggesting that anyone else could have been in the house at the time, save the appellant and his wife. True, the evidence is not positive establishing the fact that it was the voice of the wife addressed to her husband (appellant); but, while it was circumstantial, it was of such a character as to almost certainly exclude the idea that the expression could have been made by any other party than the wife, or to any other person than her husband. The evidence shows positively the absence of the nurse and children from the house at that hour, and presumptively or inferentially the presence there at that time of appellant and his wife; and I believe it was admissible for the state to show by the witness Carrie Sparks that, as she passed the residence of appellant, she heard a woman's voice exclaim, in a high tone, as if addressing someone, "I will not stand this any longer!" and this could be used by the state for the purpose of showing motive, and directly as tending to suggest sanity.

With the foregoing observations, I agree with the conclusion reached by the court.

CALIFORNIA SUPREME COURT (Department 2).

Re Estate of Henry KLEMP, an Insolvent Debtor.

(.....Cal.....)

A combined harvester used by a man engaged in the business of farming and grain raising, which he testifies is a necessary implement for his business, is exempt from execution under Code Civ. Proc. § 660, subdiv. 3, as a farming utensil or implement of husbandry, al-

though the owner has used it, after doing his own work, in harvesting the crops of his neighbors.

(November 9, 1897.)

A PPEAL by an insolvent from an order of the Superior Court for Sutter County refusing to set apart to him a combined harvesting machine as exempt from execution. *Reversed.*

The facts are stated in the opinion.

NOTE.—As to exemptions of tools of trade from execution, see also *Watson v. Lederer* (Colo.) 1 L. R. A. 854, and *note*; *Re McManus* (Cal.) 10 L. R. A. 39 L. R. A.

567; *Consolidated Tank Line Co. v. Hunt* (Iowa) 12 L. R. A. 478; and *Davidson v. Hannon* (Conn.) 84 L. R. A. 718.

Messrs. White, Hughes, & Seymour, for appellant:

"The farming utensils or implements of husbandry of the judgment debtor" are exempt from execution.

Code Civ. Proc. subd. 3, § 690.

Statutes of exemption are remedial in character, and are enacted for humane purposes, and are everywhere given a most liberal construction, in furtherance of their benevolent objects.

Montague v. Richardson, 24 Conn. 388, 63 Am. Dec. 178; *Re McManus*, 87 Cal. 292, 10 L. R. A. 567; *Re Robb*, 99 Cal. 202.

In Kansas a printing press, type, and other articles used in publishing a newspaper have been held to be exempt under a statute exempting "the necessary tools and implements of any mechanic," etc.

Bliss v. Vedder, 84 Kan. 59, 55 Am. Rep. 287.

So, in the state of Vermont a barber's chair was exempted as a tool or implement "necessary for upholding life" of the debtor.

Allen v. Thompson, 45 Vt. 472.

In Wisconsin a mowing machine was exempted as a "farming utensil" necessary to a farmer in the conduct of that business.

Humphrey v. Taylor, 45 Wis. 251, 30 Am. Rep. 738.

There seems to be no limitation of the things which may be held exempt as implements, save that of necessity. If they are necessary in the debtor's trade or calling, they are exempt, though they are not mere tools, but are complicated and expensive machinery.

Freeman, Executions, 2d ed. § 226a; *Re Baldwin*, 71 Cal. 74; *Robert v. Adams*, 38 Cal. 383, 99 Am. Dec. 413; *McCue v. Tunstead*, 65 Cal. 506.

Modern ways of farming, as well as of doing all kinds of business, make it necessary for the farmer or artisan who would successfully compete with others engaged in the same business, to arm himself with the most improved tools and machinery.

Healy v. Bateman, 2 R. I. 454, 60 Am. Dec. 94; *Montague v. Richardson*, 24 Conn. 388, 63 Am. Dec. 178.

Messrs. K. S. Mahon and Lawrence Schilling, for respondent:

A reasonable construction should be given to the statute, and not one which would pervert its benevolent design, and enable gross frauds to be perpetrated under cover of law.

Re Baldwin, 71 Cal. 78.

The farmer who farms 160 acres cannot afford such an expensive piece of machinery, costing \$1,500, and requiring twenty to thirty mules, or a traction engine to haul it. Nor is it a "necessary tool" to such a farmer.

Roberts v. Adams, 38 Cal. 383, 99 Am. Dec. 413.

The legislative intent showing that a harvester is not a "farming implement" is found in § 2955, Civil Code, as amended March 16, 1895, Stat. 1895, p. 57.

Sec. 2955. Mortgages may be made upon the following personal property, and none other.

"Third.—Steam engines and boilers.

"Seventeenth.—Harvesters, threshing outfits, hay presses, and farming implements."

Some large farmers who own harvesters use large steam traction engines to pull the har-

vester, and find them much cheaper and more profitable to use than horses or mules as motive power.

Such an outfit—harvester and engine—cost from \$5,000 to \$7,000.

Suppose such a farmer should avail himself of the insolvent law. Would this court sanction the exemption of such an outfit for the use of the insolvent debtor.

Such a construction would enable a person to retain to his own use thousands of dollars' worth of property, and place it beyond the reach of his creditors, who, perhaps, have supplied him with the necessities of life.

Expensive machinery of such character is not exempt.

Re Baldwin, 71 Cal. 74; *Ford v. Johnson*, 84 Barb. 364; *Meyer v. Meyer*, 23 Iowa, 359, 92 Am. Dec. 432.

McFarland, J., delivered the opinion of the court:

This is an appeal by an insolvent debtor from an order of the superior court denying his petition to have set apart to his use "one Holt Bros.' Combined Harvester." The court adjudicated that said harvester, and certain other personal property not involved here, "are not utensils or implements of husbandry," and in so holding we think the court erred. The court found that at the date of the adjudication in insolvency, and for a long time prior thereto, the appellant had been engaged in the business of farming and grain raising, and during all that time had used and employed said harvester in the conduct of his business. The only evidence introduced on the subject of the harvester was the testimony of the appellant himself. He testified that for about nine years he had been engaged in farming and wheat raising on a certain piece of land in Sutter county; that he had cultivated between 1,000 and 1,100 acres; that he had used certain personal property, including said harvester in said business; and that "all thereof were and are necessary implements for the proper conducting and care of my said business." He further testified as follows: "I purchased said harvester in the reaping season of 1888, and paid for the same about \$1,500, but at this time it is worth about \$300. I purchased said harvester to be used in harvesting my own crops, grown on the leased lands above mentioned, but I have on some occasions, after having harvested my own crops, used said harvester in harvesting the crop or crops of one or two of my neighbors, usually in return for assistance rendered by such neighbor or neighbors in harvesting my own crops. I never have been in the business of harvesting grain, nor have I used said harvester in the business of harvesting grain for others in any manner other than above explained. A combined harvester is a necessary tool for a farmer and grain raiser who is engaged in the business to any considerable extent." He further said that "comparatively few farmers in Sutter county own a combined harvester. Some of them still use headers, and some hire combined harvesters to harvest their crops." This testimony was in no way controverted.

Section 690, subd. 3, Code Civ. Proc., provides that "the farming utensils or implements

of husbandry of the judgment debtor" are exempt from execution. This provision has, on its face, no limitation as to the character of the implements of husbandry so exempt. It does not even provide that they must be "necessary," as is provided in statutes of exemption in many other states, and as is provided in our own Code as to other property exempted. Of course personal property owned by a farmer which is really not an implement of husbandry is not exempt under the section, but if it be such an implement its exemption does not depend upon its value. There is no limitation as to value, although there is such a limitation as to certain other kinds of property which are exempt under other provisions. It is clear from the evidence that the combined harvester in question is a farming utensil and an implement of husbandry, if, indeed, that fact is not a matter of common knowledge. It was used directly and prominently in the business of farming and for no other purpose, and it is not contended that appellant had other implements by which he could cut, thresh, or winnow his wheat. Horse rakes, gang plows, headers, threshing machines, and combined harvesters are as clearly implements of husbandry as are hand rakes, single plows, sickles, cradles, flails, or an old-fashioned machine for winnowing. There is no ground for excluding an implement from the operation of the statute because it is an improvement, and supplants a former implement used with less effectiveness for the same purpose. Present methods of farming, as well as conducting other kinds of business, require the use of improved machinery. The fact that not many farmers in Sutter county own combined harvesters is of no importance. It appears that it was not unusual for them to hire such harvesters. The amount of land cultivated by appellant is certainly not unusual in this state. The whole subject is one of legislative policy, and until the legislature shall see fit to limit the implements of husbandry which shall be exempt—either by enumeration or by a restriction based on value—a court has no warrant in any of the reasons given by respondent to eliminate from the statute anything which is clearly within its terms. No decisions of this court cited by respondent are adverse to the above views. In the case of *Re Baldwin*, 71 Cal. 74, it was held that a threshing machine with an expensive outfit was not exempt because it was used chiefly in doing work for others. The court there says: "It was not intended that all farming machinery which a farmer may own should be exempt, because, while he uses it chiefly by renting it out, or in doing work on others' farms for hire, he still uses it to a small extent on his own land. To hold otherwise would enable the farmer, who cultivates 40 acres, to invest a large amount of money in expensive implements, and to hold them free and clear of his creditors, though they were used but for a day on his own land, and for all the balance of the year were rented or hired out to others." And in the later case of *Estate of McManus*, 87 Cal. 292, 10 L. R. A. 567, this court say that in the *Baldwin* case it was held that the threshing machine was not exempt "upon the ground that the outfit was principally used in thresh-

89 L. R. A.

ing grain raised by other persons for hire." For a discussion of the general subject, see *Montague v. Richardson*, 24 Conn. 338, 63 Am. Dec. 178, and notes; it being remembered that our Code is broader than any to which our attention has been called, there being no such word used as "necessary," "proper," "adequate," etc.

We think that the court below erred in refusing to set apart the combined harvester as exempt, and therefore the order appealed from is reversed.

We concur: **Temple, J.; Henshaw, J.**

C. B. RODE *et al.*, Appts.,

v.

John D. SIEBE, Resp't.

(.....Cal.....)

1. The collection of taxes at an earlier date on personal property unsecured by lien on real property than upon other property, although the taxpayer thus loses the use of his money earlier than other taxpayers do, does not violate Const. art. 13, § 1, requiring property to be taxed "in proportion to its value."

2. A statute making different provisions for the collection of taxes on different kinds of property is not special, if the classification is based upon intrinsic differences requiring different regulations.

3. A statute authorizing taxes on personal property not secured by lien on real property to be collected at the time of making the assessment before equalization, before levy for the year, and before the beginning of the fiscal year to which they belonged, with a provision for subsequently collecting or refunding any difference between the amount collected and that which ought to be paid, is not unconstitutional for lack of uniformity, since there is sufficient difference between secured and unsecured taxes to justify the discrimination in the procedure.

(*Van Fleet and Harrison, JJ., dissent.*)

(January 4, 1906.)

A PPEAL by petitioners from a judgment of the Superior Court for the City and County of San Francisco refusing to restrain defendant from proceeding to seize and sell petitioner's property to enforce payment of taxes. *Affirmed.*

The facts are stated in the opinion.

Mr. Walter H. Levy for appellants.

Messrs. Naphtaly, Freedrich, & Ackerman, W. F. Fitzgerald, Attorney General, and **W. H. Anderson** for respondent.

Beatty, Ch. J., delivered the opinion of the court:

The defendant is assessor of the city and county of San Francisco. The plaintiffs are

NOTE.—As to discrimination between real and personal property with respect to taxation, see also *Ferris v. Vanier* (Dak.) 3 L. R. A. 718; *Wells v. Hyattsville* (Md.) 20 L. R. A. 89; and *Levi v. Louisville* (Ky.) 28 L. R. A. 480.

residents of San Francisco, and in March, 1895, in response to defendant's demand, made a return showing that they were owners of personal property in said city and county subject to taxation for the ensuing fiscal year, but owned no real property. The defendant assessed their personal property, and on May 20, 1895, demanded payment of the tax, amounting, at the rate of the tax levy for the previous year, to \$71.78, and threatened, in case of their refusal to pay, to seize and sell enough of said property to make the amount due. To restrain such threatened seizure and sale, this action was begun. The superior court denied the injunction, and plaintiffs appeal.

It is conceded that the proceedings of the assessor were sanctioned by the express provisions of the statute, but it is contended that a statute which authorizes the collection of taxes on personal property not secured by lien on real property, before equalization, before levy for the year, and before the beginning of the fiscal year to which they belong, is unconstitutional in those particulars, and to that extent unenforceable. The specific objection to the law is that it violates the constitutional requirement as to uniformity of all general laws, and especially of laws relating to taxation. It will not be necessary, in order to indicate the position of appellants, to cite the various sections of our revenue law to which reference has been made in the argument. It is sufficient to say that under the Constitution and laws of California the fiscal year begins on the 1st of July, and ends on the 30th of June. The taxes for each fiscal year accrue on the first Monday in March preceding its commencement, and become a lien from that date upon the real property of the respective taxpayers. Where the real property of a taxpayer is sufficient to secure the payment of all his taxes upon his personal property, as well as upon the realty itself, he is not required to pay the tax before the end of November, prior to which time the board of supervisors, first, and the state board of equalization, afterwards, equalize the assessments, and then establish the rates for state and county purposes, according to which the tax is to be levied. But where a taxpayer has no real property, or none sufficient to secure the payment of his taxes, the assessor is required to collect them at the time of making his assessment, and, in case of failure to pay, to sell sufficient of the property of the delinquent to make the amount of the tax, with costs. As this collection must be enforced before the meeting of either board of equalization, and before the rate for the ensuing year is ascertained and the levy made, it is provided that it shall be made according to the rate levied the previous year; and as this may be, and generally is, greater or less than the subsequent levy for the current year, provision is made for refunding to the taxpayer any excess in the collection, and for the payment by him of any deficiency. It is, of course, undeniable that the citizen who by the provisions of this law is compelled to pay his taxes six months sooner than others are required to pay on the same kind of property is under the disadvantage of being deprived of the use of his

money for a longer period than other owners of personal property; and it is easy to put extreme cases, as counsel have done, in which real hardship would result. But it would be equally easy to imagine extreme cases in which honest taxpayers, whose taxes are perfectly secured by lien upon their real property, would suffer great injustice by the removal of personal property from the jurisdiction between the 1st of March, when taxes accrue, and the end of November, when secured taxes become delinquent. The validity of a law is not to be tested, however, by its application to extreme cases, involving the assumption of grossly arbitrary violation of their duties by public officers. If every law were declared unconstitutional which by the application of such a test could be shown capable of working injustice, we should have very few laws left. As to the actual working of this particular law, we know that it has been in operation in this state, outside of San Francisco, for almost forty years, and that its validity has never before been drawn in question. This could scarcely have happened if its operation was oppressive or unjust. These arguments, therefore, must be put aside, and the law considered with reference to the different clauses of the Constitution which it is supposed to violate.

First, it is said to violate § 1 of article 18, which provides that "all property in the state, not exempt under the laws of the United States shall be taxed in proportion to its value to be ascertained as provided by law." There is nothing in the revenue law which is inconsistent with this provision, unless it is the requirement that unsecured taxes must be paid at the time of assessment, thereby causing the taxpayer to lose the use of his money longer than other taxpayers do. As to the right of equalization, that is not taken away by a previous collection of the tax; and if the assessment is reduced by either board of equalization, the excess over the true amount of the tax is refunded. The same is true as to the rate. If the levy for the previous year is larger than the levy for the current year, the excess is refunded. In the end all taxpayers are taxed uniformly upon their duly-equalized assessments, and it remains only to inquire whether there is such an intrinsic difference between secured and unsecured taxes as to justify the legislature in making different regulations as to the time of their collection. The clause of the Constitution which is supposed to preclude such a difference of regulation is subdiv. 10 of § 25 of article 4, which prohibits the legislature from passing local or special laws for the assessment or collection of taxes. This law is not a local law, and it is not special if the classification which it makes is based upon intrinsic differences requiring different regulations. That there is such intrinsic difference between secured and unsecured taxes seems to me self-evident. The object of the Constitution is to make the burdens of taxation equal in proportion to the value of all taxable property. To accomplish this object, it is not only necessary that assessments should be duly made and equalized, and the rate levied uniformly, but measures must be taken to secure the collec-

tion from all alike. The law imposes upon real estate a lien, dating from the first Monday in March of every year, for all taxes levied upon the owner for the ensuing fiscal year. It makes such taxes perfectly secure, by a lien upon immovable property, and the burden of this lien is in many instances an inconvenience and disadvantage to the owner. If the owner of personal property has no real property to secure the payment of his taxes, must the state leave him for more than six months at liberty to remove himself and his property without the jurisdiction, and risk the loss of the tax altogether, to the prejudice of those whose taxes are secured? Either it must do so, or it may collect the tax at once, or take the property into its possession, and thus secure the only lien to which personal property may be subjected. These considerations make it clear that there is a difference between secured and unsecured taxes which justifies the classification which the legislature has made, and leaves the law entirely free from objection on the ground that it is not general and uniform.

The other objections stated by counsel have not been pressed, and we think them wholly without merit.

Judgment affirmed.

We concur: **Henshaw, J.; Temple, J.; Garoutte, J.; McFarland, J.**

Van Fleet, J., dissenting:

I dissent. In my judgment the provisions of the act in question clearly violate the constitutional rule that "all property shall be taxed in proportion to its value." Const. art. 13, § 1. This provision is not satisfied by an equal assessment merely. Taxation consists in the payment of taxes, and, if the operation of the statute is such as to make one person or one kind of property pay more in proportion to value than other persons or property, such a statute must be void. Under the operation of this law, the owner of personal property not owning any real estate, is forced to pay his tax many months, perhaps nearly a year, before those owning real estate are required to pay their taxes on personal property. He is therefore compelled to lose the interest on his money for that time. Obviously the state has no more right to deprive a man of the use of his money than it has to deprive him of the money itself. The result is that he has to pay more than others on the same valuation,—the difference being measured by the value of the use of the money during the period in which the others are not required to pay. This constitutional rule is further violated by this legislation because the "value" in proportion to which the taxation is to be laid is "to be ascertained as provided by law," and such ascertainment has not been completed when the tax is required to be paid. The provisions of the statute concerning equalization make no exception as to any kind of property, and none could constitutionally be made. Article 4, § 25, subds. 10, 83. The right of any taxpayer to have his assessment reduced, if too high, is therefore perfect; and until the opportunity therefor has been afforded the taxpayer, the value has not been "ascertained as provided by law." In any particular case the

assessment of personal property made by the assessor may be, and not infrequently is, much too high, and is reduced by the board of equalization; yet the owner, if not also owning real property, is compelled to pay a tax based on this excessive valuation. He is therefore taxed in excess of his proportionate amount. It is said that the excess, if any, will be ultimately returned to the taxpayer. But this is no answer. For, first, he is deprived of the use of the money which the state has thus unjustly taken from him, and loses the interest thereon. Moreover (and this is no light consideration), a person who could pay the proper amount of tax may be wholly unable to pay the excessive amount thus demanded, and is therefore forced either to sell his property on the spot, perhaps at a ruinous sacrifice, or to submit to a seizure and sale by the assessor at still greater loss, aggravated by penalties and costs. By this process he is certainly taxed, in effect, at a higher rate than other persons, and the statute as to him, has not a uniform operation. The system provided by these provisions is also open to the similar objection that the property owner is required to pay his tax before even the rate of taxation has been ascertained. He is required to pay on the basis of the levy for the preceding year, and, while this may be lower than the rate which may be levied for the current year, it may also be much higher. In the latter case the taxpayer is required to pay to the state a sum in excess of his proportionate share, and he is deprived of the use of the money represented by such excess for many months, and in many cases is compelled to resort to onerous, and, for a poor man, expensive proceedings to collect it. It is contended that this legislation is based on a classification which the legislature is competent to make. But, if this were so, it would not help the case. The legislature has no power, by any process of classification, to tax any person, or any kind of property, except in proportion to the value of the property. But the supposed classification is in itself arbitrary and invalid. Personal property might be said to constitute a class, as distinguished from real property; and the legislature might, perhaps, make such differences in the rules for the taxation of these different classes, as should legitimately follow from the inherent difference between them. But the classification here attempted is not based upon any difference in the property itself or even in its situation. What has been undertaken is to prescribe one rule for the taxation of personal property when owned by one person, and a different rule for the taxation of precisely similar property when owned by another person. Such a classification the legislature has no power to make. *Pasadena v. Stimson*, 91 Cal. 288, 251; *Ex parte Frank*, 52 Cal. 608, 28 Am. Rep. 642. It is said that, unless some such distinction be made, much property will escape taxation. This, if true, would not entitle the legislature to overstep its constitutional power. But the suggestion is not necessarily true. It would be quite possible to frame a system, operating equally upon all, in which no such result would necessarily follow; and, in fact, for more than thirty years such a system prevailed in San Fran-

cisco, and it was never claimed, so far as I am aware, that personal property taxes were not collected as closely there as in the other counties of the state. It is also said that this system has been substantially in force in this state since a very early period, and that there is therefore a strong presumption of its constitutionality. It must be remembered, however, that during the greater portion of the time it was not in force in the city and county of San Francisco, wherein a very large proportion of all the taxes are paid. This system presses most heavily on the poor,—the class which is the least able to undertake legal contests,—and by far the greater proportion of the poor are in a large city like San Francisco. In the interior counties the number of persons coming under the operation of this law is very small. Most of them are too poor to resist the law, and others have been restrained, perhaps, by the sentiment that it is not patriotic to refuse to pay taxes. Under such circumstances the fact that the question has not previously been mooted can have no great force.

This whole system, it seems to me, presents an instance of the most vicious kind of discrimination known to the law,—a discrimination against the poor. It would be much better, if such a thing were necessary, that the state should lose some small portion of its revenue, than that it should wring it, by questionable means, out of those least able either to endure or to resist such exactions. For this reason, if for no other, it is the duty of courts to jealously scrutinize such a discriminating system, and to unhesitatingly condemn it, unless a clear constitutional warrant for its exercise has been made to appear. In my judgment, no such warrant can be found under the Constitution of this state. I think the judgment should be reversed.

Harrison, J., dissenting:

I also dissent from the judgment of the majority of the court, upon the following con-

siderations, as well as for the reasons expressed in the opinion of Mr. Justice Van Fleet: The provisions of §§ 3820-3824 of the Political Code are, in my opinion, totally at variance with the constitutional rights of the citizen. By these sections the assessor is authorized to assess and summarily sell the property of any person "when in his opinion" the person does not own sufficient real property within the county to secure the payment of his taxes. Under this provision an assessor has the unrestricted power to exercise favoritism or antagonism towards the person to be assessed. It does not affect the principle whether the power is so exercised or not. The fact that it may be used as a cover to an unfair assessment is the test of the right of the legislature to confer the power. Under the principles of the Constitution of this state, the sovereign power of taxation cannot be intrusted to the arbitrary will of any individual, and it is equally immaterial to the question that the person assessed may subsequently obtain redress for any abuse of this power. The state can by this mode no more deprive the citizen of his property for six months than it can take it from him entirely. In either case his property is taken without due process of law. Under the authority thus given, one's property, which in reality is not of greater value than \$500, may be assessed at \$5,000, and the very property so assessed taken from the owner, and summarily sold at a forced sale, where, as it is well known, its value is never realized, and the surplus, after deducting the taxes and costs, returned to the owner. It is poor satisfaction to him that months afterwards the assessment is reduced by the board of equalization to its actual value, and that still later he may recover from the county the difference between what should have been his taxes and what the assessor took at the sale of his property. I have no hesitation in holding that such a procedure is contrary to the principles of free government.

SOUTH DAKOTA SUPREME COURT.

Julia K. SEARLE, *Respt.*,

v.

City of LEAD, *Appt.*

(.....S. D.....)

1. **A liberal construction should be given** to the constitutional provision for just compensation to the owners of property taken or damaged for public use.
2. **The ascertainment and payment of damages** that may be caused by a change of grade of a street is a condition precedent to the right of the municipality to proceed under a Constitution providing for just compensation to the owners of property taken or damaged for public use.

NOTE.—As to damages by grading a street, see also *note* to *Hickman v. Kansas* (Mo.) 23 L. R. A. 666; *Blair v. Charleston* (W. Va.) 35 L. R. A. 852; and *Ressegieu v. Sioux City* (Iowa) 28 L. R. A. 359.

3. **An allegation of a threat to "change the grade"** of a street is fairly construed to mean a physical grading of the street, and not merely an ordinance establishing the grade.
4. **A mere denial that plaintiff is entitled to any damages**, while affirmatively showing that the work of grading a street in front of his premises is being done, is not such a denial of all the equities of his bill for an injunction as to justify the vacation of an injunction order.
5. **An allegation of irreparable injury to plaintiff's property**, or of the inability of the defendant to respond in damages, is not necessary for an injunction against grading a street in front of plaintiff's premises without paying him compensation for his damages, where the Constitution forbids taking or damaging his property without such compensation.
6. **Damages by the grading of a street in front of one's premises**, although no

prior grade had been established, are within the provision of the Constitution against taking or damaging property without just compensation.

7. A constitutional provision against taking or damaging property for public use without just compensation is self executing.

8. No admission that any damage will be caused by the grading of a street is necessary to the filing of a petition by a city, under Acts 1891, chap. 94, providing for the ascertainment of damages before taking or damaging private property for public use.

(November 20, 1897.)

APPEAL by defendant from an order of the Circuit Court for Lawrence County granting an injunction to restrain defendant from changing the grade of the street in front of plaintiff's property until compensation had been paid for the damage caused thereby.

Affirmed.

The facts are stated in the opinion.

Mr. H. E. Dewey, for appellant:

An injunction will not lie unless some physical act is threatened, like digging up the street.

Hempstead v. Des Moines, 63 Iowa, 36; *Mulholland v. Des Moines*, A. & W. R. Co. 60 Iowa, 740; *Brown v. Lowell*, 8 Met. 172; *Tyson v. Milwaukee*, 50 Wis. 78; *Jennings v. Le Roy*, 68 Cal. 397; *Lewis, Em. Dom.* §§ 210, 667.

When the defendant fully and fairly denies, under oath, the equities claimed by the bill of complaint, the injunction will be dissolved.

2 Walt, Pr. 115.

The extraordinary judicial writs of the courts will not be issued, like summons from justice courts, as a mere matter of course, on application, but the right to the relief demanded must be clear and the facts on which it is asked not disputed and the remedy by ordinary law action inadequate.

3 Walt, Act. & Def. § 6, p. 761.

There is nothing in our Constitution requiring condemnation proceedings, where the property is not actually taken for public use.

It will be observed that the requisite of prepayment is limited to the taking possession of private property for public use, and not to damaging it.

Const. art. 6, § 18.

There have been many attempts to have the word "taking" so held as to cover property consequently damaged by a public improvement, but they have always failed.

2 Dill. Mun. Corp. 4th ed. § 995, p. 1182, and note 1.

The only ground that equitable jurisprudence has ever recognized as being sufficient to sustain an injunction for threatened damages to property is that the damage would be irreparable. Included in this ground is another, *viz.*: That the defendant is irresponsible and unable to respond for the threatened damage, which would, of course, make it irreparable.

3 Walt, Act. & Def. p. 700.

An abutting owner cannot claim any compensation whatever, for purely consequential damages in bringing a street to grade the first time, the street to be used solely for ordinary purposes of travel.

2 Dill. Mun. Corp. 4th ed. §§ 995a et seq. p. 1235.

89 L. R. A.

Messrs. McLaughlin & McLaughlin, for respondent:

The injunction was properly granted.

S. D. Const. art. 6, § 18, art. 17, § 18; *Lewis, Em. Dom.* § 222; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *New Brighton v. United Presby. Church*, 96 Pa. 381; *Hendrick's Appeal*, 103 Pa. 358; *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109; *Davis v. Missouri P. R. Co.* 119 Mo. 180; *Hickman v. Kansas*, 120 Mo. 110, 28 L. R. A. 658; *O'Brien v. Philadelphia*, 150 Pa. 589; *Harmon v. Omaha*, 17 Neb. 548, 53 Am. Rep. 420.

Corson, P. J., delivered the opinion of the court:

This is an appeal from an order granting a preliminary injunction. The plaintiff, claiming to be the owner of certain town lots in Lead city, fronting upon Mill street, in said city, upon which she had erected a house and made other improvements, instituted this action to restrain the city from changing the grade of said street, which she avers the city was threatening to do, and which change of grade, she avers, would cause damage to her property in a sum of, at least, \$1,000, until such damages shall be ascertained and paid. The court made the order restraining the city from grading in front of her premises, but permitted it to complete a sidewalk then partially completed.

The errors assigned upon which the city relies for a reversal of the order are, in substance, as follows: (1) That the complaint does not state facts sufficient to constitute a cause of action for an injunction; (2) that the court erred in making said order after the defendant had presented its proposed answer, in which it denied that plaintiff was entitled to any compensation as in her complaint alleged, or that she would sustain any damage; (3) that the court erred in making the order, having dissolved the restraining order as to the construction of the sidewalk; (4) that the court erred, for the reason that the complaint shows upon its face that the only change of grade threatened was to bring the street to the established grade for the first time; (5) because the complaint contains no allegation that plaintiff would sustain irreparable injury, or that the defendant was not solvent, and fully able to pay any damages plaintiff might sustain by reason of such threatened change of grade.

The complaint states, in effect, that the defendant (appellant here) is a municipal corporation; that Mill street is one of the streets of the city; that plaintiff (respondent here) is the owner of certain lots (describing them) fronting upon said street; that she had erected a house and made other improvements upon said lots on the "natural grade" of said street; and that the defendant threatens to change the grade of said street by raising the same about 3½ feet, thereby leaving the house and other improvements of said plaintiff that depth below the grade, causing damage to her property fronting on said street of at least, \$1,000; and that said defendant has not compensated nor offered to compensate her for the damage so threatened. She therefore prays that said defendant be enjoined from in any manner changing the grade of said street until her damages have been

ascertained and paid. The defendant filed an answer, which will be referred to further on in this opinion. A hearing was had, and the trial court made the order appealed from.

The theory, evidently, upon which the complaint was drawn, and upon which the court below granted the injunction, was that, under the provisions of the Constitution of this state, it was the duty of the defendant to first proceed to ascertain the damage resulting to plaintiff's property by the change of grade or proposed change of grade, and pay or tender the same, before the street could be lawfully graded. The section of the Constitution relied on reads as follows: Private property shall not be taken for public use or damaged without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken." Const. art. 6, § 13. In this connection it may be proper to notice the act of the legislature of 1891, entitled "An Act to Provide for the Assessment by Jury of Just Compensation for Private Property Taken for Public Use or Damaged," approved March 7, 1891, and which constitutes chapter 94, Laws 1891. The first section of this act reads as follows: "In all cases when municipal or other corporations, or individuals, invested with the privilege of taking private property for public use or damaging the same in making, constructing, or repairing any work or improvement allowed by law, shall determine to exercise such privilege, it shall be the duty of such corporation or individual to file a petition in the circuit court of the county in which the property to be taken or damaged is situated praying that the just compensation to be made for such property may be ascertained by a jury." The sections following provide specially the method of proceeding, impaneling a jury, etc. This act seems to have been adopted to provide a summary proceeding for carrying into effect the constitutional provision. It may be assumed from the statements in the complaint that Mill street is one of the streets of Lead city over which the defendant has the right to exercise municipal control, by grading, keeping the same in repair, etc., and in which the public has the usual easements incident to highways in incorporated towns and cities. It may also be assumed from the statements in the complaint that Mill street had not been previously graded or the grade established prior to the erection of plaintiff's buildings, and that the change of grade threatened was from the natural grade to the grade established by an ordinance of the city. It does not appear from the complaint whether the fee to the soil of Mill street is in the city or the owners of lots fronting thereon; but in the view we take of the case, this is not material, as the authority of the municipality over the same and the rights of fronting owners are practically the same as to the liability of the one to pay and the right of the other to recover damages.

The question as to whether or not the facts stated in the complaint entitled the plaintiff to an injunction is an important one, and has not been heretofore passed upon by this court. It involves a construction of the constitutional provision, and the effect of including the term "or damaged" in our Constitution, and the du-

ties and powers of municipal corporations thereunder. It is a general rule that compensation for private property, taken for public use, shall be ascertained and paid before the property is taken; and, in states where such provisions exist, it has been the rule to restrain the taking until after the ascertainment and payment of the compensation. *McElroy v. Kansas City*, 21 Fed. Rep. 257. It is also true, as a general rule, that in states where no constitutional provision exists similar to the one in this state, and in which the term "damaged" is not included, if no property is in fact taken, the incidental damages which may result to the owner of abutting property give no right of action to the owner, and furnish no basis for interference by the courts or otherwise. We say as a general rule, for courts have held in a class of cases that where the injury was in some manner direct, and the estate actually invaded by super-induced additions of water, earth, sand, or other matter or artificial structures placed upon it, so as effectually to destroy or impair its usefulness, it is a "taking," within the meaning of the Constitution. *Vanderlip v. Grand Rapids*, 73 Mich. 52, 23 L. R. A. 247. The reports disclose many cases under the former system where streets were cut down or filled to such a depth as to render the property of the abutting owner comparatively worthless, and yet such owner was without remedy. In other words, the private property of such owner was, in effect, taken for the use or benefit of the public, without any compensation made to the owner. Most of these decisions were based largely upon the decision of the supreme court of Massachusetts in *Callender v. Marsh*, 1 Pick. 417, which was a street-grade case, in which a deep cut had been made. But in that case the learned chief justice who wrote the opinion fully recognized the injustice of the old rule as applied to the facts in that case. He says: "These are cases, without doubt, where an individual may suffer by the exercise of this power, and thus be made to involuntarily contribute much more than his proportion to the public convenience; but such cases seem not to be provided for, and must be left to that sense of justice which every community is supposed to be governed by. . . . Cases apparently hard will occur. The present is such a one."

But the framers of our organic law deemed it proper to fully protect the rights of the abutting property owner in the Constitution itself, and not leave him to the "sense of justice" by which a community is supposed to be governed. The framers of our organic law must be presumed to have been familiar with the provisions in the earlier state Constitutions, and of the many cases in which private property had been, in effect, taken for public use, for which the property owner seemed to have no redress; and it is quite manifest that they inserted the term "or damaged" for the express purpose and object of protecting private property from the arbitrary exercise of municipal or other corporate power. The constitutional provision is unquestionably a wise and just one, and well calculated to protect property owners from injustice and wrong on the part of municipal or other corporations or individuals invested with the privilege of taking pri-

vate property for public use, and should be given a liberal construction by the courts, in order to make it effectual in the protection of the rights of the citizen. The words "or damaged" were, without doubt, added to the usual provisions contained in earlier Constitutions for the purpose of extending the remedy to incidental or consequential injuries to property, not actually taken for public use, in the ordinary acceptance of that term; and the same was adopted by the people with this express guaranty that just compensation should be made for property so taken or damaged for public use. And there is the further express guaranty that this compensation shall be paid before the proposed improvement can be made, or, in the language of the Constitution, "possession is taken." The ascertainment and payment of damages that may be caused is a condition precedent to the right of the municipality to proceed. We are of the opinion, therefore, that, upon the facts stated in the complaint, the court below was authorized to make the order. The words "or damaged" are found in the later Constitutions of several of the states, among which are Illinois, Missouri, Nebraska, Pennsylvania, California, and West Virginia; and the construction we have placed upon these words is fully sustained by the courts of these states. *Werth v. Springfield*, 78 Mo. 107; *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109; *Blanchard v. Kansas*, 16 Fed. Rep. 444; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420; *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779; *Chambers v. Cincinnati & G. R. Co.* 69 Ga. 320; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *New Brighton v. United Presbyterian Church*, 96 Pa. 331; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638. The supreme court of Missouri, in the first case above cited, says: "When property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the Constitution." In the case last above cited, the Supreme Court of the United States quotes from the supreme court of the state of Illinois in *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 518, the following: "It is needless to say our decisions have not been harmonious on this question but in the case of *Rigney v. Chicago*, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was, that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using and improvement that is public in its character, that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question." And then adds: "We concur in that interpretation. The use of the word 'damaged,' in the clause providing for compensation to owners of private property, appropriated to public use,

could have been with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use, than was guaranteed by the former Constitution." In some respects our constitutional provisions differ from those of the states mentioned,—notably as to the ascertainment and payment of the compensation before possession is taken. Upon this subject see exhaustive opinion of Brewer, circuit judge, in *McElroy v. Kansas City*, 21 Fed. Rep. 257, *supra*.

The learned counsel for the defendant contends that the complaint does not allege that the defendant threatened to disturb the street itself; but we think the expression "change the grade" fairly imports that the defendant was threatening to physically grade the street, and not merely to pass an ordinance establishing the grade.

He also contends that, defendant having denied that plaintiff would suffer any damage, the court should have vacated the injunction order. The rule invoked only applies to a case where all the equities of the bill are fully and specially denied. *Grant County v. Colonial & U. S. Mortg. Co.* 3 S. D. 390. The answer in this case does not come within the rule. Without attempting to give the answer in full, or even its substance, it is sufficient to state that it appears from the affirmative defense therein that the grade of the street had been established by ordinance No. 75, and that the city engineer was proceeding with the work of constructing a sidewalk in front of plaintiff's lots on the grade so established. The mere denial, therefore, that plaintiff was entitled to any compensation or entitled to any damages was not sufficient to defeat the injunction.

The contention that the failure to allege in the complaint that the plaintiff would sustain irreparable injury, or that the defendant was unable to respond in damages, was fatal to plaintiff's right to an injunction, is not tenable, as applied to this class of cases. Plaintiff's right to an injunction does not depend upon the ability or the inability of the defendant to respond in damages, but upon the fact that plaintiff is entitled to be paid such damages as she may sustain before the city can lawfully proceed to damage her property. In *McElroy v. Kansas City*, 21 Fed. Rep. 257, the court says: "When the defendant has an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all those cases the legislature has placed at the command of the defendant means for ascertaining the value of the property. In those cases the courts have seldom stopped to inquire whether the value of the property sought to be taken was little or great, whether the injury to the com-

plainant was large or small, but have contented themselves with holding that, as the defendant had full means for ascertaining such compensation, it was his first duty to use such means, determine and pay the compensation, and until he did so the taking of the property would be enjoined." And in the same opinion the court says: "As the established rule of construction has been, under Constitutions prohibiting the taking of private property for public use until compensation was first made, to enforce that mandate irrespective of all legislative action, the same rule must obtain in this case. The damage to property is placed upon the same basis as the value of property taken, and neither can be done without compensation first made. In other words, uniting 'property damaged' with 'property taken' in the same clause, and subject to the same prohibitions, places them in the same category as to judicial action. I see no logical escape from the conclusion."

Appellant further contends that the complaint fails to show that any previous grade had been established; and, unless that fact appears, the respondent would have no right to damages for an incidental injury caused by the making of a grade for the first time, and cites § 18, art. 16, chap. 87, Laws 1890, which provides that, after the grade of any street has been established, the city shall, if they change the grade, be liable for damages. But an act of the legislature, while entitled to great consideration, cannot abridge or control the provisions of the Constitution. The provisions of the Constitution are not limited to a change of grade once established, but are general, and in-

clude all damages to private property for public use. The legislature is not authorized to restrict the language or take from the citizen the protection the Constitution has thrown around him and his property. This provision of the Constitution is self-executing, and, if there was no law to carry it into effect, a court of equity would, in the exercise of its inherent power, provide some method for ascertaining the damages, if any, caused by the injury threatened. But we think the act of 1891, heretofore referred to, provides fully the proceedings which the city should have taken.

The contention that the city does not admit that its threatened acts would cause any damage to the respondent, and cannot avail itself of the provisions of the act, is without merit. The object of the provisions of the act is to ascertain whether or not there will be damage caused by the proposed improvement, and the amount, if any. The first section, as we have seen, provides that, "in all cases when municipal or other corporations . . . invested with the privilege of . . . damaging the same . . . shall determine to exercise such privilege, it shall," etc. It will be seen that the municipality is not required to state that its acts will, in fact, damage anyone, but only that it has determined to exercise its privilege as such corporation, stating the necessary facts to call into exercise the power of the court. Whether or not the court below properly granted the order upon the evidence before it cannot be considered by this court, as the evidence is not brought in by the record.

The order of the court below is affirmed.

KENTUCKY COURT OF APPEALS.

City of HENDERSON, *Appt.*,

v.
Helen McCLAIN.

(.....Ky.....)

1. **Damages for injuries caused to an abutting lot** by being left 8 or 10 feet above the street by change of grade must be paid by the city to the lotowner, under a Constitution providing compensation for property taken, injured, or destroyed, for public use.
2. **The filing of a second traverse of an answer** is not necessary in case the answer after having been traversed was withdrawn for the purpose of a motion to dismiss the petition, and refiled when the motion was dismissed.
3. **Failure to bring an injunction suit to prevent the changing of the grade** of a street without making compensation for injury to the abutting owner is not an abandonment of the right to bring an action for such compensation after the change is effected.

(December 9, 1897.)

A PPEAL by defendant from a judgment of the Circuit Court for Henderson County

NOTE.—As to change of grade, see also *Searle v. Lead* (S. D.) *ante*, 345, and footnote thereto.

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in favor of plaintiff in an action brought to recover damages for injuries to abutting property by a change of the grade of a street. *Affirmed.*

The facts are stated in the opinion.

Messrs. Clay & Clay, for appellant:

A municipal corporation has the authority to grade or regrade a street for any public purpose without incurring any responsibility to holders of lots adjacent to the street, though the street might be raised several feet above the level of the lot.

Wolfe v. Corington & L. R. Co. 15 B. Mon. 404; *Keasy v. Louisville*, 4 Dana, 154, 29 Am. Dec. 395; *Louisville & F. R. Co. v. Brown*, 17 B. Mon. 763.

Section 242 of the Constitution does not change the principle as decided in the above cases, nor was it the intention of the framers of our Constitution that such should be done.

The Constitution provides that the compensation shall be paid before such taking, or shall be paid or secured before such injury or destruction. The appellee by her delay has lost her right to damages.

When an owner dedicates without restriction land for a public street he must be taken to consent that the public authorities may deter-

mine grades, and possibly what future changes in grades may be necessary or desirable for the public convenience.

2 Dill. Mun. Corp. § 995a, p. 1236.

Messrs. Yeaman & Lockett for appellee.

Du Relle, J., delivered the opinion of the court:

The appellee brought suit against the city of Henderson, alleging that she was the owner of a lot of land fronting on Center street, and had easy and free access to and use of that street in going to and from her residence; that the appellant, in pursuance of an ordinance of its common council, caused the street to be excavated in front of and adjoining her property, up to the line thereof, to such an extent and depth as to ruin her fence and enclosure, wholly destroying her access to and use of the street, leaving the surface of her lot from 8 to 10 feet above the street and sidewalk, and the entrance to her dwelling barred by a high, perpendicular bank, so that her only ingress and egress is by an alley; that the dwelling is so situated upon the lot that the lot cannot be graded so as to give access to the street, and that to protect the lot from constant caving, which would finally destroy the house, would require the construction of a wall along its whole front, at great expense; that, by notice to the city, delivered to its mayor, she objected to and protested against the excavation before it was made, and gave notice that she would be damaged thereby and would seek to hold the city responsible.

A demurrer to the petition was sustained, and an amendment filed, which, after the answer was filed, and a reply thereto, was withdrawn by the appellee, and the appellant thereupon withdrew its answer and moved to dismiss the petition. The order sustaining the demurrer was set aside and the demurrer overruled. Appellant then filed its answer, and a trial was had, which resulted in a verdict for appellee.

As there is no bill of exceptions, and as the record does not show that the instructions were objected to, the only question presented to this court is the sufficiency of the petition.

Without determining the question whether this petition presents a case of partial destruction of the property by the city, amounting to an invasion of private rights within the rule in the cases of *Louisville v. Louisville Rolling Mill Co.* 3 Bush, 424, 96 Am. Dec. 243, and *Kemper v. Louisville*, 14 Bush, 90,—we shall consider whether the rule of *Wolfe v. Covington & L. R. Co.* 15 B. Mon. 404; *Keasy v. Louisville*, 4 Dana, 154, 29 Am. Dec. 395; *Louisville & F. R. Co. v. Brown*, 17 B. Mon. 763, and *Newport & C. Bridge Co. v. Foote*, 9 Bush, 264, that a municipal corporation has authority to grade or regrade a street for a public purpose without incurring responsibility to the owners of abutting lots, although the street might be raised several feet above the level of the lot, and that the citizen must submit to such incidental disadvantages as resulted therefrom,—has been altered by § 242 of the present Constitution.

The general rule was as stated in 2 Dill. Mun. Corp. § 990, that "municipal corporations, acting under authority conferred by the 39 L. R. A.

legislature to make and repair, or to grade, level, and improve streets, if they keep within the limits of the street, and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, trespassed upon, or invaded, for consequential damages to his premises, unless there is a provision in the Constitution of the state, in the charter of the corporation, or in some statute, creating the liability."

The Constitution of 1860 provided, in § 14 of the Bill of Rights, that no "man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

The present Constitution, in addition to the section just quoted, which is contained in § 13 of the Bill of Rights, provides, in § 242: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction."

The adoption of this section, in addition to the provisions of § 13, in our view undoubtedly indicated an intention to change the organic law of the state, and to abolish the requirement of direct physical injury to the property in order to establish a claim for damages. The language used is that municipal corporations shall make just compensation for property taken, injured, or destroyed by them. The city undoubtedly has the right to take private property, having the right of eminent domain. It also has the undoubted right to improve the streets for the public use, in proper manner, when thereto authorized by legislative authority. If, however, in making the improvements it takes, injures, or destroys private property, compensation must be made, unless consent has been given.

This exact question appears to have been decided in several of the states in which new Constitutions containing similar provisions have been adopted in recent years. In Illinois, the old Constitution contained a provision similar to that contained in § 13 of our Constitution. By the Constitution of 1870, the provision was made to read: "Private property shall not be taken or damaged for public use without just compensation;" and, while the rule under the former Constitution had been held as in the section quoted above from Dillon, it has been held in numerous cases that the new rule introduced by the present Constitution required compensation in all cases where it appears "there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." *Rigney v. Chicago*, 102 Ill. 64. It was there held "that the introduction of that word (damage), so far from being superfluous or accidental,

indicated a deliberate purpose to make a change in the organic law of the state, and abolished the old test of direct physical injury to the *corpus* or subject of the property affected."

This doctrine was approved by the Supreme Court of the United States, in an opinion delivered by Mr. Justice Harlan, in the case of *Chicago v. Taylor*, 125 U. S. 162, 81 L. ed. 689. Referring to the *Rigney Case*, he said: "The conclusion there reached was, that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character—that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question. The case of *Pittsburg, Ft. W. & O. R. Co. v. Reich*, 101 Ill. 167, is in point on this question of damages, and the case of *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598, also reviews the authorities and approves the doctrine in *Rigney v. Chicago*, 102 Ill. 64."

In Missouri a similar constitutional provision has been adopted, and a similar construction given. See *Seehy v. Kansas City Cable R. Co.* 94 Mo. 574.

In Pennsylvania a constitutional provision was adopted in 1874 exactly similar to § 242 of our Constitution, which has been construed in *New Brighton v. Peirce*, 107 Pa. 280, as the provision of the Illinois Constitution.

In a number of other states which have adopted the same or similar constitutional provisions, the courts have gone as far or farther than the Illinois courts in permitting recovery for consequential damages in such cases. See 2 Dill. Mun. Corp. 4th ed. §§ 990 to 995a, inclusive, and notes.

We conclude that, under the averments of the petition in this case, admitted by the demurrer to be true, there was a right of recovery.

But it is argued on behalf of appellant that there is no legal right or equity in a person who dedicates land for street purposes, or in his assignee, to compensation for the original establishment of a grade line and the reduction of the natural surface of the street for street

purposes to such line, for the reason that, when dedicated unconditionally, the dedicant must be supposed to have contemplated and consented that a grade should be established and the inequalities of the surface brought to some proper level, and to have embraced in his grant or dedication the right to establish such a grade. This question, however, is not presented by the record. If the law be that consequential damages are not recoverable for the original establishment of the grade of a street which has been dedicated (and this question is expressly not here decided), the fact that such establishment is original is matter of defense, and such fact does not appear in this record.

It is further urged that certain averments of the answer pleaded as an estoppel are undenied by any reply. It is not necessary to consider the sufficiency of the averments, if they have been denied, as the evidence has not been brought to this court. To the answer originally filed, a reply was filed controverting the affirmative averments. After the amended petition was withdrawn, the answer was also withdrawn by appellant, in order to insist upon a motion for a judgment dismissing the petition. This motion being overruled, and the order sustaining the demurrer having been set aside, the same answer, or a copy of it, was again filed, and it is now contended that those averments are undenied. We do not concur in this contention. While they were a part of the record the averments were traversed, and the fact that they were withdrawn and again filed does not render a second traverse necessary.

A further contention is, that appellee lost her right to compensation by not instituting a suit for an injunction to prevent the injury to her property until the damages to result therefrom had been estimated and paid her. But in response to this it is sufficient to say that the inhibition of the Constitution is not against the citizen, but against the municipality, and forbids the latter from taking, injuring, or destroying property, without previously making compensation therefor. To say that the citizen's right of recovery was barred because the municipality failed to perform its duty would be to permit it to take advantage of its own wrong.

For the reasons given, the judgment is affirmed.

COLORADO SUPREME COURT.

J. B. HINDRY, *Appt.*,

v.

Catherine M. HOLT, by Guardian *ad Litem*.

(.....Colo.....)

The words "heir or heirs" in Gen. Laws 1877, p. 343, giving to the heirs a right of action for death if there be no husband or wife

or any action by him or her within one year, mean "child or children" and limit the right of action to lineal descendants.

(December 20, 1897.)

APPEAL by defendant from a judgment of the District Court for Arapahoe County in favor of plaintiff in an action brought to re-

NOTE.—On the question who are heirs, see generally *Johnson v. Supreme Lodge K. of H. (Ark.)* 8 L. R. A. 782, and note; also note, to *Boston Safe Deposit & T. Co. v. Coffin (Mass.)* 8 L. R. A. 747;

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Proctor v. Clark (Mass.) 12 L. R. A. 721, and note; *Heath v. Hewitt (N. Y.)* 13 L. R. A. 46.

As to the meaning of the word "heirs" in insurance policies, see note to *Hubbard v. Turner (Ga.)* 30 L. R. A. 563.

cover damages for alleged negligent killing of plaintiff's uncle. *Reversed.*

Statement by **Goddard, J.:**

This is an action brought in behalf of Catherine M. Holt by C. J. Burns, her guardian *ad litem*, against J. B. Hindry, to recover damages for the death of Thomas Holt, her uncle. The right to such recovery is predicated upon the following facts: On October 6, 1893, Thomas Holt, an unmarried man, thirty-eight years of age, was employed by J. B. Hindry, the defendant, as a common laborer, and while engaged under his direction in excavating a sewer trench in North Denver, the ground caved in upon him, causing his death. He died intestate, leaving surviving him Catherine M. Holt, a daughter of his deceased brother, an infant five years of age, as his only heir. From November, 1890, to September, 1892, he resided in the city of Denver with Catherine and her mother, and contributed almost entirely to her support, furnished her clothing, and the provisions and necessities for the family. In September, 1892, plaintiff and her mother moved away from the city of Denver, and from that time until his death he continued to support plaintiff, sending money to her mother for that purpose; and, if he had survived he would have continued to support, educate, and maintain her. The cause was tried to a jury, and resulted in a verdict and judgment for \$4,500. To reverse this judgment, defendant, Hindry, prosecutes this appeal.

Messrs. George W. Miller, Daniel Sayer, and John H. Reddin, for appellant:

Although the appellee may be a niece of the deceased Thomas Holt, she is not an heir of the said Thomas Holt within the meaning of the statute under which this action is brought, and consequently is not entitled to sue or recover damages in this action under said statute by reason of his death, and the court had no jurisdiction to render judgment herein.

The word "heir," often has a special and restricted signification, and is controlled by the context in which it is used, and it would seem when used by the legislature in furtherance of the humane purpose of making whole and compensating the families of persons killed by accident that it should be interpreted to mean lineal descendants, and confined to sons and daughters and their descendants in a direct line instead of collateral issue.

There should be no encouragement to foster an avarice that seeks to make misfortunes of this character the vehicles to transport good fortune and undeserved favors to remote relatives, and to claim such an application for the law is a diversion from its intent and purposes, and it is safe to say the statute in question was never passed for that purpose.

This statute was adopted by our legislature from Missouri.

Atchison, T. & S. F. R. Co. v. Farrow, 6 Colo. 506.

The supreme court of Missouri, in *Coover v. Moore*, 81 Mo. 574, held that the statute must be strictly construed, and that only such persons as are specifically granted the right under the statute can recover.

The word "heir," as used in our statute, was 89 L. R. A.

intended by the legislature to mean a child of the deceased, and can in no event be extended to collateral relatives, and we propose to show this from the context of the act itself and by analogy.

The damages given must be in reference solely to the pecuniary loss which, however, may be evidenced by proof of a reasonable expectation of a pecuniary benefit as of right or otherwise from a continuance of life.

Bourke v. Cork & M. R. Co. Ir. L. R. 4 C. L. 685, 10 Cent. L. J. 48.

The object of all these statutes is to provide actual compensation to those persons who have sustained a pecuniary loss, and not any other kind of a loss, such as a loss of affection, or by grief or like matters.

Jordan v. Cincinnati, N. O. & T. P. R. Co. 89 Ky. 40.

Messrs. Cayless & Brown, for appellee:

In *Jordan v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 40, it is stated: "However, we do not deem it necessary to refer at length to the construction that has been given to statutes of other states, as they, with some exceptions, differ materially from § 8, chap. 57, Gen. Stat. For it will be observed that section is unlike them, as well as the English statute, in the following particulars: 1. In none of them is the right to maintain the action given to the widow and heir. 2. The cause of action provided for by § 8 is for destruction of life by wilful neglect only. 3. In no other statute is the right to recover punitive damages in express terms given. 4. Unlike some other statute, § 8 gives the right to sue persons as well as companies, for the cause therein mentioned."

Brothers and sisters can maintain an action for damages under our statute.

Denver, S. P. & P. R. Co. v. Wilson, 12 Colo. 20.

Goddard, J., delivered the opinion of the court:

Among the many objections raised by the specifications of error, we deem it necessary to notice the one only which challenges the right of appellee to maintain the action, since, in our opinion, this question is decisive of the case. No right of action for damages resulting from death through wrongful act or negligence was given by the common law, and such right exists only by virtue of our statute. Gen. Laws 1877, p. 348; Mills's Ann. Stat. chap. 37. This statute gives the right of action, and designates the party or parties who may sue for recovery of damages in cases of this kind, and classifies them as follows: First, husband or wife of deceased; second, if there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of deceased; third, if such deceased be a minor, or unmarried, then by the father or mother, who may join in the suit, and each shall have an equal interest in the judgment, or, if either of them be dead, then by the survivor. Though similar in its general features to the original English statute (9 & 10 Vict. chap. 93), known as "Lord Campbell's act," and the statutes on this subject generally adopted in this country, it will be seen that our act differs from all of them in its designation of the parties that may sue. Most of

them provide that the action may be brought by the personal representatives of the deceased, for the benefit of his widow and next of kin, while by the terms of our statute the right to sue is vested, in the first instance, in the surviving husband or wife, to the exclusion of all others; and the existence of the right in the second class named is wholly dependent upon the fact that there be neither husband nor wife surviving, or that he or she shall have waived the right by failing to sue in the time prescribed; thus evincing an intention on the part of the lawmaking power to confer this new right of action upon the second class only in the event the decedent at the time of death was, or had been, a married person, and should leave surviving lineal descendants. This is made more manifest by the third subdivision, whereby the right of action is exclusively given to the father and mother in case the deceased was a minor, or unmarried. By construing the words "heir or heirs," as used in the second subdivision, to mean "child or children," the purpose of this character of legislation is carried out, which is to compensate those who suffer pecuniary loss by reason of the death. While, on the other hand, if the words "heir or heirs" are to be construed as meaning all those who, under the statute of descents and distributions, would be entitled to inherit, then collateral kindred, however remote, who would derive no pecuniary benefit from the continuance of the life of deceased, as well as the direct descendants, may maintain the action,—a result wholly inconsistent with the plain purport and object of the statute. And furthermore, such construction would render the third subdivision wholly useless and unnecessary, since the father and mother would, by our act of descents and distributions, be the heirs in case the deceased was a minor, or unmarried, and consequently included within the class of beneficiaries described in the second subdivision. In order, therefore, to give consistency and effect to all of the foregoing provisions, and to carry out the beneficent purpose of the statute, the words "heir or heirs," as used in the second subdivision, must be held to be synonymous with "child or children." In *Jordan v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 40, the supreme court of Kentucky had under consideration the meaning to be given to the word "heir" as

used in their statute, which provided that the "widow, heir, or personal representative" of the deceased should have the right to sue; and it was held that it should be so limited as to mean "child," and not extended so as to include collateral kindred of the deceased. *Lewis, Ch. J.*, in speaking for the court, says: "The word 'heir' cannot, according to its 'peculiar and appropriate meaning in the law,' be used in relation to damages recoverable under the section, being applicable to real estate of inheritance, and not to personality. It must therefore be interpreted to mean either distributee or child. To make it mean distributee would, it seems to us, be contrary to the reason and purpose of the law, which was intended to give redress, reparation, or compensation to those only who are injured pecuniarily by the loss or destruction of the life of husband and father." To the same effect are *Henderson v. Kentucky C. R. Co.* 86 Ky. 389; *Cincinnati, N. O. & T. P. R. Co. v. Adam*, 11 Ky. L. Rep. 833. The case of *Denver, S. P. & P. R. Co. v. Wilson*, 12 Colo. 20, is relied on as recognizing the right of brothers and sisters of the deceased to maintain an action under this statute. That was an action brought by the parents to recover damages for the death of an unmarried son, and the question as to the right of collateral kindred to maintain the action was in no way involved; and, moreover, the language used, aside from being mere *dictum*, is found in a quotation from the case of *Chicago v. Keefe*, 114 Ill. 322, 55 Am. Rep. 860, cited in support of a different proposition. The case, therefore, is not an authority for the rule claimed by appellee. Our conclusion is that the words "heir or heirs," as here used, do not include all those entitled to share in the estate of a person dying intestate, under our statute of descents and distributions, but were intended to mean "child or children," and limit the right of action to lineal descendants of the deceased. In this case the deceased had never been married, and had no children. Under such circumstances, the right of action is given, as we have seen, exclusively to the father and mother. This, in itself, precludes the plaintiff from maintaining the action. *The judgment of the District Court is therefore reversed, and the cause remanded, with directions to dismiss the action.*

CONNECTICUT SUPREME COURT OF ERRORS.

Timothy H. PORTER, *Appt.*,

v.

Thomas G. RITCH *et al.*

(.....Conn.....)

1. An order by a judge for the temporary confinement of a person alleged to be insane pending proceedings for the deter-

NOTE.—As to the necessity of notice of lunacy proceedings to the alleged lunatic, see note to *Evans v. Johnson* (W. Va.) 23 L. R. A. 737.

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mination of that question is not a denial of due process of law when made on a written complaint and affidavit to the fact of insanity, but it is clearly within the police power of the state, and is for the restraint of a dangerous person in an emergency.

2. A proceeding for a hearing as to the insanity of a person is pending after a written complaint alleging the insanity is presented to the judge, as required by Pub. Acts 1880, p. 88, and supported by an affidavit of a physician.

3. A temporary provisional order for

the custody of a person alleged to be insane pending a hearing of the question as to his insanity is not an adjudication, and is not void on its face because it fails to recite the affidavit of a physician on which it was based or the fact that proceedings for a hearing as to the sanity were then pending.

4. Evidence of acts of an agent of a defendant cannot be given under allegations of the performance of such acts by the defendant.
5. Testimony that the members of a club considered a certain paper one of the strongest they had read before them is incompetent as hearsay.
6. Testimony of a defendant that he did not instruct his counsel in the matter, but that he acted altogether on the advice of the counsel, is admissible where he is charged with acting maliciously in making a complaint on which a hearing as to the insanity of another person was based.
7. The rejection of a hypothetical question involving assumptions concerning which no evidence has been offered is not ground of error.

(January 5, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for Fairfield County in favor of defendants in an action brought to recover damages for alleged conspiracy to defraud plaintiff of his property and false imprisonment in execution thereof. *Affirmed.*

The complaint charged that defendants conspired together to obtain from plaintiff a very large sum of money, and, to effect that result, purporting to act under Public Acts 1889, chap. 162, they made a false and malicious complaint against him before the judge of probate in the district of Stamford, representing that he was insane and unfit to go at large. That an order was obtained committing plaintiff to the custody of two of the defendants, where he remained for three months and until more than \$100,000 in money had been extorted from him.

The defense was that Schuyler Merritt one of the defendants, acting in good faith, and fully believing that plaintiff was an insane person, made an application to said court praying it to inquire into the alleged insanity of plaintiff. This application was supported by an affidavit of plaintiff's family physician stating that in his opinion plaintiff was insane and unfit to go at large. The court made an order for a hearing, and directed that notice thereof be served on plaintiff. It was further ordered that, pending the proceedings, the custody of plaintiff be committed to Richard Bolster and Henry E. Schock, two of the defendants. The order of notice was served on the plaintiff, and immediately afterwards the committee began to exercise suitable and proper restraint over him. On December 19, 1893, plaintiff obtained a writ of habeas corpus from the superior court of Fairfield county to obtain his release. That court found that the probate court had jurisdiction of the matter, and remanded petitioner to custody, from which decree he appealed. On the same 19th day of December, 1893, plaintiff's minor children prayed the probate court for the appointment of a conservator over the plaintiff. On

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December 21, 1893, plaintiff sought an injunction to restrain defendants from interfering with his books and papers. On January 2, 1894, persons interested in the trust estate in plaintiff's possession brought suit to prevent his wasting property belonging to said estate. On February 21, 1894, all the parties interested in the various suits made and entered into an agreement which became known in the case as the "Family agreement." Defendants claimed that by their performance of the terms of that agreement all the claims of plaintiff in this suit were fully and finally adjusted. Plaintiff claimed that the agreement was made under duress.

The court found as facts that defendant Merritt, who had married plaintiff's wife's sister had been on intimate terms with plaintiff, and later with his family. That after consulting counsel and acting on his advice, he filed the application for an inquiry into plaintiff's sanity. That the court relying on the physician's affidavit accompanying the application, issued the preliminary order for plaintiff's custody. That the order for hearing was served on plaintiff and afterwards the order for custody was presented, and plaintiff under advice of his counsel obeyed it. That the acts of defendants Bolster and Schock, complained of, were performed by them as officers of the law, in execution of and under and within the authority of the order, in good faith, and in full belief of its validity. That none of their acts were done as agents for the other defendants unless the law implied agency from the facts found. That pending the proceedings plaintiff's counsel, Judge Stoddard, made suggestions to the opposing counsel for a settlement. Through the efforts which he and other friends brought to bear upon plaintiff and his appeals to defendants the family agreement which was prepared by Judge Stoddard himself was signed and executed. That said agreement was executed by plaintiff under the advice of his friends and counsel and without any influence having been brought to bear upon him by the adverse parties. That it was understood that said agreement should accomplish a full and final settlement of all existing differences between the parties, and of all the legal proceedings then pending, and of all matters arising out of such proceedings. Immediately after the execution of the agreement all pending proceedings were withdrawn and the restraint exercised over plaintiff terminated. That Merritt alone was responsible for the institution of the proceedings before the judge of probate and that he acted in good faith.

Further facts appear in the opinion.

Messrs. Earliiss P. Arvine, Robert E. De Forest, and Stiles Judson, Jr., for appellant:

The court of probate had no jurisdiction to issue the order of custody.

Where the count is of limited and special jurisdiction the warrant must set forth affirmatively and clearly all facts necessary to show that it was legally constituted and had jurisdiction.

Brooks v. Adams, 11 Pick. 441; *Hall v. Howd*, 10 Conn. 519, 27 Am. Dec. 696; *Sears v. Terry*, 26 Conn. 285; *Grimond v. Raymond*, 1 Conn. 46, 6 Am. Dec. 200.

The jurisdiction of the probate court did not appear upon the face of the warrant by which plaintiff was taken into custody.

The fact of insanity in one case, and the fact of death in the other, can never be conclusively determined by these special statutory tribunals, in order to support their decrees and judgments.

Shelton v. Hadlock, 62 Conn. 143; *Willett's Appeal*, 50 Conn. 330; *Culver's Appeal*, 48 Conn. 173; *Olmstead's Appeal*, 43 Conn. 123; *First Nat. Bank v. Balcom*, 35 Conn. 351; *Dickinson v. Hayes*, 81 Conn. 422; *Sears v. Terry*, 26 Conn. 232; *Brown v. Lanman*, 1 Conn. 469; *McFeely v. Scott*, 123 Mass. 16; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87.

The legal "pendency" of the application only began with its service upon the alleged lunatic. The finding shows that such service had not been made when this order of custody was issued, and therefore the proceedings were not "pending" in legal contemplation.

Taylor v. Judd, 41 Conn. 435; *Studwell v. Cooke*, 38 Conn. 551; *Elting Woolen Co. v. Williams*, 36 Conn. 319; *Sanford v. Dick*, 17 Conn. 216; *Spalding v. Butts*, 6 Conn. 29; *Jencks v. Phelps*, 4 Conn. 152; *Spice v. Steinruck*, 14 Ohio St. 214.

The mere issuing of a summons is not the commencement of an action for general purposes.

Kerr v. Mount, 28 N. Y. 664.

The acts authorized by chap. 162, Pub. Acts 1899, are in violation of the 14th Amendment to the Federal Constitution, and the statute is unconstitutional.

The proceedings which were had in this case were inquisitorial and *ex parte*. They cannot be authorized by the legislature, and the statute must be construed as impliedly requiring notice, or it must be declared invalid.

Stuart v. Palmer, 74 N. Y. 191, 30 Am. Rep. 289; *Bostwick v. Isbell*, 41 Conn. 305; *Bowler v. Eldredge*, 18 Conn. 1; *Chase v. Hathaway*, 14 Mass. 232; *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Hathaway v. Clark*, 5 Pick. 490; *Reidell v. Morse*, 19 Pick. 360; *Conkey v. Kingman*, 24 Pick. 119; *Com. v. Weiher*, 8 Met. 447; *Allis v. Morton*, 4 Gray, 63; *May's Case*, 10 Pa. Co. Ct. 283; *Com. Nyce v. Kirkbride*, 2 Brewst. (Pa.) 400; *Portland v. Bangor*, 65 Me. 120, 20 Am. Rep. 681; *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633; *VanDeusen v. Newcomer*, 40 Mich. 137; *Morton v. Sims*, 64 Ga. 296; *Eddy v. People*, Eddy, 15 Ill. 336; *Smith v. People*, *Bartholomew*, 65 Ill. 375; *McCurry v. Hooper*, 12 Ala. 323, 46 Am. Dec. 280; *Eslava v. Lepretre*, 21 Ala. 505, 56 Am. Dec. 266; *Moody v. Bibb*, 50 Ala. 247; *Molton v. Henderson*, 62 Ala. 426; *Re Blewitt*, 181 N. Y. 546; *Ro Russell*, 1 Barb. Ch. 38; *Re Tracy*, 1 Paige, 580; *Re Pettit*, 2 Paige, 174; *Re Vanauken*, 10 N. J. Eq. 186; *Re Whitenack*, 8 N. J. Eq. 252; *Smith v. Burlingame*, 4 Mason, 121; *Bradley v. Fisher*, 80 U. S. 13 Wall. 354, 20 L. ed. 651; *Ex parte Robinson*, 86 U. S. 19 Wall. 506, 22 L. ed. 207; *Ex parte Bradley*, 74 U. S. 7 Wall. 364, 19 L. ed. 214; *Buswell, Insanity*, § 55; 11 Am. & Eng. Enc. Law, pp. 115, 116, notes. *Ex parte Dozier*, 4 Baxt. 81; *Re Dey*, 9 N. J. Eq. 181; *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304; *Colby v. Jackson*, 12 N. H. 526; *Look v. Choate*, 108 Mass. 116.

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The court having been without jurisdiction at the time the order of custody was made and issued, the defendants Ritch and Merritt, having procured such order, are trespassers.

Prince v. Thomas, 11 Conn. 472; *Colt v. Eves*, 12 Conn. 258; *Parsons v. Loyd*, 8 Wils. 345; 2 Addison, Torts, p. 810; *Kerr v. Mount*, 28 N. Y. 664; *Hayden v. Shed*, 11 Mass. 503; *Williams v. Smith*, 14 C. B. N. S. 620; *Moody v. Bibb*, 50 Ala. 247; *Look v. Choate*, 108 Mass. 116.

The defendants Bolster and Schock are also liable as trespassers, for the reason that the order which they undertook to serve was not regular on its face, the jurisdictional requisites not affirmatively appearing upon the face of the warrant.

The officer serving a precept must at his peril observe the absence of such jurisdictional facts.

Bowler v. Eldredge, 18 Conn. 13; *Elliott v. Peirsol*, 26 U. S. 1 Pet. 340, 7 L. ed. 170; 2 Addison, Torts, 803; *Cutler v. Wadsworth*, 7 Conn. 10; *Colt v. Eves*, 12 Conn. 258; *Grumon v. Raymond*, 1 Conn. 46, 6 Am. Dec. 200; *Hall v. Howd*, 10 Conn. 519, 27 Am. Dec. 696; *Starr v. Scott*, 8 Conn. 432; *Smith v. Bouchier*, 2 Strange, 993; *Gallup v. Smith*, 59 Conn. 360, 12 L. R. A. 353; *Keifer v. Bridgeport*, 68 Conn. 401; *Hayden v. Nott*, 9 Conn. 367; 2 Hilliard, Torts, p. 317; *Philips v. Biron*, 1 Strange, 509.

The defendants Bolster and Schock became trespassers, even if this order of custody is found to be regular and valid by reason of their abuse of legal process, and in going beyond the precept of the order of custody, in the character of the imprisonment maintained.

Osgood v. Carver, 43 Conn. 29; *Wilcox v. Gladwin*, 50 Conn. 81; *Mussey v. Cahoon*, 84 Me. 74; *Colby v. Jackson*, 12 N. H. 526; *McGough v. Wellington*, 6 Allen, 507; 1 Swift's Dig. p. 510; *Patterson v. Prior*, 18 Ind. 441, 81 Am. Dec. 367; *Mallory v. Merritt*, 17 Conn. 180; *Cannon v. Campbell*, 69 Ga. 268; *Forbes v. Hagman*, 75 Va. 178.

All who command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, are liable, if done for their benefit, in the same manner as if they had done the tort with their own hands.

2 Hilliard, Torts, p. 293.

The defendants Ritch and Merritt are liable to malicious prosecution because they proceeded maliciously in legal contemplation.

Humphrey v. Case, 8 Conn. 103, 20 Am. Dec. 95; *Stone v. Stevens*, 12 Conn. 219, 30 Am. Dec. 611; *Lockenour v. Sides*, 57 Ind. 360, 26 Am. Rep. 58; *Pollock, Torts*, p. 266; *Heyne v. Blair*, 62 N. Y. 19; *Mitchell v. Wall*, 111 Mass. 493; *Harkrader v. Moore*, 44 Cal. 145; *Shaul v. Brown*, 28 Iowa, 37, 4 Am. Rep. 151; *Humphries v. Parker*, 52 Me. 505; *Wall v. Toomey*, 52 Conn. 86; Swift's Dig. p. 501; *Ives v. Bartholomew*, 9 Conn. 309; *Carothers v. McIlhenny Co.* 63 Tex. 143; *Thompson v. Beacon Valley Rubber Co.* 56 Conn. 498; *Vinal v. Core*, 18 W. Va. 8; *Wills v. Noyes*, 12 Pick. 325; 2 Addison, Torts, p. 755; *Forbes v. Hagman*, 75 Va. 168; *Spear v. Hiles*, 67 Wis. 351; *Gabel v. Weisence*, 49 Tex. 131; *Cannon v. Sipples*, 39 Conn. 503.

The fact that Mr. Merritt, acting in co-opera-

tion with Louis to accomplish certain ulterior objects, advised with counsel as to the legal mode for placing Mr. Porter under restraint, upon the pretext that after a lapse of six years since his apoplectic attack, they had suddenly discovered evidence of insanity, and that immediate physical restraint was necessary, is not in any sense a defense to the charge of bad faith.

Brewer v. Jacobs, 22 Fed. Rep. 218; *Grundy v. Crescent News & Hotel Co.* 88 La. Ann. 974; *Lytton v. Baird*, 95 Ind. 849; *Roy v. Goings*, 112 Ill. 657; *Wild v. Odell*, 56 Cal. 137; 2 Addison, Torts, p. 746; *Sharpe v. Johnston*, 76 Mo. 668.

If Merritt in bad faith made the complaint to the court of probate, he became liable for the consequences flowing from such complaint.

Goodrich v. Warner, 21 Conn. 482; *Coffey v. Myers*, 84 Ind. 105; *Walsler v. Thies*, 56 Mo. 89; *Green v. Cochran*, 48 Iowa, 545; *Shattuck v. Bill*, 142 Mass. 61.

He neglected and refused to withdraw his complaint, or to report to the court the fact that he had discovered that Mr. Porter was being held a prisoner upon a false statement of the facts in his case, or in any manner to have Mr. Porter released from the imprisonment now admitted to be false.

If this prosecution was not originally malicious, it became malicious as a proposition of law at this stage in the proceedings.

2 Addison, Torts, p. 747.

It is not necessary to show that the defendant Ritch was actively engaged in the initiatory steps, or that he joined with Mr. Merritt in applying for the order for Mr. Porter's custody. It is sufficient "that they advised and consulted together, and both participated in the prosecution, which was carried on under their countenance and approval.

Vinal v. Core, 18 W. Va. 3.

What was done was done in the furtherance of a common design. The whole course of conduct of the defendants, taken together, furnishes satisfactory proof of that fact.

State v. Spalding, 19 Conn. 237, 48 Am. Dec. 158; *Knower v. Cadden Clothing Co.* 57 Conn. 223; Stephen, Malicious Prosecution, p. 85; Pollock, Torts, p. 208.

This "family agreement" being an agreement by which Mr. Porter divested himself of a large estate in favor of other contracting parties, who sustained confidential relations to him, the burden of proving its validity, fairness, and integrity is upon these defendants.

Nichols v. McCarthy, 53 Conn. 317, 55 Am. Rep. 105.

Aside from this feature of the case, the burden is upon defendants from the fact that it is a special defense.

Taylor v. Atwood, 47 Conn. 506.

The real question is: Did Mr. Porter act as a free and voluntary agent in divesting himself of his property in order to secure his liberation?

Walbridge v. Arnold, 21 Conn. 430.

There may be a species of duress, although the imprisonment is by lawful process.

Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; *Downing v. Ely*, 125 Mass. 369.

The question was whether the contracting

party was "under pressure to such an extent as to be deprived of free agency."

Mills v. Swords Lumber Co. 63 Conn. 105.

Where the circumstances give one an unfair advantage, and an agreement is executed under an immense pressure which those circumstances produce, the contracting party will not be considered as a free and voluntary agent.

McMahon v. Smith, 47 Conn. 223, 36 Am. Rep. 67; Story, Eq. Jur. § 223; *Lomerson v. Johnston*, 44 N. J. Eq. 93; *Adams v. Irving Nat. Bank*, 116 N. Y. 612, 6 L. R. A. 491; *Guillaume v. Rowe*, 94 N. Y. 268, 46 Am. Dec. 141; *Richardson v. Duncan*, 3 N. H. 508.

Where there is an arrest for improper purposes without just cause, or an arrest for a just cause but without lawful authority, or an arrest for a just cause and under lawful authority for an improper purpose, and the person arrested pays money for his enlargement, he may be considered as having paid the money by duress of imprisonment.

Richardson v. Duncan, 3 N. H. 508; *Baker v. Morton*, 79 U. S. 12 Wall. 150, 20 L. ed. 262; *Taylor v. Jaques*, 106 Mass. 295; *Hackett v. King*, 6 Allen, 58; *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367; *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Sartwell v. Horton*, 28 Vt. 370.

The authorities fully recognize a species of moral duress.

Rau v. Von Zedlitz, 132 Mass. 169; *Bryant v. Peck & W. Co.* 154 Mass. 460; *Schoener v. Lisauer*, 107 N. Y. 115; *Phelps v. Zuschlag*, 34 Tex. 373; *Adams v. Irving Nat. Bank*, 116 N. Y. 611, 6 L. R. A. 491; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Peyser v. New York*, 70 N. Y. 501, 26 Am. Rep. 624; *Ingersoll v. Roe*, 65 Barb. 357; *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *Hackett v. King*, 6 Allen, 58; 1 Story, Eq. Jur. §§ 239-252; 2 Pom. Eq. Jur. § 942; *Lomerson v. Johnston*, 44 N. J. Eq. 93; *Shenk v. Phelps*, 6 Ill. App. 617; *Taylor v. Jaques*, 106 Mass. 291; *Seiber v. Price*, 26 Mich. 519; *Hatter v. Greenlee*, 1 Port. (Ala.) 222, 26 Am. Dec. 372; *Pierce v. Brown*, 74 U. S. 7 Wall. 215, 19 L. ed. 137; *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170; *Brooks v. Berryhill*, 20 Ind. 97; *Strong v. Grannis*, 26 Barb. 128; *Foshay v. Ferguson*, 5 Hill, 158; *Walbridge v. Arnold*, 21 Conn. 424; *United States v. Huckabee*, 83 U. S. 16 Wall. 431, 21 L. ed. 463; *Baltimore v. Lefferman*, 4 Gill, 425, 45 Am. Dec. 156.

Even where the duress is not of the person, but only a wrongful detention of property, equity will protect the person imposed on, especially when the act sought to be avoided was to prevent irreparable mischief.

Ferguson v. Winslow, 34 Minn. 385; *Corkle v. Maxwell*, 3 Blatchf. 413; *Chandler v. Sanger*, 114 Mass. 365, 19 Am. Rep. 367; *Motz v. Mitchell*, 91 Pa. 115.

It is immaterial whether the facts which prompt the settlement and constitute the duress, were communicated to the person imprisoned by the prosecutors of the legal proceedings or by some other person, who had secured from them the knowledge of their intentions in respect to the prosecution of the complaint.

Taylor v. Jaques, 106 Mass. 291; *Schultz v. Catlin*, 78 Wis. 611.

The question is whether, under the circumstances, the agreement was so voluntarily made as to be binding.

Cumming v. Ince, 11 Q. B. 112.

There was nothing that belonged to these defendants at the date of the execution of the agreement except the oppressive power that they were unconscionably exercising, and that the law does not require us to restore to them.

Higham v. Harris, 108 Ind. 246; *City Nat. Bank v. Kusworm*, 88 Wis. 203, 26 L. R. A. 48; *Brown v. Peck*, 2 Wis. 261; *Foss v. Hildreth*, 10 Allen, 76; *Manning v. Albee*, 11 Allen, 520; *Chandler v. Simmons*, 97 Mass. 508, 98 Am. Dec. 117; *Brewster v. Burnett*, 125 Mass. 68, 28 Am. Rep. 203; *Morse v. Woodworth*, 155 Mass. 233; *Baldwin v. Hutchison*, 8 Ind. App. 454; *Dimmitt v. Robbins*, 34 Tex. 441; *Cohoon v. Fisher*, 146 Ind. 588, 36 L. R. A. 198.

Messrs. Samuel Fessenden and Goodwin Stoddard, for appellees:

In civil and criminal actions before hearing had, and even without notice given, alleged trespassers, or criminal offenders, are taken into custody pending the hearing to be had.

These acts are not in violation of the Constitution, as they are in no case final, but only preliminary orders, and necessary in the due enforcement of law and justice, as the order in the present case was called for, and the provision in the statute enacted for the protection of life and property.

Re Doyle, 16 R. I. 537, 5 L. R. A. 359; *Re Wellman*, 3 Kan. App. 100.

Pendency by force of statute dates from the application.

If an ordinary civil suit could be brought by application to the superior court, and it was the mode of procedure for the court then to issue a summons for the defendant to come in and answer, the suit would be pending before services.

Wentworth v. Farmington, 48 N. H. 207; 19 Am. & Eng. Enc. Law, pp. 220 *et seq.*; *Bonesteel v. Orvis*, 81 Wis. 117; *Gordon v. Tyler*, 53 Mich. 629.

Defendants Merritt and Ritch are not liable even if the order is invalid.

The custodians of the plaintiff did not act in excess of the authority of the order.

Whether the action of the plaintiff was induced by duress of the defendants was a question of fact.

Feller v. Green, 26 Mich. 70; *Walbridge v. Arnold*, 21 Conn. 431; *McVane v. Williams*, 50 Conn. 550.

The conclusion of coercion is not always a necessary one from the fact of unlawful restraint, and it must appear that the action of the party has been influenced by it.

6 Wait, Act. & Def. 650; *Feller v. Green*, 26 Mich. 70; *Green v. Scrannage*, 19 Iowa. 461, 87 Am. Dec. 447; *Alexander v. Pierce*, 10 N. H. 498; *Baker v. Morton*, 79 U. S. 12 Wall. 150, 20 L. ed. 262; *Phelps v. Zuschlag*, 34 Tex. 371; 6 Am. & Eng. Enc. Law, p. 62; *Baldwin v. Murphy*, 82 Ill. 485.

It does not lie in the mouth of this plaintiff to interpose the objection of invalidity of the agreement, inasmuch as he as *cestui que trust* consented to the transaction and has assigned and transferred all his interest in the property in 39 L. R. A.

question, exercising thereby a right which he undoubtedly had and was competent to perform.

1 Perry, Tr. §§ 467, 870. See also *Evans v. Benyon*, L. R. 37 Ch. Div. 344; *Fyler v. Fyler*, 8 Beav. 560; *Raby v. Ridehalgh*, 7 De G. M. & G. 104; *Brice v. Stokes*, 2 White & T. Lead. Cas. in Eq. pt. 2, p. 1043.

Such agreements and settlements the courts are inclined to uphold.

2 Beach, Modern Equity, § 1003; *Williams v. Williams*, L. R. 2 Ch. 294; Brett, Lead. Cas. in Eq. 207, 2 Pom. Eq. Jur. § 805; *Leach v. Fobes*, 11 Gray, 506, 71 Am. Dec. 784; *Farnsworth v. Dinsmore*, 2 Swan, 42; *Reynolds v. Brandon*, 3 Heisk. 606; *Trigg v. Read*, 5 Humph. 529, 42 Am. Dec. 447; *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761; *Sherwood v. Whiting*, 54 Conn. 333; *Brown v. Slater*, 16 Conn. 195, 41 Am. Dec. 136; *Cake v. Peet*, 49 Conn. 504; *Quinebaug Bank v. Brewster*, 30 Conn. 563; *Ward v. Ward*, 59 Conn. 197; *Hayden v. Allyn*, 55 Conn. 289.

It is the right and duty of the court, in order to decide upon the contract's meaning, to look, not only to the language employed, but to the subject-matter and surrounding circumstances.

Mobile & M. R. Co. v. Jurey, 111 U. S. 592, 28 L. ed. 580; *Barreda v. Silsbee*, 62 U. S. 21 How. 146, 161, 16 L. ed. 86, 91; *Nash v. Towne*, 72 U. S. 5 Wall. 689, 18 L. ed. 527; *Chesapeake & O. Canal Co. v. Hill*, 82 U. S. 15 Wall. 94, 21 L. ed. 64; *Smith v. Kerr*, 108 N. Y. 31; *Davis v. Robert*, 89 Ala. 402; 11 Am. & Eng. Enc. Law, p. 368, and cases cited; *Jennings v. Whitehead & A. Mach. Co.* 138 Mass. 597; *Ward v. Ward*, 59 Conn. 199; *Williams v. Williams*, L. R. 2 Ch. 294; Brett, Lead. Cas. in Eq. 207.

A party should restore whatever he has obtained under a contract avoided by him on the ground of duress before he can successfully interpose the plea of duress.

2 Bishop, Mod. Eq. Jur. § 552; 21 Am. & Eng. Enc. Law, pp. 43-84; 6 Wait, Act. & Def. 661.

Andrews, Ch. J., delivered the opinion of the court:

There is quite a long list of reasons of appeal, but it will not be necessary to consider them in detail. They are only an expansion of the claims made by the plaintiff at the trial, and these may all be disposed of by considering a few general propositions. If the act of 1889 was constitutional, especially that part of it which is relied on to support the order made by the judge of probate in Stamford on the 18th day of December, 1893, and if the law is so that the proceeding was pending at the time that order was made and the order was not void on its face, and if there was no error in the rulings on the evidence, or if the causes of action were discharged by the "family agreement," then there is no material error on which the appellant is entitled to have a new trial. Everything else is included in the finding of facts.

At its January session, 1889, the legislature passed "An Act Concerning Insane Persons" (Pub. Acts 1889, p. 88), which enacted that "any judge of a probate court within his probate district shall have power to commit any

insane person residing in said district to an asylum in this state in the manner hereinafter provided," and that, "except when otherwise specially provided by law, no person shall be committed or admitted to an asylum without an order signed by a judge of probate, as hereinafter provided." The act then proceeded to details, and enacted that "whenever any person in this state shall be insane, or shall be supposed to be insane, any person may make complaint in writing to any judge of probate within whose district the person complained of shall reside, alleging that such person is insane and is a fit subject to be confined in an asylum, and when any insane person, who ought to be confined, shall go at large in any town, any person may, and the selectmen thereof shall, make a like complaint to the judge of probate within whose district such town is included. After receiving said complaint, the judge of probate to whom it is made shall forthwith appoint a time, not later than ten days after the receipt of said complaint, and a place within said district, for a hearing upon said complaint, and shall cause reasonable notice thereof to be given," etc. The act also specifies many other details to be observed by the judge of probate in respect to such hearing, for adjournments, for the certificate of physician, what shall be done in case the person complained of is found to be insane, and in its 6th section says: "Pending the proceedings for a hearing and examination, said judge may make and enforce such reasonable orders for the care and custody of the person complained of as said judge shall deem suitable and proper." The complaint made to the judge of probate for the district of Stamford concerning the plaintiff was made under this legislation, and the proceedings were pursuant to its provisions. There is a general claim by the plaintiff's counsel that the whole act is unconstitutional. It is, however, so obviously within the power of the legislature to make provisions for insane persons, and for their commitment to and confinement in an asylum for treatment and care, that we suppose counsel intend to attack this act no further than the provision respecting the care and custody of the person complained of pending the proceedings is an essential feature of it.

It is strenuously insisted that so much of the act as is relied on to justify the order given to Bolster and Schock is unconstitutional, for the reason that it may, as in this case it is claimed that it did, deprive a person of his liberty without due course of law. That constitutional provision is invoked which says that no person shall be deprived of his life, his liberty, or his property without the due course of law. Nothing can well be dearer to the law than the right of each person to his life, his liberty, and his property. For more than 600 years the law has been zealous and astute to protect these rights. The words of Magna Charta, which declare that every person shall be protected in the enjoyment of his life, his liberty, and his property, except as they might be declared to be forfeited by the judgment of his peers or the law of the land, furnish the rule. In some form of words this principle is now found in every one of the American Constitutions. No one

does, or can, deny its binding force. But constitutional provisions, however often repeated, do not give to anyone an absolute estate in even these high privileges, which he can enjoy to the exclusion of others. These privileges must be enjoyed with just limitations,—with such limitations as are necessary to make their enjoyment by each consistent with the like enjoyment by all. The right of all is superior to the right of any one. These limitations are not deprivations of the right. They are regulations, so that no one person can insist on the right to the enjoyment of any one of these privileges, to the exclusion or the infringement of the right of any other person to the like enjoyment. The taking of life itself by a private person, and without warrant, may sometimes be justified. One may lawfully kill an assailant, if necessary to save his own life, or the life of his wife or children. *Morris v. Platt*, 32 Conn. 75. A burglar who in the night season, is attempting to break into a dwelling, may be killed, if his attempt can be frustrated in no other way. A husband or father who finds one attempting to commit rape on his wife or daughter may lawfully kill him to prevent the crime. 4 Bl. Com. 179, 180. Examples of this sort of regulation are more often found in the laws and ordinances which apply to property than elsewhere. Among them are the very many statutes and regulations which concern the use of property. The constitutional provision just stated has never been regarded as incompatible with the principle, equally vital, being essential to the permanent safety of society, that all property is held subject to the power of the state to regulate the use by the owner when that use is found to be injurious to the community. *Mugler v. Kansas*, 123 U. S. 628, 665, 81 L. ed. 205, 211; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 24 L. ed. 989, 991; *Com. v. Alger*, 7 Cush. 53. There are many cases in which the rights to the use of property must be exercised subservient to the public welfare. The maxim of the law is that a private mischief is to be endured rather than a public inconvenience. On this ground rest the rights of public necessity. Thus, if a common highway be out of repair, a passenger may lawfully go through an adjoining private inclosure. So it is lawful to raze houses to the ground to prevent the spreading of a conflagration, without being responsible in trespass or otherwise. *Russell v. New York*, 2 Denio, 461. There are many other like conditions. See 12 Coke, 13, 63; *Maleverer v. Spinks*, 1 Dyer, 366; Vin. Abr. title *Necessity*; 2 Kent, Com. 383; *British East India Co. v. Meredith*, 4 T. R. 794, 797; *Respublica v. Sparhawk*, 1 U. S. 1 Dall. 357, 363, 1 L. ed. 174, 177; *Vanderbilt v. Adams*, 7 Cow. 349; *Cooley*, Const. Lim. 739. So, too, public nuisances may be abated by anyone who is injured thereby. *Van Wormer v. Albany*, 15 Wend. 262; *Wood*, Nuisances, 768. To the same rule the vindication of our law that the property of a defendant in a civil suit may be attached on mesne process, and held till final judgment, must be referred. The various rules and statutes authorizing these limitations to the rights of property owners have always been regarded as police regulations, although they curtail it

owner's use in some degree, and not unconstitutionally.

The right to personal liberty ought, perhaps, to be regarded as on a higher plane than the right of property; but the constitutional protection to one is precisely the same as to the other. The right to enjoy liberty is always limited by the duty which requires everyone to use his liberty in such a way as not to be detrimental to the public. There are many cases in which a man may be restrained of his liberty by anyone and without warrant. It is justifiable "if a man hold another to restrain him from mischief." Comyns' Dig. *Battery*, A. In *Gleever v. Hynde*, 1 Mod. 168, a private person without a warrant removed one who was disturbing a funeral service. His action was justified. In *Hall v. Planner*, 1 Lev. 196, the church warden removed the hat from the head of one who refused to uncover his head during divine service in a church on Sunday. This was held to be justifiable. In *Hancock v. Baker*, 2 Bos. & P. 260, the defendant broke and entered into the house of the plaintiff to prevent him from murdering his wife. This was justified. A person dwelling in a house infected by any contagious disease may be required by a constable to keep within his house, and if he disregard such command it may be enforced by a watchman, and if any hurt ensue by such enforcement the watchmen are thereby indemnified. 4 Bl. Com. 161. The health officer of a city may confine one who has been exposed to the smallpox to prevent the spread of that disease. *Harrison v. Baltimore*, 1 Gill, 264. "A private person may, without an express warrant, confine a person disordered in his mind, who seems disposed to do mischief to himself or any other person." Bacon, Abr. *Trespass*, D. p. 469. "It is universally conceded that every man for his own protection may restrain the violence of a lunatic, and anyone may, at least temporarily, place any lunatic under personal restraint, whose going at large is dangerous to others." Tiedeman, Pol. Power, p. 108. Clearly, this may be done as preliminary to the institution of judicial proceedings, by which a judgment for a permanent confinement may be obtained. 6 Southern Law Rev. N. S. 568; 3 Am. Law Rev. 193; *Colby v. Jackson*, 12 N. H. 526; *Davis v. Merrill*, 47 N. H. 208; *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 804; *Williams v. Williams*, 4 Thomp. & C. 251; *Look v. Dean*, 108 Mass. 116, 120, 11 Am. Rep. 323; *Re Doyle*, 16 R. I. 537, 588, 5 L. R. A. 359; *Lawson, Rights, Rem. & Pr.* § 1066; 11 Am. & Eng. Enc. Law, p. 112; *Cooley, Torts*, 179; *Com., Draper v. Kirkbridge*, 3 Brewst. (Pa.) 393; *Van Deusen v. Newcomer*, 40 Mich. 90. "The right to restrain an insane person of his liberty is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others. In the delirium of a fever, or in the case of a person seized with a fit, unless this were the law, no one could be restrained against his will. And the necessity which creates the law creates the limitation of the law. In the case of an application to have a guardian appointed over the person and estate of an insane person, under the statute,

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some time must necessarily elapse before the appointment can be made, and during that time restraint may be necessary. If there is no right to exercise that restraint for a fortnight, there is no right to exercise it for an hour. And if a man may be restrained in his own house, he may be restrained in a suitable asylum, under the same limitations and rules. Private institutions for the insane have been in use, and sanctioned by the courts; not established by any positive law, but by the great law of necessity and humanity. Their existence was known and acknowledged at the time the Constitution was adopted. The provisions of the Constitution in relation to this subject must be taken with such limitations and must bear such construction, as arise out of the circumstances of the case." Chief Justice Shaw, in *Re Oakes* (Mass.) 8 Law Rep. 122, 124.

Limitations to the use of property, or to the personal liberty of another, in the different classes of cases to which the instances we have cited may be referred, have always been held not to infringe the constitutional provision now invoked. In none of them is there any deprivation of the right, but only its just regulation. These limitations serve to prevent such a use by one of his property or of his liberty as takes away from others their equal right to the use of their own. One who is prevented from injuring another cannot justly assert that he has himself been deprived of any right. An insane person, whose going at large is dangerous to others or to himself, and who is restrained, cannot maintain that he has been deprived of any right, or that he has suffered any injury. In most of the cases cited the act placing a restriction upon the liberty of another was by a private person, and the act has been held to be justified. But a private person can act only in an emergency, and then only at his peril,—the peril of being unable to prove the existence of the emergency which is his justification. Restrictive conditions of this kind upon the liberty or the use of property are sometimes absolutely necessary to the safety of all. A wise administration of government does not leave it to private persons to decide when these restrictions shall be exercised. Private persons may not be willing to take the hazard, and so statutes are passed which directly name or authorize a municipal board to appoint someone to judge of the emergency and direct the performance of those acts which any individual might do at his peril without any statute. Such a one is the agent of the law, and incurs no personal liability. Statutes of this kind, and in many states, have been upheld, and, so far as we know, without exception. *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 8; *Dunham v. New Britain*, 55 Conn. 378; *Russell v. New York*, 2 Denio. 461; *Van Wormer v. Albany*, 15 Wend. 262; *Doe v. Schultz*, 47 Barb. 64; *Taunton v. Taylor*, 116 Mass. 254; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113; *Ex parte Shrader*, 33 Cal. 279; *Harrison v. Baltimore*, 1 Gill, 264; *Cooley, Const. Lim.* 720, 721. That part of the 6th section of the act of 1889 under which the judge of probate acted is a statute of this kind. It named the judge of probate in each district as the agent

of the law to decide whether such conditions existed as made it necessary to confine a person supposed to be insane for a temporary period. It does not violate any constitutional provision. It is clearly within the police power of the state.

The statute authorizes the judge to make reasonable orders for the custody of the person complained of, "pending the proceedings for a hearing and examination." If we should assume that this language did not authorize the order made on the 18th of December upon the mere presentation of the complaint, it clearly did not authorize the order as modified and confirmed on the 22d of that month, after a full hearing of all parties. The action of the judge upon the hearing was at least equivalent, so far as concerns the defendants Bolster and Schock, to the order of that day. We might, therefore, deem it immaterial to pass upon the validity of the order when first issued, —not because it could only affect the claim for damages for the unlawful custody from the 18th to the 21st, but because the statute under which it arises has since been altered, and the claim for damages, if valid, has been discharged by the family agreement.

It is further claimed that the order to Bolster and Schock was void for the reason that no proceeding for a hearing was pending at the time it was made. The "proceeding" was the application to the court of probate to have Mr. Porter declared insane and a fit person to be confined in some suitable asylum. This application was made to the court on the 18th day of December, 1893. With this application there was also presented to the court the affidavit of Dr. Geib that in his opinion Mr. Porter was insane, and liable at any time to do injury to himself or others. The court of probate thereupon made an order fixing the time for a hearing on the application, together with an order of notice to be given to Mr. Porter, and immediately thereafter, and before the same was served on Mr. Porter, issued the said order to Bolster and Schock. It appears that Bolster and Schock did not attempt to enter upon their duties under the said order to them until after service of the said application and order of notice had been made on Mr. Porter, so that the "proceeding for a hearing" was pending at all times while they were exercising any care or control of the plaintiff. But the argument is that the said order for care and control was void, for the reason that the proceeding was not pending at the moment that order was made service on Mr. Porter not then having been made. The argument depends on the case of *Jencks v. Phelps*, 4 Conn. 149, and the several cases in later reports which follow that one. It was held in that case that an "action" was not commenced till service had been made on the defendant. It was said by Chief Justice Marshall, in *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264, 407, 5 L. ed. 257, 291, that an action or suit is the prosecution of some demand in a court of justice. An "action," then, requires two parties, —one who prosecutes the demand, and the other against whom the demand is prosecuted, —and something sought to be obtained by the former of the latter. In this sense it is no more than just that an action shall not be

deemed to be commenced, so as to affect the defendant, until service has been made upon him. This is what was done in *Jencks v. Phelps*. It seems to us that the proceeding before the court of probate in the district of Stamford on the 18th day of December, 1893, was not an "action," in the sense in which that word was there used, and that the rule of *Jencks v. Phelps* does not apply. There were no parties; there was no demand, —nothing sought to be recovered by one against another. It is obvious that the definition of an "action," given by Chief Justice Marshall does not include, and was not intended to include, proceedings or actions *in rem*, nor proceedings in the nature of an inquest of office, and other like proceedings. By the said act of 1889 the judge of probate is made an agent of the law to decide whether or not a person complained of was insane and ought to be committed to an asylum. The judge was to act on the complaint in writing of any person; but the person complaining did not thereby become a party to the proceeding. The statute requires the judge of probate to give notice of the time and place of hearing to the party complaining, as much as it does to the party complained of. At no time in the progress of the inquiry is there any "action" pending in the court, nor are there any "parties," in the sense that these words are used in the case of *Jencks v. Phelps*. The proceeding was the inquiry by the court as to the sanity or insanity of the person complained of. It was an inquest of insanity. It was in the nature of a police regulation, for the care and restraint of a person insane or supposed to be insane. The proceeding was commenced when the court received the written complaint. So far as the court of probate was concerned, the proceeding was then pending. Any proceeding once commenced in any court in the regular way is pending in the court until it is in some way terminated. Webster, Dict. Until it is terminated the proceeding is in suspense; it is depending. *Wentworth v. Farmington*, 48 N. H. 207; *Littlefield v. Delaware & H. Canal Co.* 8 Cliff. 371. Our own case of *Huntington v. McMahon*, 48 Conn. 174, shows clearly what the term "pending" means when applied to a court. Complaint had been made to a justice of the peace in the town of Winchester for the condemnation of certain liquors. The liquors had been seized, notice was given, and a hearing was had before the justice, at which certain parties appeared who claimed to be the owners of the liquors. The justice condemned the liquors to be destroyed. The owners took an appeal to the district court, and the liquors were committed to the keeping of a person named by the justice. The next day, or within a day or two, the owners brought a replevin for the liquors, and took them out of the possession of the person so named as the keeper. The case cited was an application to the said district court by the state's attorney that all the persons concerned in the action for replevin be punished for contempt of that court. On the hearing of the contempt proceedings, one claim made by the parties was that there could be no contempt of the district court, for the reason that the appeal was not pending in that court at the time the replevin was served. This court held that

the appeal was pending in the district court as soon as the appeal was regularly taken from and allowed by the justice court, although it was long before the return day to the district court, and although it appeared that the appeal papers had not been filed with the clerk of that court, and that they had not even been made out by the justice, and that the bringing and serving of replevin was a contempt of the district court. We are of the opinion that the proceeding for a hearing was pending at the time the order to Bolster and Schock was issued.

The plaintiff argues that the order given by the judge of probate to Bolster and Schock was void on its face, and cites largely from authorities to sustain his claims. We are not able to agree with the plaintiff. It seems to us that he misjudges the character of that order. It is not a judgment. It is a temporary order, provisional, issued only as a precaution to provide against an emergency deemed liable to arise,—an order in its nature interlocutory, rather than final. It is a part of the procedure, and does not enter into the judgment or decree. It is not an adjudication. It is true that this order does not recite the affidavit of Dr. Geib, nor does it recite the fact that proceedings for a hearing as to the sanity of Mr. Porter were then pending. But the superior court could not shut from its eyes, nor can this court, the fact, which the record of the probate court discloses, that that court had that affidavit before it at the time this order was issued, and acted on it, nor that the proceedings for the hearing were at that time actually pending. To be sure, the order committed the plaintiff to the care and custody of the persons named; but it was not an order of commitment in execution, and therefore was not to be construed with the same strictness as are final orders. *Rex v. Gourlay*, 7 Barn. & C. 669. It was not void. In the case of *Van Wormer v. Albany*, 15 Wend. 262, an order was made by the board of health of that city declaring certain premises to be a nuisance, and ordering the same to be abated, because of the Asiatic cholera then prevailing in this city; and thereupon the mayor pulled the house down. The order was sustained, although it did not appear that it had ever been reduced to writing, or recorded, except by way of recital in an ordinance by the board.

During the trial the plaintiff offered evidence of certain acts done by one Thoms, on the ground that Thoms had been deputed by Bolster to do those acts. The defendants objected to this evidence, for the reason that the complaint did not charge the defendants with doing anything by their agent. The court sustained the objection. This ruling was in accordance with the rules established under the practice act. Prac. Book, p. 14, rule 3, § 1.

The Reverend Mr. Scoville testified that the plaintiff, within a year next before he was placed in custody, read a paper on John Calvin before a literary club in the city of Stamford, and that the paper "was considered by the members of the club as one of the strongest papers they had had." The defendants asked that this evidence be stricken out. The court so ordered. We think the evidence was rightly stricken out. It was hearsay.

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Mr. Merritt testified concerning his action in making the complaint to the probate court, and in reply to a question by Mr. Fessenden, who was his counsel in this action, said: "I laid the facts before you, as my counsel, and before Dr. Geib, at your suggestion, as a competent medical man and as the family physician. Since that time I have done absolutely nothing, except as you directed me. I have been a mere instrument since that. In fact, I was a mere instrument before." Mr. Fessenden then asked this question: "Did you, in any way, directly or indirectly, instruct me as to the course of procedure, or any step I have taken in it, or any advice of counsel I have given in the matter?" The plaintiff objected to this question, but the court admitted it, and the witness answered: "I never did." This evidence was admissible. Mr. Merritt was charged with acting maliciously in making this complaint to the probate court. He had the right to show that he acted on the advice of counsel.

Counsel for the plaintiff asked of an expert witness, one Dr. Cowles, a hypothetical question. It was conceded, and the fact was so, that it involved assumptions concerning which no evidence whatever had been offered. The court excluded the question for the reason that a foundation for it had not been laid, and, upon the offer of counsel to subsequently present such evidence, the court decided not to admit the question until the basis for it had been laid. This ruling was not more than an exercise by the court of its discretion as to the order in which evidence should be put in. It is not a ground of error.

One part of the defendant's answer is a discharge of all the causes of action alleged in the complaint by the agreement of the parties. This defense sets up the agreement called the "Family agreement." After stating the purpose for which that agreement was entered into, its execution and delivery, and setting it forth in full as a part of the defense by making it an exhibit, and alleging that the defendants had fully kept and performed all their part of said agreement, this defense concludes in this way: "And the defendants say, upon the facts aforesaid, that by said agreement, and the proceedings thereunder, and by the performance by the defendants of the provisions and conditions thereof on their part to be performed, and by said acts of the defendants, the subject-matter of the present suit, and the plaintiff's claims or alleged rights of action described in plaintiff's complaint, and all of the controversies, questions, and claims between the plaintiff and the defendants, were fully and finally adjusted, settled, satisfied, and ended." The plaintiff, in his reply, admits the execution and delivery of the said agreement, and substantially admits the performance by the defendants of their part thereof, but asserts that "the execution of the said paper by the plaintiff was procured, induced, and compelled under the circumstances and by the false imprisonment and duress set forth in the various paragraphs of the complaint, and by the conspiracy, malicious arrest, fraud, and duress therein stated." To this replication the defendants rejoined by a denial. The issue so formed, as were all the

other issues in the case, was found in favor of the defendants. The finding of facts on this part of the case is as explicit and clear as language can make it. The court says: "It was understood, intended, and agreed by all the parties to said negotiation and settlement, and to the said family agreement, that the same should accomplish a full and final settlement and adjustment of all the existing claims, questions, and differences between the parties thereto, and of all the legal proceedings then pending, and the subject-matter thereof, and of all the matters arising out of the proceedings instituted by Mr. Merritt,—the said complaint and application made to the judge of probate on the 18th day of December, 1893,—in favor of or against whatever party, and including all matters covered by the plaintiff's complaint, all of which antedated the said settlement." We are not able to see why this finding of the issue and of the facts is not a complete and absolute bar to the plaintiff's entire action. Had he desired to make the claim that the "family agreement" did not of itself operate to bar his action, because its terms do not warrant such a construction, and that the alleged intention that it should so operate was unavailing, because not so expressed in it, he

should have demurred. So far as the plea of duress is concerned, the plaintiff was never in such a situation that it was legally impossible for him to make an agreement which would be binding on him. All those circumstances with which he was surrounded, so graphically and impressively set forth by his counsel in their brief, which constitute the duress and imprisonment complained of, and which would be likely to affect his freedom of action, were for the consideration of the trial court. From the finding of facts we know that the trial court did consider them, and, having so considered them, has found that "said family agreement was executed by the plaintiff freely and voluntarily, and under the advice of his friends and counsel, and without any influence having been brought to bear upon him by any person or persons, save only his friends and counsel, who, acting solely in his interests, advised and urged him to its execution." It seems to us that the plaintiff is bound by the family agreement; that he ought to keep it, and that he has no right of action for anything alleged in the present complaint.

There is no error.

The other Judges concur.

FLORIDA SUPREME COURT.

'Greenfield TAYLOR *et al.*, *Appts.*,
v.

A. G. BRANHAM *et al.*

(85 Fla. 297.)

***1. A corporation created by and under the laws of Tennessee, or any other jurisdiction, cannot come to Florida, and exercise corporate functions here, without becoming incorporated under the laws of Florida, and, if it attempts to do so, its liabilities contracted here rest upon its members or stockholders in this jurisdiction as partners, and they will here be treated as, and held to be, merely partners.**

***2. A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. And, where a number of individuals assume to act in a corporate capacity in a state where they have not been clothed with corporate existence and authority, they cannot there be recognized as a legally constituted corporation though they may have been duly incorporated in another state; and such persons, in the state where they assume corporate ca-**

***Headnotes by TAYLOR, J.**

NOTE.—As to the exclusion of foreign corporations, see *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 289.

As to personal liability of persons claiming to be stockholders of a defectively organized company, 39 L. R. A.

capacity, will be treated as, and held to the responsibility of, partners, both in courts of law and equity.

***3. Where a judgment gives the style of the cause, at its head, with sufficient definiteness to show without doubt that the "plaintiffs" and "defendants" referred to therein as such are the same individuals that are named and designated as such in the declaration, and throughout the proceedings composing the record in the cause, such judgment is not void for vagueness or indefiniteness if it fails, in the body thereof, to give the names of the plaintiffs and defendants for and against whom it is rendered. While it is best that a judgment should be so complete, within itself, that the officer issuing the process to enforce it can see at a glance the parties for and against whom such process is to be issued, yet if the parties for and against whom it is rendered are so referred to therein as that a reference to its caption, or to the pleadings, process, and proceedings in the action, will make certain the names of the parties thus referred to, it is sufficient. Every judgment may be construed and aided by the entire record.**

(January 23, 1895.)

A PPEAL by defendants from a judgment of the Circuit Court for Orange County in favor of plaintiff in an action brought to enforce alleged partnership liability for debts of

see *note* to *Rutherford v. Hill* (Or.) 17 L. R. A. 549; *Finnegan v. Knights of Labor Bldg. Assn.* (Minn.) 18 L. R. A. 778; and *Wechselberg v. Flower City Nat. Bank* (C. C. App. 7th Cir.) 26 L. R. A. 470.

an association of which defendants were members. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. R. Gunby and Beggs & Palmer for appellants.

Mr. William H. Jewell, for appellees:

On issue joined on a plea of abatement, a judgment thereon for plaintiff is final.

McCartee v. Chambers, 6 Wend. 649, 22 Am. Dec. 556; *Haight v. Holley*, 8 Wend. 258; *Tidd*, Pr. 641; *Good v. Lehan*, 8 Cush. 801.

By pleading over in bar after referee's adverse decision on appellants' plea in abatement, the appellants waived their plea in abatement and cannot in this court avail themselves of any error in this regard.

Robinson v. L'Engle, 18 Fla. 497; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 657, 26 Am. Rep. 781; *Howard v. Pensacola & A. R. Co.* 24 Fla. 578.

The testimony fails to show that the charter offered by appellants in evidence was ever duly accepted by the incorporators named therein, and the burden of proof in this regard was upon the appellants.

Smith v. Silver Valley Min. Co. 64 Md. 85, 54 Am. Rep. 760; 1 Lawson, Rights, Rem. & Pr. §§ 338-344.

Organization in Florida would not be a valid acceptance of the charter or a legal organization thereunder, because an incorporated body has its domicile and must obtain its legal existence in the state creating it; failing to obtain a legal existence in the state granting the franchise, it had none anywhere.

Bank of Augusta v. Earle, 38 U. S. 13 Pet. 588, 10 L. ed. 274; *Day v. Newark India-Rubber Mfg. Co.* 1 Blatchf. 628; *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286, 17 L. ed. 130; *Allegheny County v. Cleveland & P. R. Co.* 51 Pa. 238, 88 Am. Dec. 579.

Chartered corporations cannot migrate from one state to another, even after obtaining a legal existence in the state granting the charter. It must have its domicile and principal place of business, and hold its corporate meetings, in the state creating it.

1 Morawetz, Priv. Corp. §§ 186, 363, 500; *Miller v. River*, 27 Me. 509, 46 Am. Dec. 619; 1 Abbott, Corp. § 88, p. 597; *Ormsby v. Vermont Copper Min. Co.* 56 N. Y. 628; 1 Lawson, Rights, Rem. & Pr. § 346, and citations; *Sangamon & M. R. Co. v. Morgan County*, 14 Ill. 163, 56 Am. Dec. 497; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 588, 10 L. ed. 274.

If appellants were not legally incorporated they could not be sued as an incorporated body, but could be sued individually or as partners.

Glenn v. Bergmann, 20 Mo. App. 348; *Hurt v. Salisbury*, 55 Mo. 310; *Richardson v. Pitts*, 71 Mo. 128; *Heath v. Goslin*, 80 Mo. 310, 50 Am. Rep. 505; *Hill v. Beach*, 12 N. J. Eq. 31; *Lewis v. Tilton*, 64 Iowa, 220, 52 Am. Rep. 436; *Wells v. Gates*, 18 Barb. 554; *Herod v. Rodman*, 16 Ind. 241.

Contracting with others acting under a corporate name does not estop one from denying the fact of incorporation.

Glenn v. Bergmann, 20 Mo. App. 348; 1 Lawson, Rights, Rem. & Pr. § 344; *Holloway v. Memphis, E. P. & P. R. Co.* 23 Tex. 465, 76 Am. Dec. 68.

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The judgment as entered in this case is sustained by the authorities, the parties being readily ascertained by reference to the record in the case.

1 Freeman, Judgm. § 50; *Wilson v. Nance*, 11 Humph. 189; *Little v. Birdwell*, 27 Tex. 688; *Collins v. Hyslop*, 11 Ala. 508; *Hays v. Farborough*, 21 Tex. 484; *McCartey v. Kittrell*, 55 Miss. 258; *Smith v. Chenault*, 48 Tex. 455.

Taylor, J., delivered the opinion of the court:

The defendants in error, as plaintiffs below, sued the plaintiffs in error, as defendants below, in the circuit court of Orange county, in assumpsit upon an account for work and labor and materials, the suit being instituted against the defendants as former copartners. All of the defendants appeared by attorney, and all joined in a plea of *nil debet*. Although this form of plea is expressly prohibited by our 68th rule of practice in common-law actions, the plaintiffs joined issue thereon. After thus joining issue the parties by consent had the cause referred to an attorney, as referee, for trial. On motion before the referee the defendants were allowed to amend their pleas. By virtue of this permit to amend, the defendants on May 28, 1889, interposed the following plea in abatement: "And now comes James A. Knox, one of the defendants, and for himself and the other defendants herein, for plea to above action says that the defendants never were partners trading as the Florida Orange Hedge Fence Company, but that the Florida Orange Hedge Fence Company was and is a corporation duly and legally organized under the laws of Tennessee, and the said defendants therefore ask to be dismissed with their costs," etc. Issue being joined on this plea, the parties held a separate trial before the referee upon the special issue thus presented on the 23d of January, 1890. To sustain their plea the defendants introduced a certified copy from the secretary of the state of Tennessee of a charter of incorporation to the Florida Orange Hedge Fence Company, creating it a corporation of and in the state of Tennessee. They also introduced as a witness the defendant James A. Knox who testified, in substance, that he was secretary of the Florida Orange Hedge Fence Company, and custodian of its papers; that the defendants sued herein were on the 1st of January, 1887, and still were stockholders in said corporation; that he was present when the Florida Orange Hedge Fence Company organized in Orlando on the 5th day of March, 1885; that he was a director by election on that date, and was one of the original stockholders; that they organized under the charter already offered in evidence. This comprised the entire evidence offered to sustain said plea. The referee overruled the plea upon the ground that a corporation cannot be legally organized in this state under a charter granted by another state. Upon overruling this plea the referee allowed the defendants until the first Monday in February, 1890, to file pleas. On the 3d of February, 1890, all of the defendants interposed the plea of never was indebted, and the defendant G. Taylor on that day filed also a special plea to the effect that he had no interest in the said company; that the only in-

terest he has or has ever had therein is as administrator of the estate of one J. C. Fleming, deceased; that J. W. Childress, one of the original incorporators of the defendant company, gave the said Fleming in his lifetime fifty shares of the stock of said company, but failed to have same issued to him in his lifetime; that after his death he became administrator of the estate, and at the request of the heirs of the said estate he consented that said stock should be issued to him, but that instead of said stock being issued to him as administrator of said estate, the officers of said company issued them to him individually, but that he has no interest in the said stock except as administrator as aforesaid; and that neither he nor the said Fleming ever assumed any liability of the said company.

By agreement of counsel representing all parties the cause was set down for trial on February 17, 1890, and on that day the referee rendered judgment in favor of the plaintiffs, the judgment being in the following form:

In the Circuit Court, 7th Judicial Circuit of Florida, Orange County.

A. G. Branham & Co.,

Collis Ormsby *et al.*, Doing
Business as the Florida
Orange Hedge Fence Co. }

On the 17th day of February, A. D., 1890, the above cause came on to be heard, and after argument of counsel and a careful examination of the testimony, I find that the defendants are indebted to the plaintiffs in the sum of \$813.80, as principal, and \$75.83 interest. It is therefore ordered and adjudged that the plaintiffs do recover of and from the defendants the sum of \$889.13 together with the further sum of \$28.45 (costs) of suit.

H. C. Harrison, Referee.

The defendant then moved the referee to set aside his findings and to grant a rehearing of the cause upon the following grounds: "1. Because the findings of the referee are contrary to law. 2. Because said findings are contrary to the evidence. 3. Because the referee erred in overruling the defendants' plea in abatement. 4. That the referee erred in entering judgment while the plea of the defendant G. Taylor was not disposed of. 5. Because the referee did not report the findings of law. 6. Because the finding and judgment of the referee is vague and indefinite." Which motion the referee denied and refused. From this judgment the defendants take writ of error.

The errors assigned are: "1. That the referee erred in overruling the defendants' plea in abatement. 2. That the referee erred in overruling the defendants' motion for a rehearing."

The defendants are sued as, and sought to be charged as, copartners. The plea in abatement denies the alleged partnership, but says that defendants are, instead, members of an incorporated company chartered in and by the state of Tennessee. The proof adduced to sustain the plea shows that the individual defendants sued are stockholders in an incorporated company chartered in and by the state of Tennessee; that the company came to Orlando, in

Orange county, Florida, and "organized" (in the language of one witness) there, electing a board of directors, etc., and that it undertook in Florida to carry on and conduct the business for which it had been incorporated in Tennessee; and that in the conduct of such business the debt sued for was contracted in Orange county, Florida. There is no proof that the defendants took any steps whatsoever to acquire corporate existence and authority in Florida, but they rely entirely upon the incorporation conferred by the state of Tennessee.

The law is settled "that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Freeman v. Machias Water Power & M. Co.* 38 Me. 343.

It seems to be further well-settled that where a number of individuals assume to act in a corporate capacity in a state where they have not been clothed with corporate existence and authority, they cannot there be recognized as a legally constituted corporation, though they may have been duly incorporated in another state, and that such persons, in the state where they assume corporate capacity, will be treated as, and held to the responsibility of, partners, both in courts of law and equity. *Hill v. Beach*, 12 N. J. Eq. 81; *Fuller v. Rowe*, 57 N. Y. 23; *Wells v. Gates*, 18 Barb. 554; *Hurt v. Salisbury*, 55 Mo. 810; *Richardson v. Pitts*, 71 Mo. 128.

The proofs adduced to sustain the defendants' claim that their liability was that of members of an incorporated company instead of that of copartners, shows that they were incorporated in Tennessee; that they then came to Florida and organized here by electing a board of directors and a president and general manager, without becoming incorporated under Florida laws, and that they assumed to conduct here, in their corporate capacity, the business of planting and cultivating hedge fences, for which they had been incorporated in Tennessee, and that the work and labor sued for were done for them in and about the conduct of that business. Under these circumstances they are liable individually or as copartners here, and the referee correctly overruled their plea in abatement.

We do not think the findings and judgment of the referee are contrary to the law of the case, or to the evidence adduced therein, as is contended for in the motion for rehearing, the overruling of which is assigned as the second error. On the contrary, we think the judgment is fully sustained by the evidence, and the law of the case, as we have before seen, was with the plaintiffs.

The entry of judgment, by the referee without any express disposition of the special plea filed by the defendant G. Taylor, to the effect that the stock held by him in the defendant company was really held by him as admin-

istrator of a deceased party's estate, though it may have been technically erroneous, was not such error as will warrant a reversal of the judgment by this court. The same facts set up in the special plea, if they could have availed him as a defense under the circumstances of this case, could just as well have been adduced and taken advantage of under his plea of never was indebted, yet he offered no word of proof to sustain the position assumed in the special plea. Under these circumstances the special plea served no other purpose than to encumber the record, and no such error was committed in making final disposition of the cause without specially disposing of it, as would authorize us to reverse the judgment found. *Walter v. Florida Sav. Bank & R. E. Exchange*, 20 Fla. 826.

The fifth ground of the motion for rehearing, to the effect that the referee did not report the findings of law, is not supported by the facts disclosed by the record, even if the failure of a referee to report his findings upon the law questions presented furnished a valid ground of exception upon writ of error. The only question of law presented in the case was whether the defendants were liable as copartners instead of as a corporation, as presented by their plea in abatement, and the referee's findings upon this question are explicitly set forth in the record.

Under the sixth ground of the motion for rehearing, the defendants contend that the judgment is void because it is vague and indefinite in that it fails, in the body of the judg-

ment, to give the names of the plaintiffs in whose favor it is rendered, or the names of the defendants against whom it is pronounced, they being referred to therein simply as the "plaintiffs" and "defendants" and that no valid execution can issue thereon to enforce the same, as it does not show from whom the adjudged amount is to be collected. There is no merit in this contention. The declaration gives accurately the names of each defendant; the judgment gives the style of the cause at its head with sufficient definiteness to show without doubt that the "plaintiffs" and "defendants" referred to therein are the same individuals named and designated as such in the declaration and throughout the proceedings composing the record in the cause. While it is best that a judgment should be so complete within itself as that the officer issuing the process to enforce it can see at a glance the parties for and against whom such process is to be issued, yet, if the parties for and against whom a judgment is rendered are so referred to therein as that a reference to its caption, or to the pleadings, process, and proceedings in the action, will make certain the names of the parties thus referred to, it is sufficient. Every judgment may be construed and aided by the entire record. 1 Freeman, Judgm. 4th ed. § 50a; *Smith v. Chenuit*, 48 Tex. 455; *Little v. Birdwell*, 27 Tex. 688; *Hays v. Yarrowborough*, 21 Tex. 487; *Wilson v. Nance*, 11 Humph. 189.

Finding no errors in the record, the judgment of the court below is affirmed.

IDAHO SUPREME COURT.

STATE of Idaho, *Respt.*,
v.
James DUCKWORTH, *Appt.*

(.....Idaho.....)

***1. The nonexercise by Congress of its power to regulate commerce among the states is equivalent to a declaration by that body that such commerce shall be free from any restrictions.**

2. Section 14 of an act of the legislature concerning the appointment of a sheep inspector, etc. (see Sees. Laws 1895, p. 126), and §§ 4 and 6 of an act amendatory thereof (see Sees. Laws 1897, p. 115), declaring it to be unlawful to bring sheep into this state without first having them dipped as provided in said acts, place an unnecessary burden and restriction upon interstate commerce, and are repugnant to the commerce clause of the Federal Constitution.

3. Said sections also discriminate to such an extent against persons who may desire

to bring sheep into the state, and those who have sheep within the state as to be clearly repugnant to the provisions of § 2, art. 4, of the Federal Constitution.

(December 18, 1897.)

A PPEAL by defendant from a judgment of the District Court for Oneida County convicting him of violating a statute against bringing sheep into the state without a license. *Reversed.*

The facts are stated in the opinion.

Messrs. F. S. Dietrich and George E. Gray, for appellant:

The act imposes onerous distinctive burdens, merely because of the nonresidence of the owner of the sheep.

The requirement is clearly repugnant to the Constitution.

Cooley, Const. Lim. 5th ed. p. 21, and note, pp. 490-492, and notes; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185; *Re Watson*, 15 Fed. Rep. 511.

There is no need for discriminating measures against outside sheep. The same inspection and same quarantine regulations should be applied to them as to Idaho sheep. There being

*Headnotes by SULLIVAN, Ch. J.

NOTE.—As to state inspection laws, see also *American Fertilizing Co. v. North Carolina Bd. of Agriculture* (C. C. R. D. N. C.) 11 L. R. A. 179, and note.

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no difference, there should be no discrimination.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Hannibal & St. J. R. Co. v. Huse*, 95 U. S. 465, 24 L. ed. 527; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 8 Inters. Com. Rep. 185; *Brimmer v. Rebman*, 188 U. S. 78, 34 L. ed. 862, 8 Inters. Com. Rep. 485; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 688; *Schmidt v. People*, 18 Colo. 78; *Farris v. Henderson*, 1 Okla. 384; *Philadelphia & R. R. Co. v. Pennsylvania (Case of the State Freight Tax)* 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Hobbs v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694.

Mr. R. E. McFarland, Attorney General, for respondent:

The state legislature is the sole judge as to the expediency of making police regulations interfering with the rights of persons and property when such regulations are not prohibited by the Constitution.

Varick v. Smith, 5 Paige, 187, 28 Am. Dec. 417; *Cooley, Const. Lim.* 704-707.

Every sovereign state possesses within itself absolute and unlimited power except so far as it is prohibited by the fundamental law.

Potter's Dwarrr, Stat. p. 455.

The facts and conditions of things which render law necessary for the public welfare are to be determined solely by the legislature.

New York v. Campagnie Générale Transatlantique, 107 U. S. 62, 27 L. ed. 883; *Hopes v. O'Brien*, 24 Fed. Rep. 145.

The police power is a part of the law of public necessity, and abstractly it is limited only by that law.

Potter's Dwarrr, Stat. p. 444; *New York v. Lord*, 17 Wend. 285; *New York v. Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648; 2 Kent. Com. 388; *Russell v. New York*, 2 Denio, 461; *Cooley, Const. Lim.* 706.

This power antedates commerce, and its exercise forms a necessary condition, not only to the development, but to the creation, of commerce, and it is therefore a higher and superior power; both may be exercised, but when they come in conflict upon a vital point, upon the principle the latter must yield.

State laws establishing quarantine and health laws of every description, even to the extent of destroying private property when infected with disease or otherwise dangerous, fall within the proper bounds of state police.

Cooley, Const. Lim. 706; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Cisco v. Roberts*, 36 N. Y. 292; *Benedict v. Vanderbilt*, 25 How. Pr. 209; *Vanderbilt v. Adams*, 7 Cow. 349; *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *The Jas. Gray v. The John Frazer*, 62 U. S. 21 How. 184, 16 L. ed. 106; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713, 18 L. ed. 96.

Those provisions of the act regulating the quarantining and hand-dressing or spotting of sheep in Idaho during certain months of the year do not render the act repugnant to any provisions of the Federal Constitution, nor

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do they in any manner affect interstate commerce.

U. S. Const. art. 1, § 10, cl. 2; *Cooley, Const. Lim.* 720, 721; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370; *Hopes v. O'Brien*, 24 Fed. Rep. 145.

The law is valid.

Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 304; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 287; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 852, 2 Inters. Com. Rep. 238; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1117; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24; *Ex parte Maier*, 103 Cal. 476; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Paul v. Virginia*, 75 U. S. 8 Wall. 163, 19 L. ed. 357.

Messrs. Alfred Budge and D. C. McDougal also for respondent.

Sullivan, Ch. J., delivered the opinion of the court:

The appellant who was the defendant in the court below, was convicted of the crime of bringing sheep into the state without having first obtained the certificate or permit of the deputy sheep inspector. He waived a jury trial, and the case was submitted to the court on a written stipulation of facts. The defendant was found guilty, and sentenced to pay a fine of \$100, and 5 cents per head on 3,000 head of sheep, from which judgment this appeal was taken.

The appellant contends that said judgment is erroneous, because the act of the state legislature under which he was convicted is repugnant to certain provisions of the Federal Constitution: (1) To ¶ 1, § 2, art. 4, which provides that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; and (2) to that provision of § 8, art. 1, which authorizes the Congress to regulate commerce. The defendant was convicted under the 4th section of an act entitled "An Act to Amend Sections 2, 3, 5, 6, 7, 8, 11, and 12 of an Act to Create the Office of Sheep Inspector for the State of Idaho; to Provide for the Appointment and to Define the Powers and Duties of Said Officer and His Deputies, and Fixing His Salary and the Compensation of His Deputies and Providing for the Prosecution of Offenses in Said Act," approved March 12, 1897 (see Sess. Laws 1897, p. 115), which act is commonly called the "Scab Law." Said 4th section is as follows: "That § 6 of said act is hereby amended to read as follows: Section 6. Any person, persons, company, corporation, or association, intending to bring, or cause to be brought from any other state or territory into any of the counties of the state of Idaho, any sheep, he or they must first notify the deputy sheep inspector of the district or county nearest to the point of entrance into this state; that at a fixed date he will be within 20 miles from the state line at a designated point, with said sheep for inspection; and it shall be the duty of the

deputy sheep inspector to examine such sheep within three days, and if pronounced sound, to immediately dip such sheep once, and then upon being tendered his compensation as hereinafter provided, issue a permit allowing such sheep to enter this state subject to such regulations as are enforced on resident sheep. But if such sheep are found scabby or infected with any contagious or infectious disease, then the deputy sheep inspector must dip said sheep twice with an interval from eight to fifteen days between dipping, and then issue a permit for said sheep to enter said state under the same regulations as heretofore provided: provided, however, that all sheep must enter said state within three days from final dipping, otherwise permits so issued shall be null and void. And any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, they shall be punished by a fine of not less than one hundred (\$100) dollars, or more than three hundred (\$300) dollars, or by imprisonment in the county jail, not less than two months, nor more than six months, or by both such fines and imprisonment; provided, that any person, persons, company, corporation, or association bringing or causing to be brought any sheep into any counties of this state in violation of the provisions of this act, shall be fined in addition to the penalty imposed in this section 5 cents per head, for every sheep so brought into this state, which shall be a lien on said sheep; and it shall be the duty of the deputy sheep inspector to seize and hold such sheep by such means as he deems best for a period of ten days, and if said sum is not paid within that period, to advertise and sell said sheep, or as many of the same as may be necessary to satisfy and pay such fine and costs." Said section makes it a misdemeanor for any person to bring any sheep into this state without having them first dipped by the sheep inspector. Section 6 of said act provides "that no person, persons, company, or corporation within the state of Idaho shall be required to dip his or their bands of sheep between the 1st day of December and until such time as he or they can shear such sheep in the following spring," while any person who brings sheep into this state between the 1st day of December and such time in the spring as such sheep can be sheared must have them dipped before bringing them in, whether the sheep are sound and healthy or not. And it is further provided in said section that "no person, persons, company, or corporation within the state of Idaho shall be required to dip a band or bands of ewes, or any part of them in which there are ewes with lambs, at any time between the 15th day of March and the 15th day of May following of any year; but they must be held in quarantine and kept separate from sound sheep, and the owner, owners, or controller shall be responsible for all damages as stated in this act, to be enforced and recovered as therein provided for." And it is also provided that sheep held in quarantine, which show any scab or contagious disease, shall be "spot or hand dressed" with some reliable medicine. The provisions of that section make a clear discrimination between sheep in Idaho and those

that may be brought in between the dates designated. The alleged offense for which the defendant was convicted was for bringing sound and healthy sheep into the state without first having them "dipped" as directed by the provisions of said § 4.

It is contended that said act, and the act of which it is amendatory, are police regulations enacted for the purpose of the suppression and prevention of disease among sheep. The legislature, no doubt, had authority to enact laws for such purpose; but, in so doing, it must not come in conflict with the provisions of the Constitution of the United States. Section 2, art. 4, of the Constitution of the United States is as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." And § 8, art. 1, provides, among other things, that the Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with Indian tribes." Numerous cases involving the construction of statutes similar to the one under consideration have been passed upon by the Supreme Court of the United States. All decisions from that court give to the commercial clause of the Federal Constitution a most liberal and salutary construction. And all statutes passed professedly as police regulations have not been tested by the innocent titles they may have, but by their natural and probable effect upon interstate commerce; and, if found in any manner to harass or burden such commerce, they have been invariably declared void. The leading case in construing the commerce clause of the Federal Constitution is that of *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23. The construction given that provision by the great Chief Justice Marshall in that decision has not been questioned or doubted. It has been cited and approved in many cases. See *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185; *Brimmer v. Robman*, 188 U. S. 78, 8 L. ed. 862, 3 Inters. Com. Rep. 485; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638; *Schmidt v. People*, 18 Colo. 78; *Farris v. Henderson*, 1 Okla. 384; *Philadelphia & P. R. Co. v. Pennsylvania (The State Freight Tax)* 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694. Mr. Justice Johnson, in a concurring opinion in *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23, said: "If there was any one object riding over every other, in the adoption of the Constitution, it was to keep the commercial intercourse among the states free from all invidious and partial restraints." As defined in that opinion, the term "commerce" means, not only traffic, but also intercourse. When applied to states, it means commercial intercourse, as between them. It has been held that the nonexercise by Congress of its power to regulate commerce among the states is equivalent to a declaration by that body that such commerce shall be free from any restriction. *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

Applying the rule laid down in the foregoing authorities to the 14th section of the act providing for the appointment of a sheep inspector (see Sess. Laws 1895, p. 124), and the 4th and 6th sections of the act amendatory thereof (see Sess. Laws 1897, p. 115), and the facts of this case, it is made clearly to appear that said sections place unnecessary burdens and restrictions upon owners of sheep who desire to bring them into the state, as well as upon transportation companies, and greatly interfere with interstate commerce in the matter of the transportation and sale of sheep, and are therefore repugnant to the commercial clause of the Federal Constitution and void. Said § 4 requires any person, company, or corporation intending to bring sheep into the state to notify the deputy sheep inspector that at a fixed date he will have his sheep within 20 miles from the state line, at a designated point; and it then is made the duty of said inspector to examine such sheep within three days after such notification, and, if such sheep are found to be sound and healthy, to immediately dip them; and then, upon tender of his compensation, he shall issue a permit allowing such sheep to enter the state. But in case such sheep are found scabby, or infected with a contagious or infectious disease, then such inspector must dip them twice, with an interval of from eight to fifteen days between dipping, and then issue a permit. And it is provided that sheep must enter the state within three days from the final dipping; otherwise the permit shall be null and void; and for a violation of said law a penalty of fine or imprisonment, or both, are provided; and a further fine of 5 cents per head on all sheep brought into this state contrary to, or in violation of, said provisions, is imposed, and made a lien on the sheep. Said act assumes extraterritorial jurisdiction. It authorizes the deputy inspector to proceed into an adjoining state, and there inspect and dip sheep. The 14th section of the state sheep inspector law, approved March 9, 1895 (Sess. Laws 1895, p. 124), of which the act of 1897 is amendatory, is as follows: "It shall be unlawful for any person, persons, company, corporation, or association, owning, controlling, or managing any ferry boat, toll bridge, car, steamboat, or other things used for transportation, to allow any sheep to be carried thereon, unless the party in charge of said sheep shall first produce a certificate from a deputy sheep inspector appointed under this act, that said sheep are free from scab, scabbies, and other infectious or contagious disease. Any violation of this section shall be deemed a misdemeanor and punishable by a fine of not less than \$100 nor more than \$250." Said section makes it a misdemeanor for any person, company, corporation, or association owning, controlling, or managing any ferry boat, toll bridge, car, steamboat, or other thing used for transportation, to allow any sheep to be carried thereon unless the party in charge of such sheep shall produce a certificate from a deputy sheep inspector. Any violation thereof is made a misdemeanor, and made punishable by fine. In order to procure a certificate or permit from a deputy sheep inspector under the provisions of the act of 1897, all healthy sheep must be dipped once; and

said § 14 makes it a criminal offense for any transportation company to bring sheep into the state unless the person in charge of such sheep have a proper certificate from a deputy sheep inspector. Under the provisions of said acts, sheep cannot be shipped from Washington or Oregon, or from any other state, over the transportation lines in this state, without first unloading such sheep, and having the proper deputy sheep inspector inspect and dip them. To illustrate: Supposing a train load of sheep are being shipped from Oregon to Chicago over the Oregon Short Line Railroad, if said acts be valid the train must be stopped near the state line of Idaho, the sheep inspected, and, if healthy, dipped by a deputy sheep inspector once, and, if not free from disease, dipped twice. Thereafter, a proper certificate being given to the shipper of said sheep, the train may then proceed. Again, to illustrate: Supposing that Wyoming, Nebraska, Iowa, and Illinois had sheep inspector laws similar to those of Idaho, such sheep would have to be inspected and dipped before entering Wyoming, and again before entering Nebraska, and again before entering Iowa, and again before entering Illinois. It certainly does not require any argument to show that such acts would most seriously harass and burden interstate commerce, so far as the great sheep industry in the west is concerned. The statement of the proposition is sufficient to show to one familiar with the matter that it would not only take days, but weeks, to get a train load of sheep which were free from disease from the state of Oregon to market in the city of Chicago, and at an expense which even the present prosperous condition of the sheep industry could not long withstand. And, again, said § 4 prohibits the bringing of sound healthy sheep into the state, at any season of the year, unless they be first inspected and dipped; and the provisions of said § 6 recognize the fact that it is absolutely impracticable, and very dangerous to the lives of the sheep, to dip them during cold weather, or during the winter months. By requiring all sheep to be dipped before they can be brought into the state, a prohibition is thus set on bringing any sheep into the state during the winter months. The act thus unjustly discriminates against outside sheep, for it provides that sound sheep within the state need not be dipped, and diseased sheep need only be quarantined and "spot or hand dressed," while sound outside sheep can only be brought within the state after first being dipped, and diseased outside sheep must be dipped twice before they can be brought within the state. An unjust discrimination is made against bands of ewes that are out of the state, whose owners desire to bring them into the state. Said act does not require the dipping of the ewes that are in the state between the 15th day of March and the 15th day of May following, but it requires all ewes that are brought into the state between those dates to be dipped once if sound and healthy, and twice if infected with contagious disease. The danger of loss being so great, in dipping ewes between said dates said act is a virtual prohibition on bringing bands of ewes into this state between the dates specified therein. Said act admits that sound sheep, by inspection, may

be distinguished from infected ones; that the inspector can easily determine whether a band of sheep is sound or not. It is admitted that the disease known as "scab" breaks out in open sores within ten days after exposure. It is also conceded that said disease is as prevalent in Idaho as it is in the surrounding states, and that Idaho sheep are the same as those of other states, and that scab is as prevalent and natural among sheep in Idaho as it is among the sheep of our neighboring states. In other words, the sheep of our neighboring states are no more the natural habitat for scab, or other infectious diseases to which sheep are subject, than are Idaho sheep. Those facts distinguish the case at bar from those cases in which the constitutionality of laws aiming to protect the cattle of certain states from the ravages of the disease commonly known as "Texas fever" is involved. It is recognized that Texas cattle are the natural habitat for said disease, and if they are excluded from a state, as well as cattle that have come in contact with them, the disease is wholly prevented. It is thus shown that that class of cases is distinguishable from the case at bar. The enactment of a similar statute to the one under consideration, by the states of Wyoming, Ne-

braska, Iowa, and Illinois, would result in closing the markets of Kansas City, Omaha, and Chicago to the sheep growers of our state. The burden placed upon the shipper or driver of sheep would be very great, if, upon arriving at a state line, he must notify a sheep inspector, and, in case such inspector pronounce the sheep sound and healthy, they must be dipped once before entering such state. Under the guise of inspection and quarantine, said sections place unnecessary burdens and restrictions upon bringing sheep into this state for any purpose whatever, or transporting them through the state to the markets of the east, and make unnecessary and prejudicial discriminations against sheep whose owners may desire to bring them into the state; and they are repugnant to the provisions of the Federal Constitution.

Said sections are void for that reason, and the judgment of the Lower Court must be reversed, and it is so ordered: The case is remanded, with instructions to the court below to set aside said judgment, and to discharge the appellant and dismiss said action. Costs of this appeal are awarded to the appellant.

Huston and Quarles, JJ., concur.

ILLINOIS SUPREME COURT.

SANITARY DISTRICT OF CHICAGO,

Appt.,
v.

John A. COOK.

(100 Ill. 184.)

1. Parties can raise by exceptions any questions of law for decision as readily as by submitting propositions to be held as law, under Rev. Stat. 1893, chap. 117, § 1, providing that referees shall have authority to take testimony and report the same in writing together with their conclusions of law and fact, and that either party may except to such report.
2. Trade fixtures erected by a tenant upon the leased premises during the term of the original lease cannot be removed after the expiration of the term of a new lease which contained no reservation of any right or claim of the tenant to the fixtures, and does not recognize his right to remove them.
3. A covenant in a new lease that the tenant will keep the premises in good repair and deliver them up in as good condition as they were when entered upon prevents the removal, at the close of the new term, of trade fixtures placed on the premises by the tenant during the original term, where the new lease contains no reservation or recognition of such right, even if the right of removal would not be lost in the absence of such a covenant.

(November 8, 1897.)

NOTE.—As to fixtures on leased premises, see also *Collamore v. Gillis* (Mass.) 5 L. R. A. 150, and *note*.

As to mortgages on buildings upon leased premises, see *Fletcher v. Kelly* (Iowa) 21 L. R. A. 347, and *note*.

39 L. R. A.

APPEAL by complainant from a judgment of the Appellate Court, First District, which reversed a judgment of the Circuit Court for Cook County disallowing compensation for certain buildings on property which complainant had undertaken to obtain by condemnation proceedings. *Affirmed*.

Statement by Carter, J.:

In September, 1892, the sanitary district of Chicago filed its petition in the circuit court of Cook county to condemn, for its right of way, among others, a number of tracts of land belonging to Thomas and Seth Piper and others and also two tracts, known in the case as Nos. 68 and 70, belonging to John A. Cook, on which there were certain buildings and other improvements. The sanitary district settled with the Pipers, while the suit was pending, for their interest in the land, and the verdict of the jury was subsequently rendered in the cause, awarding to the owner of tracts 68 and 70, who was John A. Cook, the appellee, the sum of \$43,845, and finding that the value of the buildings, fences, and other improvements situated upon the tract 70 was \$1,575.60. This last amount is the amount in controversy here, the money having been deposited in the Globe National Bank pending the determination of its ownership. In October, 1893, Cook served a notice on the district that he would, on a certain day, ask for an order requiring the money to be paid to him, claiming that he was the only person entitled to it. By agreement of the parties, made in open court, the cause was referred to Thomas Taylor, Jr., to take proof, and report to the court his conclusions

of law and fact. It was afterwards stipulated by the parties that all irregularities in the order of reference, taking testimony, making objections to the report, and filing exceptions thereto, be waived; and it was agreed that the same should have the full force and effect of a reference by agreement, pursuant to chapter 117 of the Revised Statutes of 1893, providing for the appointment of referees in common-law cases. It was also stipulated that the improvements consisted of a large stable and hay barn, dwelling, corn crib, cow house, some fences, well, pump, and drinking trough.

The evidence before the referee disclosed that the improvements were put on the land several years prior to 1888 by the Pipers; that the barn was constructed of eighty telegraph poles set in the ground, to which the rest of the lumber was attached; and that the stable was largely made of scantlings set in the ground; and that it would be impossible to move the buildings without tearing them to pieces. It seems that the Pipers had either a five or ten year lease, during which time they put on these improvements. Neither this lease nor its contents was given in evidence. After the lease had expired, and in 1888, a new lease was made between the same parties, for a period of five years, which was afterwards extended from time to time until the sanitary district took possession by virtue of the condemnation proceedings. This lease did not reserve to the tenant the improvements, but it contained the following: "And, as additional rents, said Piper covenants and agrees at his own expense to keep in good repair the fences upon said demised premises. And the said party of the second part further covenants with said party of the first part that the said party of the second part has received said demised premises in good order and condition, and that at the expiration of the time in this lease mentioned, or sooner determination thereof by forfeiture, he will yield up the said premises to said party of the first part in as good condition as when the same was entered upon by said party of the second part, loss by fire or inevitable accident or ordinary wear excepted, and also will keep the said premises in good repair during this lease at his own expense." The testimony further showed that, during the time negotiations were pending between the district and the Pipers and Cook in regard to acquiring their interests in the premises, the attorney for the Pipers disclaimed their ownership of the improvements; that the attorney for Cook at first claimed that his client did not own them, but, after seeing the lease, he informed the district that he did claim them; that a dispute at the trial of the cause as to their ownership, and before a settlement was reached with the Pipers, led the jury to make a separate finding as to the value of the improvements. The district made a settlement with the Pipers, and took a warranty deed for the tracts belonging to them, and also a quitclaim for certain tax titles held by them, including in said quitclaim all their interest in any building situated on the land of John A. Cook, and in the leasehold of the same land. This clause was put in the deed at the request of the attorney for the district, the attorney for the Pipers at the same time disclaiming that they had any

rights in the improvements. He testified positively that nothing was allowed in the settlement for these improvements. The district claims the money by virtue of the settlement with the Pipers and the quitclaim deed to these improvements. The referee made his report, finding that the buildings and improvements were attached to the freehold, and erected with the intention of becoming fixtures; that, by reason of the tenant accepting a new lease without reserving any right to remove them, they had become a part of the real estate; that there was no estoppel against Cook by reason of the admissions of his attorney, the same having been retracted and corrected before the final settlement was made with the Pipers; that, at the time of making such settlement, the district knew of Cook's claim of ownership, and that their value was not included in the settlement with the Pipers; and that Cook was entitled to the money. All of the findings of the referee, as well as his recommendations, were objected and excepted to. The referee's recommendations were overruled, and judgment for the amount in controversy was entered in favor of the district. From this judgment, Cook appealed to the appellate court for the first district, and that court reversed the judgment, and remanded the cause, with instructions, the effect of which was to direct the circuit court to find that Cook was entitled to the money, and to enter judgment therefor in his favor. The sanitary district then took this appeal to this court.

Messrs. F. W. C. Hayes and Seymour Jones for appellant.

Mr. Arthur B. Wells, for appellee:

Improvements of a permanent character erected on land, designed for its better enjoyment, are deemed a part of the land.

Dooley v. Crist, 25 Ill. 551.

This rule is relaxed in the case of improvements erected by a tenant during his term for use in his business, and which are so annexed that they can be removed without injury to the land.

Taylor, Land. & T. 8th ed. § 549.

The removal of these improvements would not leave the premises in as good condition as they were prior to their erection.

Chase v. New York Insulated Wire Co. 57 Ill. App. 205.

A tenant can remove trade fixtures erected by him during his term provided he removes them before the expiration of his term, or, in case he is allowed to remain in possession after the expiration of the term, without any new lease being executed, or the old lease is renewed, his right continues as long as under such circumstances he retains the possession.

Mason v. Fenn, 18 Ill. 525.

But if he accepts a new lease without reserving the right to so remove his trade fixtures he is held to have abandoned that right.

Leman v. Best, 30 Ill. App. 328; *Chase v. New York Insulated Wire Co.* 57 Ill. App. 205; *Lougram v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Watris v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 649; *Hedderich v. Smith*, 103 Ind. 203, 58 Am. Rep. 509; *Marks v. Ryan*, 63 Cal. 107; *Talbot v. Oruger*, 81 Hun, 504; *Carlin v. Ritter*, 68 Md. 478; *Wright v. Mac-*

donnell (Tex. Civ. App.) 27 S. W. 1024; *Elwes v. Mawe*, 2 Smith, Lead. Cas. 8th Am. ed. 214; Taylor, Land. & T. 8th ed. § 552; Ewell, Fixtures, ed. 1876, pp. 172 *et seq.*

In order to create an estoppel *in pais* the following elements must be present:

1. There must have been a representation concerning material facts.
2. The representation must have been made with a knowledge of the facts.
3. The party to whom it was made must have been ignorant of the truth of the matter.
4. It must have been made with the intention it would be acted upon.
5. And it must have been acted upon.

People v. Brown, 67 Ill. 435; *Winslow v. Cooper*, 104 Ill. 239; *Knapp v. Jones*, 143 Ill. 382.

Carter, J., delivered the opinion of the court:

As the appellate court made no finding of facts in its judgment of reversal, we must assume that it found the facts to be as found by the circuit court. Appellant here contends that, as no propositions to be held as law in the decision of the case were submitted to the trial court, no questions of law are presented here, and, as all questions of fact have been finally settled, nothing can be done by this court but to affirm the judgment. We are of the opinion that the report of the referee of his conclusions of law and fact under the statute, and the objections and exceptions to that report, raised for decision all such questions of law as fully as could have been raised by propositions of law had they been presented. The statute (Rev. Stat. 1893, chap. 117, § 1) provides that the referees "shall have authority to take testimony in such cause, and report the same in writing, together with their conclusions of law and fact, to the court," and that either party may except to such report. Appellant itself filed eight exceptions to the report, raising questions of law which were sustained by the court in overruling the recommendations of the referee, and rendering judgment for the district. Under this statute, parties can raise by exceptions any question of law for decision as readily as by submitting propositions to be held as law. There was but little dispute as to the evidence.

The only questions of law raised relate—First, to the effect of the subsequent leases of Cook to the Pipers of the premises containing the buildings, etc., after the expiration of the lease under which such buildings were erected by the Pipers; and, second, to the question whether or not Cook was estopped from claiming these improvements by the declarations of his attorney disclaiming his ownership. Conceding that it is settled by the evidence that the Pipers erected the buildings, etc., on the leased premises while holding under a former lease, as agricultural or trade fixtures, and had the lawful right to remove and retain them while holding under such former lease, the question remains whether such right was not lost by the expiration of such lease without such removal, and the taking of the subsequent leases in evidence which contained no reservation of such right, but, on the contrary, contained the covenants before set out, binding the lessees to

keep up the fences, to keep the premises in good repair, and to deliver up the same in as good condition as they were when entered upon. The record does not show the contents of the original lease.

We have been cited to no case, and know of none, in which the precise question here presented has been considered by this court. In *Mason v. Fenn*, 13 Ill. 525, it was said (p. 529): "As between landlord and tenant, improvements put on the demised premises by the latter, for purposes of trade or manufacture, and which can be detached without material injury to the estate, may be removed by him before he quits the possession." As to this proposition there can be no doubt. But the great weight of authority seems to be that where, at the expiration of a lease during which trade fixtures have been erected on the premises by the tenant, a new lease is taken of the same premises, containing no reservation of any right or claim of the tenant to the fixtures still remaining on the premises, and without recognizing the right of the tenant to remove them, such fixtures, erected under the former lease, cannot be removed by the tenant during or at the end of the new lease, notwithstanding his actual possession of the premises has been continuous. *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Heap v. Barton*, 12 C. B. 274; *Thresher v. East London Waterworks Co.* 2 Barn. & C. 608; *Sharp v. Milligan*, 23 Beav. 419; *Merritt v. Judd*, 14 Cal. 59; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 178; *Watris v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694; *Carlin v. Ritter*, 68 Md. 478; *Hedderich v. Smith*, 103 Ind. 208, 58 Am. Rep. 509; *Marks v. Ryan*, 63 Cal. 107; Taylor, Land. & T. § 552; Ewell, Fixtures, 174, 175; Tyler, Fixtures, 487-439; Wood, Land. & T. § 532. The reason given is "because the fixtures set up on the premises at the time of the lease are part of the thing demised, and the tenant, by accepting a lease of the kind without reserving his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterwards estopped from denying."

The only cases *contra* are *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, and *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501. In *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, leases had been executed for a certain term, all expiring on the same date, in which leases there was a provision allowing the lessees time for the removal of the buildings they might erect. Afterwards, the lessor having sold his real estate to another, a new lease was taken from the vendee, to expire at the same time as the former leases; and no reason appeared for doing so, unless it was to obtain some lots not included in the old leases. Judge Cooley, after stating the rule that the tenant must remove trade fixtures during the term, or while he still has a right to regard himself as occupying in the character of tenant, before surrendering possession, in delivering the opinion of the court, said: "But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in

the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble and incur the loss of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise, you will be deemed to abandon them to your landlord.' He then cited *Merritt v. Judd*, 14 Cal. 59, and proceeded to review the authorities therein cited, to show that they do not bear out the decision of the California court. However, the case of *Thresher v. East London Waterworks Co.* 2 Barn. & C. 608, which he distinguishes, is directly in point in the case at bar. This case, he said, "was decided upon the construction of a covenant contained in the new lease, by which the tenant undertook to repair the erections and buildings, and at the end of the term the premises so repaired, etc., to leave and yield up, etc." In commenting on *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, he used the following language: "The case of *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, is in accord with the case in California. In that case, Mr. Justice Allen, speaking for the majority of the court, says: 'In reason and principle, the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landlord at the expiration of the first term. The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease, and returned to the premises.' This is perfectly true if the second lease includes the buildings; but, unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion, it ought not to be held to include them, unless from the lease itself an understanding to that effect is plainly inferable."

The supreme court of Wisconsin, in the case of *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, cited *Kerr v. Kingsbury*, 39 Mich. 150, 38 Am. Rep. 362, with approval. Still, in the opinion it was said: "For the reason that the great preponderance of the evidence in this case clearly shows that it was understood that the tenant's right to his fixtures and machinery should remain in him notwithstanding the acceptance of a new lease, and because there is nothing in the terms of the new lease which must necessarily be construed as a letting by the landlord to the tenant of such fixtures and machinery, and an acceptance by the tenant of a lease of the same, with a covenant to return them to the landlord at the end of the lease, we think the right of the tenant to remove the trade fixtures and machinery placed upon said premises by him has not been lost; that such fixtures and machinery are still owned by him and that he has the right to remove the same."

89 L. R. A.

In another part of the opinion the court said: "If he [the tenant] accepts the lease which in express terms recognizes the right of the landlord to the fixtures, and he agrees to pay rent for their use thereafter, and keep them in repair, and surrender their possession at the end of the new term, a strong case would be made out in favor of a surrender of the fixtures to the landlord by the acceptance of such new lease; and it would require very clear evidence that, notwithstanding the acceptance of such new lease, there was an agreement that the title to the fixtures should remain in the tenant. If it should be admitted that the general words of description in the new lease would under ordinary circumstances be a lease of the fixtures as well as of the land and buildings, still the lease only raises a presumption that it was intended to cover the fixtures, and it is open to proof whether it was in fact intended to cover such fixtures, or whether they were intended by both parties to be excepted therefrom."

In *Carlin v. Ritter*, 68 Md. 478, the doctrine of *Kerr v. Kingsbury*, 39 Mich. 150, 38 Am. Rep. 362, as stated in the opinion of Judge Cooley, is disapproved in the following language: "We cannot go along with him in his reasoning. We are not able to discover anything 'absurd' in the rule laid down by the other authorities. . . . If it was the intention of the parties in this or any other similar case, that the right to remove fixtures should continue, nothing was easier than to insert in the lease a clause to that effect, and it seems to us reasonable to infer from the absence of such a clause that it was their intention that this right should no longer continue. . . . We neither know of, nor can we recognize, any 'public policy' which ought to induce the courts to place a different construction or give a different effect to a lease between landlord and tenant from that given to other contracts between other parties, or to set aside a well-settled rule or principle of law, in order to promote the interests of either party thereto." In this case the terms of the lease were: "The premises known as the 'City Hotel,' . . . together with all the rights, appurtenances, and privileges thereunto belonging or in any wise appertaining;" and the court said, in construing the same: "We take it then to be clear that the descriptive terms in this lease are sufficient to convey to the lessee the fixtures in dispute if they had been previously placed upon the premises by the landlord, or had been left there by a previous outgoing tenant. There is, it is true, no express covenant on the part of the lessee to keep the premises in repair, and restore them in good condition."

The Texas court of civil appeals, in *Wright v. MacDonnell*, 27 S. W. 1024, quotes the general rule, and says that *Carlin v. Ritter*, 68 Md. 478, answers and completely overthrows Judge Cooley's position. But the supreme court of Texas, on appeal, in the same case (38 Tex. 140), while conceding the rule as established by the weight of authority, inclines to the Cooley theory, and says: "The opinion of Judge Cooley in the former case is an able presentation of that side of the controversy, and is very difficult to answer. But as we view the case before us, it is not necessary for us to determine the naked question. The rule

recognized by the majority of the courts is neither inflexible nor arbitrary. It must yield to the intention of the parties to the lease, as deduced from the language employed, when viewed in the light of the circumstances attending the transaction."

In *Marks v. Ryan*, 68 Cal. 107, the case of *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362, is cited; but the court after citing *Watrous v. First Nat. Bank*, 124 Mass. 571, 26 Am. Rep. 694; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173, and *Ewell, Fixtures*, 174, followed the weight of authority, and adhered to the doctrine of its former decisions, as laid down in *Merritt v. Judd*, 14 Cal. 60, and *Jungerman v. Boese*, 19 Cal. 355.

We see no reason for departing from the general common-law rule, and must hold that the Pipers lost their right to the improvements by accepting the new leases, and that they did not pass to the sanitary district by the quit-claim deed. Besides, the covenants in the new leases would seem to put the question in this case beyond the realm of reasonable controversy. Even if it be conceded that the attorney of Cook had authority to bind him by the representations or admissions made to the attorney of the district that Cook had no claim to the improvements, still, as the statement was corrected and withdrawn before the appellant had acted upon it to its prejudice, and, by the later action of both parties on the trial in the condemnation proceedings, the ownership of the improvements was treated as a disputed question, to be left for future determination, we see no grounds from which an estoppel against Cook could arise.

The judgment of the Appellate Court is affirmed.

PEOPLE of the State of Illinois, *ex rel.*
William W. McILHANY, *Appt.*,

v.

CHICAGO LIVE-STOCK EXCHANGE.

(170 Ill. 556.)

1. Efforts to prevent competition, and to restrict individual effort and freedom of action, in trade and commerce, are restrictions hostile to the public welfare, not consonant with the spirit of our institutions, and in violation of law.
2. A by-law of a live-stock exchange limiting the number of solicitors that any member shall employ, with a provision for its enforcement by fine, suspension, or expulsion from membership, is an unlawful restriction on freedom of trade and business.
3. An act of a corporation tending to produce injury to the public by affecting the welfare of the people is an abuse of its corporate franchise, for which the charter of the company may be forfeited by an information in the nature of quo warranto.

(December 22, 1897.)

A PPEAL by relator from a judgment of the Circuit Court for Cook County in favor of

NOTE.—As to the ouster of a corporation from its franchise for attempting to create an illegal monopoly, see also *Ford v. Chicago Milk Shippers' Assn.* (Ill.) 27 L. R. A. 298.

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defendant in a quo warranto proceeding to oust defendant from its franchises for abuse of its charter powers. *Reversed.*

Statement by Phillips, Ch. J.:

On January 24, 1894, Jacob J. Kern, as state's attorney of Cook county, filed in the circuit court of that county a petition upon the relation of William McIlhany for leave to file an information in the nature of quo warranto against the Chicago Live-Stock Exchange. From a judgment denying a prayer of and dismissing that petition, an appeal was prayed and allowed by this court.

The material facts shown by the petition are as follows: "Appellee here (respondent below) is a corporation incorporated under the laws of the state of Illinois. The charter states that the object for which the corporation is formed is to establish and maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock, as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." The petition charges that all of the live-stock commission merchants who do business at the stock yards in the city of Chicago are members of said corporation, and that through such members said corporation has and exercises entire and absolute control over all the live-stock commission business transacted at said stock yards; that because of the control which said corporation has acquired over the live-stock commission business it is impossible for anyone who is not a member of said corporation to transact a live-stock commission business at said stock yards; that relator is engaged in the live-stock commission business at said stock yards, and is a member of said corporation; that he paid for said membership, and the same is worth, the sum of \$500; that said corporation, without any power, right, or authority, has assumed to enact the following rule or by-law: "Sec. 7. There shall be no solicitor employed who is not a member of this exchange. There shall be no solicitor employed except on a stipulated salary, which shall not be contingent on commission earned. Members of the exchange shall file with the secretary thereof, within five days of the time of employment, the name and postoffice address of their traveling solicitors. Members shall not employ to exceed three traveling solicitors for each firm in the states of Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa, and Minnesota. Members of a commission firm may solicit in the aforesaid states, provided they be counted as the solicitors allowed therein, and provided further, that they comply in all respects with the restrictions governing such solicitors. It shall be a violation of this rule for any solicitor representing or claiming to represent a commission firm located in another market to solicit for any Chicago firm in the states before named, and members shall be held responsible for any violation of this section by their partners or employees at other market

centers, and shall be held accountable for the acts of any solicitor who, under the guise of soliciting for a branch house, invades the territory above described, and solicits for a Chicago firm. Members may employ an unlimited number of solicitors to solicit outside of the foregoing prescribed territory, provided they comply in all respects with the restrictions governing solicitors. It shall be a violation of this rule for any nonresident member or stockholder of any commission firm to solicit for any commission firm in which he may be interested, unless he be duly registered and employed as a solicitor under the rules and regulations provided. It is provided further that members representing commission firms or incorporated companies shall be held responsible for any violation of this rule by the nonresident partners or stockholders of said firms or corporations."

The petitioner charges that the above rule operates in restraint of trade, and interferes with the just rights of relator and other members of said corporation in the management and conduct of their business; that for the enforcement thereof said corporation has enacted that "any member of this exchange, or firm in which he may be a partner, violating any of the provisions of this rule, shall be fined not less than \$250 nor more than \$1,000 for the first offense; for a second offense, not less than \$500 nor more than \$1,000; and, if either of such fines is not paid within three days, said firm shall be suspended from membership until same is paid. For a third offense they shall be expelled from membership in the exchange." The petition further charges that the business of relator, as well as the business of a large number of other members of said corporation, extends into the territory comprising the states mentioned in the above rule; and that relator and the other members of said corporations have, and by law ought to have, the right to conduct and extend their business in said territory, and for that purpose to employ such and so many solicitors as they may see fit; that relator and a large minority of the other members of said corporation desire to conduct their business in said territory in open competition; that relator and others of the members of said corporation have engaged solicitors who are not members of said corporation; that said corporation threatens to enforce the provisions of the above rule against relator and said other members, and to expel them from said corporation; that such action will ruin the business of the members against whom it is taken. The prayer is for leave to file information in the nature of quo warranto against said Chicago Live-Stock Exchange, requiring it to appear, and show by what right it assumes to exercise the privilege and franchise of enacting said rule or by law.

On the filing of this petition the court entered a rule directing the respondent exchange to show cause why the petition should not be granted. The exchange filed its answer to the rule, verified by the affidavit of its secretary. The facts disclosed by the answer show that the exchange does no business of any kind itself, but is an organization for the mutual benefit of its members in the fields indicated by the objects stated in its certificate of incorpo-

ration; that it has a membership of about 700 persons, mainly live-stock commission merchants; that each of its members voluntarily sought such membership, and agreed, in joining it, to abide by such by-laws and rules as it might make; that the exchange has no market, and conducts no market; that the Union Stock Yards are the separate and exclusive property of another and different corporation, *viz.*, the Union Stock Yard & Transit Company, a corporation for pecuniary profit, organized by a special act passed February 13, 1865; that upward of 80,000 persons are employed in the yards, of whom only a small number are members of the exchange; that the exchange has no property at the stock yards except a leasehold of one room for a term of one year; that its rules are adopted in order to carry out the objects of its creation above set forth; that its rules are operative upon and apply to such persons only as have voluntarily sought and obtained membership; that the powers of the exchange to make rules, and the validity of its rules establishing uniform rates of commission to be charged by its members, and determining that they may deal as live-stock commission merchants only with members of the exchange, have already been inquired into in this court, and sustained, both in proceedings by quo warranto and by injunction, judgment in the latter case being affirmed both by the appellate and supreme courts. The answer then sets up the substance of the opinion of this court. It also alleges that many evils formerly existed which the rule as to solicitors would be calculated to prevent; among others, a tendency to destructive rivalry in the number of solicitors who are sent out into the country by members to solicit shipments of live stock to their respective employers, amounting to a war of solicitation by competing houses, in which those unable to carry it on were defeated and driven out of business, and business demoralized, and left in the hands of the victors in the war; that dishonest and irresponsible and disreputable solicitors were employed, who used dishonest, irresponsible, and disreputable methods, and misrepresented the character and credit of rivals; that the business of commission men is confidential, and based on a trust relation, rendering it difficult to ascertain and prove the acts of dishonest solicitors, but that such acts bring discredit on the entire trade, and often brought on bitter disputes between members, and led to the sale of diseased live stock; that the rules requiring uniformity in the rates of commission and forbidding rebates of commission to shippers were frequently violated by commission merchants who resorted to the device of appointing consignors as solicitors of their own shipments, and paying to shippers rebates of commission under the guise of compensation for services as solicitors, and that the appointment and payment of compensation to alleged solicitors was also used as a collusive device by money lenders to cover usurious loans to commission merchants, and by railroad employees to cover extortion and unjust discrimination in the use of transportation facilities; that these rules in question would tend to prevent these evils, and to settle disputes and promote uniformity and co-operation among the members; that membership is a

voluntary matter, and that any dissatisfied member can withdraw at any time; that each member, by joining the association, freely and voluntarily surrendered a portion of his natural liberty in the methods of doing this particular business, in order to secure the greater advantages of co-operation, uniformity, mutual protection, the settlement of disputes, and exclusion of the disreputable methods and disease products from the business.

The questions presented upon the petition and answer were: (1) In enacting said rule or by-law, has appellee abused its corporate franchises? (2) Conceding that the enactment of such rule or by-law is an abuse of appellee's franchises, can that abuse be corrected through an information in the nature of quo warranto? The trial court held that the by-law is valid, and thereupon rendered a judgment denying the prayer of the petition, and dismissing the same. From that judgment the cause comes on appeal to this court.

Messrs. Jacob J. Kern and Moran, Kraus, & Mayer, for appellant:

The practical effect of the by-law is to take from appellee's members their individual control over their respective businesses, and vest that control in appellee.

This was illegal.

Huston v. Reullinger, 91 Ky. 333.

In all classes of business, the employer and employee should be allowed to contract with each other, unrestrained by others who may demand that the one shall give more or the other receive less, and, as a general rule, when restrictions are placed upon their rights by combinations or associations of men, they will be regarded as in violation of law, and void.

Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *People, Gray, v. Medical Soc. of Erie County*, 24 Barb. 572; *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340; *King, Coates, v. Coopers Co. Wardens*, 7 T. R. 540; *Ipswich Tailors' Case*, 11 Coke, 53; *Gunmakers' Soc. v. Fell*, Willes, Rep. 384.

Corporate franchises are granted in trust that they be used to attain the purpose for which they are granted, and on condition that they be not used to the public detriment.

2 Morawetz, Priv. Corp. § 1024; 2 Beach, Priv. Corp. § 840.

The state is not required to prove an actual injury. It is a sufficient cause of forfeiture if the act be such as, in the nature of things, is calculated to produce injury.

2 Waterman, Corp. § 427; 2 Spelling, Extraordinary Relief, § 1820.

Whenever a corporation uses its corporate powers to promote or consummate acts which are in contravention of the public policy of the state, it abuses its corporate franchise.

People v. North River Sugar Ref. Co. 121 N. Y. 582, 9 L. R. A. 33; *State, Atty. Gen., v. Milwaukee, L. S. & W. R. Co.* 45 Wis. 579.

It is one thing for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, 39 L. R. A.

and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations.

People v. North River Sugar Ref. Co. 121 N. Y. 582, 9 L. R. A. 33.

The word "unlawful," as applied to corporations is not used exclusively in the sense of *malum in se*, or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do.

People, Peabody, v. Chicago Gas Trust Co. 180 Ill. 268, 8 L. R. A. 497.

Whatever tends to create a monopoly is unlawful as being contrary to public policy.

2 Addison, Contr. 748; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 48 Ga. 13; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 23 W. Va. 600, 46 Am. Rep. 527.

With the corporation, restraint is the rule, and no act is lawful unless it be authorized by the charter.

Black v. Delaware & R. Canal Co. 24 N. J. Eq. 455; *Pennsylvania R. Co. v. Canal Comrs.* 21 Pa. 9.

It does not follow that when a state seeks to punish a corporation for violating the public policy of such state, the courts will refuse relief on the ground that the acts showing the violation would not have been illegal if performed by an individual.

State, Atty. Gen., v. Milwaukee, L. S. & W. R. Co. 45 Wis. 579.

In a proceeding against a corporation by quo warranto for having formed with others a monopoly in the shape of a "trust," no actual public injury need be proved, but it will be presumed, when an agreement is shown which, if carried out, will obviously result to the public detriment.

2 Spelling, Extraordinary Relief, § 1820; *Skranika v. Scharringhausen*, 8 Mo. App. 522; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456.

If a corporation does an act, or enters into a contract, which is in restraint of trade and in contravention of public policy, there is involved a public interest which the state may and must protect by proceedings in quo warranto.

Such is the doctrine of—

State, Atty. Gen., v. Milwaukee, L. S. & W. R. Co. 45 Wis. 579; *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33; *People, Peabody, v. Chicago Gas Trust Co.* 180 Ill. 268, 8 L. R. A. 497.

A corporation may have power to enact by-laws, yet, if it enacts a by-law upon a subject which it has no lawful authority to control, the state may, by information in the nature of quo warranto, oust the corporation from the exercise of such power.

People, Stewart, v. Young Men's Father Matthew T. A. Benev. Soc. No. 1, 41 Mich. 67; *People, Longress, v. Quincy Bd. of Edu.* 101 Ill. 808, 40 Am. Rep. 196; *Bissell v. Michigan, S. & N.*

I. R. Co. 22 N. Y. 258; *Chicago Bldg. Soc. v. Crowell*, 65 Ill. 453; *People, Peabody, v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *People v. Geneva College*, 5 Wend. 212; *People, Atty. Gen., v. Utica Ins. Co.* 15 Johns. 558.

Messrs. Peck, Miller, & Starr for appellee.

Phillips, Ch. J., delivered the opinion of the court:

This corporation organized as stated in its certificate of organization was formed to establish and maintain a commercial exchange, to promote uniformity in the customs and usages of merchants, to provide for the speedy adjustment of all business disputes between its members, to facilitate the receiving and distributing of livestock as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats, and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits. The purpose of this corporation, as expressed in this certificate of incorporation, is undoubtedly, if carried out to the fullest extent, in the interest of the people. The common law refused to recognize restrictions upon trade and business among the citizens of a common country. Under this rule of the common law the right of the laborer to dispose of his skill and industry, and to contract in reference to the same with whom he pleased and at such contract rates as might be agreed on, was recognized, and not allowed to be trammelled with restrictions which interfered with individual action and liberty. Combinations and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business employing such means and agencies as are not prohibited by law. The natural flow of trade and commerce must be unrestricted, and men engaged therein may accelerate its current by all means not unlawful. To this end men engaged in trade and commerce may advertise, employ men to solicit business, and offer rewards and inducements to secure trade without violating the law of the land; and in so doing are exercising a right which is in the interest of the public, because competition cannot be hostile to public interest. Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions, and in violation of law. We said in *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492: "The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. Our Constitution guarantees that no person shall be deprived of life, liberty, or property without due process of law. Article 2, § 2. And says Cooley: 'The man or the class forbidden the acquisition or enjoyment of property in the manner permitted the community at large, would be deprived of liberty in particulars of 89 L. R. A.

primary importance to his or their pursuit of happiness.'" It was also held in *Mors v. Bennett*, 140 Ill. 69, 15 L. R. A. 361: "Whatever may be the professed objects of the association, it clearly appears, both from its Constitution and by-laws, and from the averments of the declaration, that one of its objects, if not its leading object, is to control the prices to be charged by its members for stenographic work, by restraining all competition between them. Power is given to the association to fix a schedule of prices which shall be binding upon all its members, and not only do the members, by assenting to the Constitution and by-laws, agree to be bound by the schedule thus fixed, but their competition with each other, either by taking or offering to take a less price, is punishable by the imposition of fines, as well as by such other disciplinary measures as associations of this character may adopt for the enforcement of their rules. The rule of public policy here involved is closely analogous to that which declares illegal and void contracts in general restraint of trade, if it is not indeed a subordinate application of the same rule. As said by Mr. Tiedeman: 'Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the price of commodities or services.'" In *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, it was said: "Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it; and the right of property, preserved by the Constitution, is the right, not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage, and, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty." In other jurisdictions the rule is the same. In *King, Coates, v. Coopers Co. Wardens*, 7 T. R. 543, it was held that a by-law limiting the number of apprentices which any member of the company might take was void. In the *Case of Ipswich Tailors*, 11 Coke, 58, a corporation known as the Tailors of Ipswich enacted a by-law to prohibit any tailor from exercising his trade until he had presented himself before the corporation, and proved that he had served seven years as an apprentice. This by-law was held void, as being in restraint of trade. See also *Gunmakers' Soc. v. Fell*, Willes, Rep. 834. Sustaining the same proposition are *Stanton v. Allen*, 5 Dento, 434, 49 Am. Dec. 282; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *People, Gray, v. Medical Soc. of Erie County*, 24 Barb. 570. A case similar to that now under consideration was before the court of appeals of Kentucky in *Hua-*

ton v. Reutlinger, 91 Ky. 888. There the Louisville Board of Underwriters passed a by-law which, among other provisions, prohibited a local company from employing more than one solicitor, and regulated the manner in which the salary of such solicitor was to be paid. For a violation of this by-law the offending member of that board forfeited all rights as a member of the association. A local company which had employed more than one solicitor sought to enjoin the enforcement of the forfeiture on the ground that the association had no authority to control the members in the employment of solicitors, etc. A decree was entered in accordance with the prayer of the bill, which, on appeal, was affirmed, the court saying: "The majority of the members, under the guise of producing harmony in this business association, have taken from these individual members the right to determine how many men they shall employ in their private business, and then only such as the association may think fit for the position; nor can they employ a solicitor for a less period than six months, or offer a solicitor an employment within twelve months after the solicitor has severed his connection with any other member; are compelled to discharge those in his employ if he has more than one, and, if these by-laws are enforced, have placed their business under the control of the majority vote of the association, a power the exercise of which was not given by the fundamental law of the order, and doubtless not contemplated when the association was formed. . . . The common-law rule, recognized and adopted when business relations were not so multiplied and extensive as now, and when less necessity existed for enforcing it, condemned all such restrictions upon trade and business intercourse with men as is found to exist in this case. The right of one to control his own property as he pleases, and to employ those necessary to aid him in his business upon such terms as may be agreed on, when not in violation of the law of the land, is the rule of the common law; and the right of the laborer to dispose of his skill and industry to whom he pleases, and for the price agreed on, is embraced within the same rule. In all classes of business the employer and employee should be allowed to contract with each other, unrestrained by others who may demand that the one shall give more or the other receive less, and, as a general rule, when restrictions are placed upon these rights by combinations or associations of men they will be regarded as in violation of law, and void." Where a corporation is created there goes with it the power to enact by-laws for its govern-

89 L. R. A.

ment and guidance, as well as for the guidance and government of its members. The power is necessary to enable a corporation to accomplish the purpose of its creation. But by-laws must be reasonable, and for a corporate purpose, and always within charter limits. They must always be strictly subordinate to the Constitution and the general law of the land. They must not infringe the policy of the state, nor be hostile to public welfare. The by-law in this case is a restriction on freedom of trade and business. It trammels competition, and prohibits an individual from contracting and engaging in business and using such agencies and means as he may desire not hostile to general law. It is not required for corporate purposes, nor is it included within the purposes declared in the certificate of incorporation. It was therefore unlawful, as this organization had no right to exercise the power of enacting it under its franchise. It is not every misconduct on the part of a corporation, or act not consonant with the purposes of its creation, that will destroy its life. An act, to thus result, must be one which tends to produce injury to the public by affecting the welfare of the people. Where this results, there is an abuse of corporate franchise. *People v. North River Sugar-Ref. Co.* 121 N. Y. 582, 9 L. R. A. 88. Attempts to place restrictions on trade and commerce and to fetter individual liberty of action by preventing competition, are hostile to public welfare, and affect the interests of the people. Such attempts by a corporation are an abuse of its corporate franchise. Public policy requires that corporations, in the exercise of powers, must be confined strictly within their charter limits, and not be permitted to exercise powers beyond those expressly conferred. The state provides for the creation of corporations. The corporation is its creature, and must always conform to its policy. This duty on the part of corporations to do no acts hostile to the policy of the state grows out of the fact that the legislature is presumed to have had in view the public interest when a charter was granted to the corporation, and no departure from its charter purposes will be allowed which would be hurtful to the public. Where such act is done by a corporation, the state may proceed to claim a forfeiture of its charter by an information in the nature of quo warranto. The petition for leave to file an information in the nature of quo warranto should have been granted.

The judgment of the Circuit Court was therefore erroneous, and is reversed, and the cause is remanded, with directions to grant leave to file the information.

OREGON SUPREME COURT.

Aaron ROSE, *Appt.*,
v.
Hyman WOLLENBERG, *Respnt.*

(.....Or.....)

A contract between cosureties fixing the proportion and extent of their several or correlative liability as between themselves is not within the statute of frauds.

(March 16, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Douglas County in favor of defendant in an action brought to compel defendant to pay to plaintiff money which plaintiff had been compelled to pay as surety on the official bond of V. L. Arrington in excess of what he had contracted to pay. *Reversed.*

NOTE.—Effect of statute of frauds upon contracts between sureties to fix their shares of liability.

The case of *Thomas v. Cook*, 8 Barn. & C. 723, 8 Moody & R. 444, though perhaps not strictly one of contract between sureties to fix their shares of liability, seems to have furnished the principles involved in and which govern this subject, a promise to indemnify being equivalent, as between themselves to a promise to take the whole liability as the promisor's share. In that case it was held that a promise by one who requests another to execute a bond with him and a third person to indemnify him against all loss by reason thereof is not a special promise to answer for the debt, default, or miscarriage of another which must be in writing under the statute of frauds, but merely a promise to indemnify, as the promise is given to the debtor, and not to the creditor, and the promisee may recover from the promisor the whole of the money which he is compelled to pay by virtue of the bond.

In *Green v. Cresswell*, 10 Ad. & El. 453, 2 Perry & D. 430, 4 Jur. 169, however, the reasons given for the rule laid down in *Thomas v. Cook*, 8 Barn. & C. 723, 8 Moody & R. 444, were said to be unsatisfactory, and were not adopted in that case, but that case was not one of an agreement between sureties. But in *Cripps v. Hartnoll*, 4 Best & S. 414, 10 Jur. N. S. 200, 11 Week. Rep. 953, 32 L. J. Q. B. N. S. 381, 8 L. T. N. S. 765, the court refused either to overrule *Green v. Cresswell*, 10 Ad. & El. 453, 2 Perry & D. 430, 4 Jur. 169, or to say that it entirely supported it, but distinguished it upon the ground that in the case at bar the bail was given for the appearance of a criminal, and not for the purpose of answering a debt or default in a civil case.

And in *Reader v. Kingham*, 13 C. B. N. S. 844, 32 L. J. C. P. N. S. 108, 9 Jur. N. S. 797, 7 L. T. N. S. 789, 11 Week. Rep. 866, which was a case of a promise of indemnity by a third person to a surety, the rule with the reasons on which it was based, of *Thomas v. Cook*, 8 Barn. & C. 723, 8 Moody, & R. 444, were adopted and the doctrine of *Green v. Cresswell*, 10 Ad. & L. 453, 2 Perry & D. 430, 4 Jur. 169, was substantially overruled.

And that rule has since been followed by the great majority of the cases both in the United States and in England, though the reasons for the adoption of such rule given in such cases have not always been the same.

Thus, an agreement by which a person becomes

Statement by **Wolverton, J.:**

The facts out of which this case arose are, in effect, as follows:

On June 21, 1892, the plaintiff and defendant became sureties upon the official bond of one V. L. Arrington, who had theretofore been elected treasurer of Douglas county. Arrington defaulted, and on December 28, 1893, judgment was taken against him and his bondsmen, which was satisfied by plaintiff and defendant each paying one half, or \$11,828.65. As touching the contractual relation of the parties with each other, the plaintiff alleges "that, at the time plaintiff and defendant so became such sureties on said official bond of V. L. Arrington, it was agreed and stipulated by and between plaintiff and defendant that their liabilities, as between themselves, as sureties on said official bond of V. L. Arrington, should not be joint or equal, but that the liability of plaintiff should be a one-third proportion, and that of the defendant should be a two-thirds proportion, of any liability that

surety on the promise and undertaking of another surety on the same instrument, that he would indemnify him from all loss, is a contract of indemnity, and not within the statute of frauds, and need not be in writing. *Rae v. Rae*, 6 Ir. Ch. Rep. 494; *Apgar v. Hiler*, 24 N. J. L. 812; *Ferrell v. Maxwell*, 28 Ohio St. 383, 22 Am. Rep. 398; *Barry v. Ransom*, 12 N. Y. 462.

The indemnity promised is to secure his own default or liability independently of the promise in question. *Ferrell v. Maxwell*, 28 Ohio St. 383, 22 Am. Rep. 398.

And it does not contradict or vary the terms or legal effect of the obligation, and may be proved by parol, and is a bar to an action by the party making the promise against his cosurety for contribution. *Barry v. Ransom*, 12 N. Y. 462.

And if such cosurety is compelled to pay he may recover the whole from the promisor. *Apgar v. Hiler*, 24 N. J. L. 812.

So, a contract by which one of the sureties upon an official bond of a third person agreed to hold the other harmless from all liability and loss thereon, in consideration of which the latter became a surety thereon, forms no part of the bond itself, but is a distinct and original contract of general indemnity which need not be in writing under the statute of frauds, and which is provable by parol. *Hoggatt v. Thomas*, 35 La. Ann. 298.

And a promise by a surety upon an administrator's bond to his cosurety to save him harmless is not a special promise to answer for the debt, default, or misdoing of another person upon an agreement that is not to be performed within one year, required by the Massachusetts statute of frauds to be in writing, and is a valid defense in an action against the surety signing in consideration thereof for contribution. *Blake v. Cole*, 22 Pick. 97.

And an agreement by one about to become a surety upon such a bond, who calls upon another to join him, that if he will do so he will indemnify him against any loss, to which the other assents and signs the bond, is not a promise to answer for the debt, default, or miscarriage of another within the statute, but an original contract between them that the promisee should be indemnified against the bond. *Jones v. Shorter*, 1 Ga. 294, 44 Am. Dec. 649.

So an agreement by a surety upon a promissory note that if another would also become surety

might occur, under said bond, to said sureties." Plaintiff, by this action, seeks to recover the difference between one third and one half of the liability incurred, amounting to \$4,008.55. The following is a copy of the bond, omitting matter of inducement and formal parts:

We, V. L. Arrington, as principal, and Aaron Rose and Hyman Wollenberg, hereby undertake that if the said V. L. Arrington shall not faithfully pay over, according to law, all moneys that may come into his hands by virtue of said office, that we, or either of us, will pay the state of Oregon the sum of thirty thousand (30,000) dollars.

V. L. Arrington. [Seal.]
\$10,000.00. Aaron Rose. [Seal.]
H. Wollenberg. [Seal.]

The sureties joined in the justification; the plaintiff justifying for \$10,000, and the defendant for \$20,000.

The allegation above quoted having been put in issue by the answer; a jury was called, whereupon the plaintiff, after putting the bond

thereon he would indemnify him from all loss and harm is an original undertaking, and not an undertaking upon his part to answer for the debt of another, and need not be in writing under the statute of frauds. *Horn v. Bray*, 51 Ind. 556, 19 Am. Rep. 743.

And an undertaking to become cosigner of a note, and to pay it at maturity, in consideration of which another signs it, is not a promise to pay the debt of another within the statute which is required to be in writing, where the object of the note was to raise money for the promisor, though the ultimate purpose was to make use of it for the benefit of third persons who were first signers of the note, and for which such promisor was to obtain security in his own name and for his own benefit as for an advance made by him personally. *Potter v. Brown*, 35 Mich. 274.

And one who executes a note jointly with the principal debtor as his surety, and intrusts it to his principal to be used, impliedly authorizes him to issue it as it then is or to procure such further security as would make it available, and for that purpose to accept such further terms as the party signing it might prescribe, and he cannot object where the principal debtor procures the signature of another surety upon the agreement that the first surety should indemnify him against loss, and such stipulation need not be in writing, and parol evidence is admissible to establish it. *Oldham v. Broon*, 28 Ohio St. 41.

So, an agreement between the first indorser and the second indorser of a promissory note, that the second indorser would bear half of the loss which might accrue from nonpayment by the drawer, is a collateral contract by parol, and parol evidence can be given to prove it. *Phillips v. Preston*, 48 U. S. 5 How. 273, 12 L. ed. 152.

And an agreement between the first and second indorsers of a promissory note that if the first indorser would pay the note at maturity the second would deliver goods to him to the amount so paid is valid and based upon a sufficient consideration, and is not an agreement to answer for the debt, default, or miscarriage of another which must be in writing under the statute of frauds, but an independent agreement based upon a new consideration moving between the contracting parties. *Sanders v. Gillespie*, 59 N. Y. 260.

And an agreement between the first and second indorsers of a promissory note, made on being in-

in evidence, testified as a witness, in his own behalf, in substance, that Arrington, Wollenberg, and the county clerk G. A. Taylor, were present when he signed the bond, and that the figures "\$10,000.00" were placed in front of his name at the time he signed, and, continuing, said: "I was to assume \$10,000, and Wollenberg \$20,000. This is the way I understood it." And upon cross-examination he further said: "All the contract I suppose I had was when I signed for one third, and he for two thirds. I suppose I had to pay one third, and him two thirds. That is all the contract. . . . I signed for security for Mr. Arrington, and at the same time I said, distinctly, that I would not go for more than one third, and Mr. Wollenberg said he would go for \$20,000." Arrington testified as follows: "Two or three days before the signing of the bond,—several days before,—I went to Marks' store, there, and asked him if he was willing to sign as my surety again; and I went into the bank, and asked S. C. Flint if he was willing to go on my bond. Mr. Wollenberg was there, and he expressed himself there voluntarily; says, 'I am willing, and will go on your

formed by the maker that he would be unable to pay it at maturity, that in consideration of an assignment by the maker of his property giving preferences to the note they would pay it and look to the assignment for remuneration, which was in terms joint with nothing to show that it was not intended to create a joint obligation, terminates the relation of the parties as first and second indorser, and deprives them of recourse to the maker beyond the assignment, or from a recourse as against each other, and is not a collateral undertaking within the meaning of the statute of frauds. *Westfall v. Parsons*, 16 Barb. 643.

So, a request to become special bailor for a person who had been arrested in a civil action, made by one who was bound to indemnify him from arrest, is an original undertaking and not within the statute of frauds, and the promisee is entitled to recover against him for expenses he had been put to in endeavoring to obtain a surrender of the person arrested. *Harrison v. Sawtel*, 10 Johns. 242, 6 Am. Dec. 387.

And a promise by the directors of a corporation to one of their number to induce him to indorse a corporate note, that they will respond to him and save him harmless from all loss incurred by indorsing except his appropriate share, which is to be borne by himself, is an original undertaking not within the statute of frauds, and need not be in writing. *Cortelyou v. Hoagland*, 40 N. J. Eq. 1.

And an agreement made by a surety on a note of a private corporation which was secured by mortgage on its real estate with his cosureties, in consideration of the assignment to him of certain stock, that he would pay the note and all other debts of the corporation upon which they were liable as sureties, does not terminate the relation of principal and agent between the corporation and the promising surety, and upon payment of the mortgage note by one subsequently becoming surety to the payee he is entitled to subrogation to the rights of the mortgagee, and acquires the right to enforce the mortgage as against the corporation and a priority as against creditors thereof. *McDaniels v. Flower Brook Mfg. Co.* 22 Vt. 274.

But a promise by the members of a voluntary association who were tenants under a lease, made to one of their number who had signed a guaranty of the payment of the rent, that they would take the responsibility of his signature upon themselves, is an agreement to answer for the debt or default of

bond.' He asked me who else were going on. I told him Aaron Rose and Asber Marks. . . . I asked them all to meet me there [at the clerk's office] on the 21st of June, so as to put the jurat on the bond. I asked Rose and Wollenberg to meet me there on that morning to justify on the bond. When this matter in regard to the signing occurred, Mr. Marks was not there. I went into my room, out of the clerk's office, for my hat, to go and get Mr. Marks to complete the business. When I came out of the room, Mr. Wollenberg met me in the corridor, and said: 'You need not go for Mr. Marks. I will take the rest of the bond.'" The witness further stated, in effect, that, after the defalcation, Wollenberg admitted his liability on the bond to the extent of \$20,000, and, upon cross-examination, that at the signing, and in the presence of Taylor, Wollenberg, and himself, "Mr. Rose said he would be liable for one third of the bond, and instructed Mr. Taylor to prefix the figures '\$10,000,' as he would sign for one third of the bond." G. A. Taylor, the clerk, gave his version of the execution of the bond as follows: "As near as I can remember the matter, these parties came into the office, and wished to fix the bond out before me,—the justification; and they told me—I do not know which one it was told me—how they wanted it fixed, and how it should read; and, according to the instructions received from the parties at that time, I filled it out, and fixed it in the amount of \$10,000 and

another which must be in writing expressing consideration therefor within the New York statute of frauds, and no recovery can be had thereon where the consideration is omitted, though contribution might have been compelled if the guarantor had been sued upon the lease or upon a promise to pay rent. *Baker v. Dillman*, 12 Abb. Pr. 318.

So, an agreement by a surety whose land had been sold under execution for the debt of the principal and bid in by the other surety, by which he was to take an assignment of the bid and pay off the debt, is not a contract to pay the debt of another which must be in writing under the statute of frauds. *Hockaday v. Parker*, 8 Jones, L. 19.

And a promise made by one of two persons believing themselves to have similar interests dependent upon the settlement of the same question, made to the other, that if he would commence and carry through a suit in his own name to settle such question he would pay one half the expense incurred by him therein, in consequence of which the other brings and prosecutes such suit to a final termination, is not a promise to answer for the debt of another which must be in writing within the statute of frauds. *Dorwin v. Smith*, 35 Vt. 60.

And an undertaking between creditors working together for the protection of their claims, whereby they agreed to share equally any loss which either may sustain in enforcing his claim, is a collateral undertaking within the meaning of the statute of frauds providing that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or misdoing of another, unless the promise be in writing signed by the person to be charged. *Spear v. Farmers' & M. Bank*, 156 Ill. 555.

So, in *Jones v. Letcher*, 13 B. Mon. 368, it was held that a surety of an executor procuring another surety to be bound with him upon his promise to save him harmless is liable thereon, and that a third surety who is released from responsibility on the contract on account of payments made is a

\$20,000, and put the figures '\$10,000' in front of Mr. Rose's name at the request of the parties. I do not know which one told me to do that." This is, in substance, all the testimony offered; and, the plaintiff having rested, the defendant moved for nonsuit, which was granted by the court, and judgment entered against plaintiff for costs, from which he appeals.

Messrs. R. Mallory and W. W. Cardwell for appellant.

Mr. J. W. Hamilton, for respondent:

It is necessary to prove the contract alleged in the complaint, which is in effect that the defendant Wollenberg agreed to indemnify and save harmless plaintiff from paying any greater amount than one third of the loss, if any should be sustained by reason of signing said bond. The evidence of plaintiff plainly contradicted these allegations. In such cases upon a failure of the testimony being insufficient to sustain a verdict, the judgment of nonsuit is proper.

Cognell v. Oregon & C. R. Co. 6 Or. 417; *Buchanan v. Beck*, 15 Or. 571; *Brown v. Oregon Lumber Co.* 24 Or. 817.

Where the sureties on a bond bind themselves severally for a certain amount, each is liable up to that amount for any debt he may be bound for as surety.

New Orleans v. Waggaman, 81 La. 299; *Fulton v. State*, 14 Tex. App. 34.

competent witness to prove the promise; but while the statute of frauds was not interposed as a defense the court said that it did not perceive any valid objection to such testimony.

And in *Hook v. Richeson*, 115 Ill. 432, it was held that an arrangement between cosureties for the distribution of the burden of their joint liabilities among themselves will not affect or defeat their rights against their principal, and though the statute of frauds was not pleaded there is nothing in the case to show that the arrangement was in writing.

In *Bissig v. Britton*, 59 Mo. 204, 21 Am. Rep. 379, however, it was held that a promise by one who has already signed a replevin bond as surety in order to make it good made to another, that if he would also sign it he would hold him harmless from all damages arising therefrom and from all liabilities incurred on account thereof, is a promise to answer for the debt or default of another within the Missouri statute of frauds, and is invalid unless in writing. Following *Green v. Cresswell*, 10 Ad. & Al. 453, 2 Perry & D. 430, 4 Jur. 169, *supra*.

And the same rule has been adopted in Virginia.

Thus a promise by one surety to indemnify another who has become cosurety with him in an official bond at the promisor's request falls within the provision of the statute of frauds requiring that a promise to answer for a debt, default, or misdoing of another, must be in writing to be enforceable by action, and the surety to whom the promise is made, where he is compelled to pay the debt, cannot recover of his cosurety who made the promise anything beyond his aliquot share of the loss occasioned by the default of the principal. *Wolverton v. Davis*, 85 Va. 64.

In that case it was said that there is no foundation for any distinction between a promise by a stranger to the debt to indemnify a surety which is *prima facie* within the statute of frauds and a promise by one who is himself surety also and therefore answerable for the default of the principal independently of his promise. F. H. R.

At the time of the payment of this liability by Rose and Wollenberg, it was in the form of a judgment against both. Neither party could dispute their liability, the judgment being conclusive as to both.

1 Freeman, Judgm. 4th ed. § 256.

A verbal promise to indemnify against loss in becoming surety for a third person is a special promise to answer for the debt, default, or mis-carriage of another person, and no action can be maintained on such promise.

Easter v. White, 12 Ohio St. 219; *Kingsley v. Balcome*, 4 Barb. 181; *Nugent v. Wolf*, 111 Pa. 471; *Brown v. Adams*, 1 Stew. (Ala.) 51, 18 Am. Dec. 36.

If the surety voluntarily pays, he cannot recover from cosurety.

Baylies, Sureties & Guarantors, p. 327, § 7; *Hichborn v. Fletcher*, 66 Me. 209, 22 Am. Rep. 563; *Bancroft v. Abbott*, 3 Allen, 524.

Wolverton, J., delivered the opinion of the court:

The question presented by this record is whether the alleged agreement between the plaintiff and defendant "that the liability of plaintiff should be a one-third proportion, and that of the defendant should be a two-thirds proportion, of any liability that might occur under said bond to said sureties," not having been entered into in writing, is within the statute of frauds and perjuries, and therefore void; and, if not, another question arises, and that is whether the evidence presents a prima facie case, sufficient to go to the jury. It is settled by *Durbin v. Kuney*, 19 Or. 71, that as between cosureties, where one of their number has paid more than his proportion of the common liability, no special agreement having been entered into between themselves, the law raises an obligation upon the part of the cosureties to repay him the excess which he has been compelled to pay, upon the principle that, where there is a common liability, equality of burden is equity. Formerly equity alone entertained jurisdiction to compel contribution, but latterly courts of law, having borrowed the jurisdiction, are competent, in most cases, to administer relief. It is said in the case cited "that the doctrine of contribution does not depend upon contract, but is bottomed and founded upon principles of natural justice. The contract on which they are codebtors, or sureties, only expresses the relation between them and their creditor, and is entirely distinct from the right of contribution, which exists between themselves." While the law, upon principles of natural justice, raises the obligation of equitable contribution among cosureties, it by no means follows that they are inhibited from fixing or determining their relative liabilities by express contract or agreement among themselves. Indeed, the right to enter into any agreement in respect of such liability as their discretion or judgment may dictate is not questioned. The important question is whether such contracts or agreements are within the statute of frauds, requiring all contracts for the debt, default, or mis-carriage of another to be contained in some note or memorandum in writing expressing the consideration, signed by the party to be charged. It is well settled that the true rela-

tions existing between joint, or joint and several, promisors or obligors upon a note or bond, or other instrument of writing, can be shown by parol, whether principals or sureties. The writing is paramount, and fixes liability, as it pertains to the payee or obligee; but, as between the makers or obligors, their correlative undertakings, whether in the capacity of principals or sureties, may be otherwise established. The principal, who has obtained the benefit of the contract, or suffered the forfeiture of his bond or obligation, is always bound to indemnify his surety who has sustained loss upon his account, and he cannot interpose the statute of frauds to prevent it. But when we go a step further, to the proposition which involves the undertaking of one surety to indemnify another, in whole or in part, against liability upon their principal's obligation, or, as is alleged in the case at bar, an agreement between themselves fixing upon a different ratio of liability than that which the law raises or implies, we find much contrariety of opinion and authority, as respects the enforcement of such undertaking or agreement where it rests in parol.

The earliest case to which our attention has been called is that of *Thomas v. Cook*, 8 Barn. & C. 728. It there appeared that one person requested another to become surety with him for a third party, under promise of indemnity against payment. In deciding it, Bayley, J., says: "Here the bond was given to Morris as the creditor, but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds." This was in 1828. In 1839 *Green v. Crenwell*, 10 Ad. & El. 453, was decided by the same court, which may be taken to have overruled *Thomas v. Cook*. At least, the reasoning of that case was severely criticised. The case was this: The plaintiff, at the request of defendant, and under his promise to indemnify and save him harmless, became surety for one Hadley upon a bail bond in a civil action. The defendant did not join as cosurety. The undertaking was held to be within the statute. The court distinguishes *Thomas v. Cook* by reason of the fact that both the plaintiff and defendant therein joined as cosureties. Subsequent authorities have assigned as a reason for the distinction that, where the defendant is cosurety, he is, as such, and without any special promise, liable already to contribute, and that his special promise to pay the whole may be regarded as but a matter of regulation of contribution between the two sureties. In *Browne*, Stat. Fr. 4th ed. § 161a, it is argued that the reason is not well assigned, because—"First, that, though called regulation of a contribution, it is really a promise to pay what he was not otherwise liable to pay for a third party; and, secondly, that he was never liable to contribute at all except by force of the relation of cosuretyship into which he entered, and owed no antecedent debt or duty of his own." These

cases gave rise to the subsequent divergence of opinion on the subject treated therein, and the decisions of courts of different jurisdictions are to be largely distinguished, in that they have followed the one or the other of these early authorities. *Reader v. Kingham*, 13 C. B. N. S. 844, a later English case, decided in 1862, and arising out of a similar state of facts, although not overruling, is in direct conflict with *Green v. Cresswell*. In *Cripps v. Hartnall*, 4 Best & S. 414, the court would not say that it could lend its support to *Green v. Cresswell*. But in a much later case, decided in 1874 (*Wildes v. Dudlow*, L. R. 19 Eq. 198), *Green v. Cresswell* was expressly overruled, and *Thomas v. Cook* approved and followed. In that case the son, at the request of his father, became surety for a third party, the father not signing as a co-surety; and it was held to be an original contract for indemnity, and within the statute of frauds. By a very recent case (*Guild v. Conrad* [1894] 68 L. J. Q. B. 721), decided in 1894, it was held that *Green v. Cresswell* was no longer binding, but that *Thomas v. Cook* was good law. So that it may be said that in England the doctrine has been finally settled in harmony with the latter case.

The authorities among the states of this country are much divided upon the subject. Among the earlier cases to be found is *Chapin v. Merrill*, 4 Wend. 657, decided in 1880. The facts stated are that plaintiff, at the request and upon the solicitation of the defendant, and under a promise of indemnity, entered into an undertaking, under seal, with one Asa Ransom, by which they covenanted with a mercantile firm that if they would supply one Asa Ransom, Jr., with goods, they (the co-sureties) would pay such an amount unpaid by Ransom, Jr., not exceeding \$2,000, as should be due the firm. The defendant had no interest in the goods. Marcy, J., in deciding the case, says: "The contract on which this action is brought is not, in my opinion, within the statute of frauds. The action is brought on the parol undertaking of the defendant to save the plaintiff harmless. . . . The promise in this case was original, and not a collateral undertaking, but had it a sufficient consideration? It is not disclosed that the defendant received any benefit from what was done by the plaintiff; nor is it necessary, as I conceive, that he should, to make him liable. In *Tomlinson v. Gill*, 1 Ambl. 330, and *Read v. Nash*, 1 Wils. 305, it does not appear that the defendant did or could derive any benefit from their undertakings, yet they were held liable on them. The consideration was the harm to the plaintiffs. In this case the consideration was the assumption of the plaintiff of a responsibility on which he was obliged to pay about \$600. This is an abundant consideration for the undertaking on which this action is brought." This case was subsequently overruled by the supreme court of New York. (*Kingsley v. Balcome*, 4 Barb. 181), which latter was a case wherein plaintiff became bail upon arrest, at the request of defendant, who promised to indemnify and save him harmless. The opinion is based, to some extent, upon the express authority of *Green v. Cresswell*, 10 Ad. & El. 458. In a later case (*Barry v. Ransom*, 12 N. Y. 462), decided in 1855, it was held that

a surety who became such (upon a tax collector's bond) at the request of his co-surety, and under promise of indemnity, could not be required to contribute, the co-surety having paid the whole loss. Denio, J., says: "The cases where the person making the promise was himself bound for the default of the third person are uniform in holding the contract to be unaffected by the statute." Thus distinguishing *Green v. Cresswell* and *Kingsley v. Balcome*, and following *Thomas v. Cook*, the court concludes: "I am of opinion that where a person is about to become bound by writing to answer for the default of a third party, and he procures another to be bound with him in the same obligation by promising to indemnify him, that this is an original promise, and not within this branch of the statute of frauds." The same result was reached in a Massachusetts case (*Blake v. Cole*, 22 Pick. 97), based upon a similar state of facts. In a later case from the same state (*Aldrich v. Ames*, 9 Gray. 77), in which the facts are not stated, except that the promise was made for a valuable consideration, Shaw, Ch. J., says: "The theory of the statute of frauds is this, that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For instance, if A, a debtor, owes a debt to B, and C promises B, the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the same case should C, on good consideration, promise A, the debtor, to pay the debt of B, and indemnify A from the payment, although one of the results is to pay the debt to B, yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt. This rule appears to us to be well settled as the true construction of the statute." These earlier cases are sufficient to illustrate the distinguishing features between the prevailing antagonistic opinions in this country.

The leading and perhaps the best considered cases to be found which follow in the wake of *Green v. Cresswell* and *Kingsley v. Balcome* are *Easter v. White*, 12 Ohio St. 219; *Bissig v. Britton*, 59 Mo. 204, 21 Am. Rep. 379; *Macey v. Childress*, 2 Tenn. Ch. 438; and *Nugent v. Wolfe*, 111 Pa. 471, 56 Am. Rep. 291. The Ohio case was decided long prior to the English case of *Wildes v. Dudlow*, while the Missouri case was almost concurrent in time with it, but without knowledge of its announcement, and was not in any manner controlled by it. The other two cases cite it with disapproval. The clearest illustration of the principle maintained by these cases is to be found in *Nugent v. Wolfe*. The First National Bank of Ravenna, Ohio, had obtained judgment against Powers & Co. Nugent went security for Powers & Co., as he alleges, at the request of Wolfe, accompanied with a verbal undertaking or agreement to save Nugent harmless in his undertaking for Powers & Co. with the bank. The court in deciding the case, says: "There is no testimony, nor was any offered, to show that defendant had any personal interest in the judgment on which bail was entered,

or that he held property or funds that should have been applied to the payment thereof. So far as appears, it was the proper debt of Powers & Co., and the substance of defendant's agreement is that he would see that they paid it, and, if they failed to do so, he would pay it for them. It was literally a promise to answer for the default of Powers & Co. Plaintiff's liability as bail for stay was merely collateral to the debt in judgment, and had in contemplation nothing but the payment thereof to the bank."

The cases which are usually classed as following *Thomas v. Cook* and *Chapin v. Merrill* may be subdivided into three classes, in consideration of the grounds upon which each is apparently sustained. First. It is held that where the inducement for the promise of indemnity is a benefit to the promisor which he did not before, or would not otherwise enjoy, as where he has a personal, immediate, and pecuniary interest in the principal transaction, and is therefore himself a party to be benefited by performance on the part of the promisee, the contract is not within the statute, and may be supported by a verbal undertaking. In reality the undertaking is to pay a debt which is, in substance, the debt of the promisor. *Smith v. Delaney*, 64 Conn. 264; *Davis v. Patrick*, 141 U. S. 479, 35 L. ed. 826; *Reed v. Holcomb*, 81 Conn. 360; *Potter v. Brown*, 35 Mich. 274; *Hilliard v. White* (Tex. Civ. App.) 31 S. W. 553; *Emerson v. Slater*, 68 U. S. 22 How. 43, 16 L. ed. 365. The doctrine established by these authorities does not seem to be at variance with *Green v. Cresswell* and *Kingsley v. Balcomb*. See *Waterman v. Reeseter*, 45 Ill. App. 155, 165. It cannot be true, as has been intimated, that a new and independent consideration, moving from the promisor to the promisee, will support a verbal promise; for this does not meet the statute, as the writing or memorandum which the statute requires must itself be supported by a consideration. See *Mallory v. Gillett*, 21 N. Y. 412, 414. Second. The promise of indemnity is not a contract with the creditor to answer for the default or miscarriage of the debtor, but is independent of the principal contract or obligation, and constitutes an entirely distinct and separate undertaking, with which the creditor has nothing to do, and which cannot avail him or redound to his benefit in any manner. In such a case the assumption of the liability by plaintiff is itself a sufficient consideration to support the promise, regardless of any subservient interest of the promisor, or of the fact of his becoming cosurety with the promisee, and it need not be in writing. *Mills v. Brown*, 11 Iowa, 314; *Dunn v. West*, 5 B. Mon. 376; *Lucas v. Chamberlain*, 8 B. Mon. 276; *Holmes v. Knights*, 10 N. H. 175; *Jones v. Bacon*, 72 Hun, 506; *S. C.* on appeal, 145 N. Y. 446; *George v. Hoskins*, 17 Ky. L. Rep. 63; *Shook v. Vanmater*, 22 Wis. 582; *Vogel v. Melms*, 81 Wis. 306, 11 Am. Rep. 608; *Boyer v. Soules*, 105 Mich. 31; *Minick v. Huff*, 41 Neb. 516; *Tighe v. Morrison*, 116 N. Y. 270, 5 L. R. A. 617; *Wildes v. Dudlow*, L. R. 19 Eq. 198, and *Chapin v. Merrill*, 4 Wend. 657. Third. Where the promisee, under the promisor's agreement to indemnify and save harmless, becomes jointly liable as cosurety

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with him for the same obligor, such an agreement is held to be an original undertaking, and not within the statute. As sustaining this proposition, *Thomas v. Cook* is directly in point. See also *Horn v. Bray*, 51 Ind. 555; *Appar v. Hiler*, 24 N. J. L. 812; *Chapeze v. Young*, 87 Ky. 476; *Adams v. Flanagan*, 86 Vt. 400; *Baldwin v. Fleming*, 90 Ind. 177; *Houck v. Graham*, 123 Ind. 277; *Barry v. Ransom*, 12 N. Y. 462; *Jones v. Letcher*, 13 B. Mon. 363; *Oldham v. Broom*, 28 Ohio St. 41; *Brandt, Suretyship*, § 226; *Mickley v. Stock-sleger*, 10 Pa. Co. Ct. 845; *Blake v. Cole*, 22 Pick. 97.

It is within this latter class that the case at bar must be grouped. The authorities have not concurred entirely in the reasoning which is supposed to support the doctrine upon which these cases proceed. Chancellor Cooper in *Macey v. Childress*, 2 Tenn. Ch. 438, says they "may be safely rested on the well-established doctrine that a surety may by parol limit the extent of his liability as between him and the other parties to the paper." *Mickley v. Stock-sleger* distinguishes *Nugent v. Wolfe*, in that the latter case "was in no way connected with the original cause of action; he was not a party liable, and it did not appear that he had any personal interest in the judgment on which the plaintiff was the only bail for the stay of execution." Mr. Browne ventures a reason for which he declares that none other exists so satisfactory or consistent with the spirit of the statute. The reason is alike applicable to the second and third classes above enumerated. The troublesome element in the cases is that by the hypothesis there are, or are to be, two different persons concurrently liable to the plaintiff to do the same duty. He says: "The implied obligation of the third party exists only by force of, and incidental to, the special contract between the plaintiff and defendant," and "that the statute contemplates only obligations of the third party previously existing or incurred contemporaneously with the defendant's special promise, or afterwards, as the case may be, but always existing, or to exist, independently of any contract of guaranty between the plaintiff and defendant: an obligation which exists, or may exist, whether any contract be made between the plaintiff and defendant or not; not an obligation which comes into existence only as a legal incident of the contract which they have made." Browne, Stat. Fr. § 162.

But, seek where you will for a plausible footing upon which to found the obligation so as not to come within the purview of the statute of frauds, the distinction taken in *Green v. Cresswell*, of *Thomas v. Cook*, that the promisee became likewise bound upon the obligation with the promisor, as cosureties, and for this reason, if not also for the reason upon which the second class is supported,—that it is not an undertaking with the creditor,—the indemnity is not within the statute, whether adequate or not, has taken deep hold in the judicial mind, and the undoubted weight of authority in this country is grounded upon it. Indeed, the doctrine is even regarded as settled. Mr. Throop, in his treatise on the Validity of Verbal Agreements (§ 474), says: "As the result of the conflict of authority

upon this question [speaking generally of contracts of indemnity against a surety's liability], nothing can be regarded as definitely settled, except, perhaps, that, where the promisor and promisee are about to unite in an instrument as sureties for the third person, the promise to indemnify is not within the statute." If one cosurety can, by a verbal undertaking, indemnify another in whole against the obligation of the latter, without suffering the interdiction of the statute, he may also in part, as the greater includes the less; and thus it is that cosureties may, by contract, agreement, or understanding between themselves, limit and fix the proportion and extent of their several or correlative liability, and it is competent to establish the agreement by parol. So we conclude that it was competent for the plaintiff and defendant to enter into such a contract or agreement as is set forth in plaintiff's complaint, and the fact that it is not in writing cannot be

taken as an objection against its enforcement.

Now as to the question whether, in view of the evidence, the court erred in taking the case from the jury and sustaining the motion for nonsuit. Without intimating any opinion as to the weight and effect to be given to the testimony,—that being a matter for the jury to determine,—and without recapitulation here, let it suffice to say that we deem the evidence introduced competent and sufficient to go to the jury for their consideration whether or not there was such an agreement entered into between the parties touching their correlative liabilities as plaintiff has alleged by his complaint. *Tippin v. Ward*, 5 Or. 453; *Brown v. Oregon Lumber Co.* 24 Or. 317; *Vanbeber v. Plunkett*, 26 Or. 562, 27 L. R. A. 811; *Baldwin v. Fleming*, 90 Ind. 177.

Let an order be entered remanding the case for a new trial.

INDIANA SUPREME COURT.

Patrick HAGGERTY, *Appt.*,

v.

Mary J. WAGNER.

(.....Ind.....)

1. A wife's inchoate interest under Rev. Stat. 1894, § 2652, in real property owned by her husband as a tenant in common, may be extinguished by a partition sale notwithstanding the Indiana statutes make no provision for the partition of her inchoate right and the courts are not authorized to direct the payment of any part of the proceeds to her upon such a sale.

2. A statute providing that a judicial sale of a man's property in a suit to which his wife is not a party shall not prejudice her dower rights has no effect in case of a sale for partition of land in which he has an undivided interest, where another statute designating the persons to be made parties to partition proceedings does not recognize her as a necessary one.

3. The interest of a woman in an undivided share of real estate held by her husband in common with others, which is contingent on her surviving him, does not bring her within the provisions of a statute authorizing persons to be made parties to partition proceedings who are "necessary to complete determination or settlement of the questions involved,"—especially where there is no authority to award her any of the proceeds of the sale.

4. The inchoate right of the wife of a cotenant of real estate is subject to the liability of the husband's estate to be devested by a partition sale.

5. The effect of the deed in a partition

NOTE.—The Indiana law as to rights of wife in husband's property is peculiar to itself. For the kindred question of dower, see *Flowers v. Flowers* (Ga.) 18 L. R. A. 76, and *note*; also *Butler v. Fitzgerald* (Neb.) 27 L. R. A. 232.

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sale is not reduced to that merely of co-owners so as to leave the property subject to the inchoate dower rights of their wives, by a statute providing that the conveyances shall bar all claims of such owners to said lands as effectually as if they themselves had executed the same.

6. The inchoate right of a wife under Rev. Stat. 1894, § 2652, in land held by her husband as a cotenant, may be barred by a partition sale in an action to which she was not a party, notwithstanding Rev. Stat. 1894, § 2663, providing that no sale of the husband's property by virtue of any decree to which she shall not be a party shall affect her rights, as that section applies only where the wife is a necessary party, which she is not in such action.

(*Jordan, J., dissents.*)

(November 4, 1897.)

APPEAL by defendant from a judgment of the Superior Court for Marion County in favor of plaintiff in an action brought to obtain partition of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Ayres & Jones and Caroline B. Hendricks, for appellant:

The wife's inchoate interest in husband's real estate is a matter subject to legislative control.

Noel v. Ewing, 9 Ind. 37; *May v. Fletcher*, 40 Ind. 575; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Lawrence v. Miller*, 1 Sandf. 516, Overruled 2 N. Y. 245, upon another point; *Jackson v. Edwards*, 7 Paige, 386; *Davis v. Lang*, 153 Ill. 175; 1 Washb. Real Prop. p. 208, *158; *Story*, Conf. L. § 109; *Park, Dower*, 5.

The wife's inchoate right is an incident of the husband's seisin, and this seisin may be terminated at any time by authority of the legislature in sale under partition.

Moore v. New York, 4 Sandf. 456; *Jackson v. Edwards*, 23 Wend. 498.

It is an incident to an estate held in common

that the tenant can be compelled to make partition.

Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262; *Potter v. Wheeler*, 18 Mass. 506; 1 Washb. Real Prop. p. 208, *158.

The law gives the wife an inchoate interest in the real estate of her husband as against the voluntary act of the husband, and not as against legislative provision for the general good.

Jackson v. Edwards, 22 Wend. 519; *Weaver v. Gregg*, 6 Ohio St. 552, 67 Am. Dec. 355.

The wife is not a necessary party, and her appearance in suit could not affect her interests therein.

Holley v. Glover, 36 S. C. 404, 16 L. R. A. 776; 1 Washb. Real Prop. p. 208, *158; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262.

It was the legislative intent to divest the wife of her inchoate interest without making her a party to the proceedings.

Davis v. Lang, 153 Ill. 175; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Hinds v. Stevens*, 45 Mo. 209; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262.

Mr. T. E. Johnson, for appellee:

Mrs. Wagner had an inchoate interest in the land at the time the partition proceedings were instituted in May, 1856, which interest under the rulings of this court she took by purchase.

Richardson v. Schultz, 98 Ind. 435.

The title of the wife, when it vests, is absolute as against a grantee of the husband, so that it does not merely encumber the land, but tears up the title from the very roots.

Bever v. North, 107 Ind. 548; *Tanguay v. O'Connell*, 132 Ind. 63; Rev. Stat. 1881, § 2508.

Ample provisions are made for the ascertaining and the settling the rights of the parties in the land, and if the land cannot be divided without damage to the owners, and consequently has to be sold, the court has power to adjust and secure the rights of the parties in the proceeds of such sale.

Milligan v. Poole, 35 Ind. 63; *Martindale v. Alexander*, 26 Ind. 104, 89 Am. Dec. 458; *Schissel v. Dickson*, 129 Ind. 149.

To give validity and effect to a partition all persons interested should be made parties to the suit.

Milligan v. Poole, 35 Ind. 63.

The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow.

Fletcher v. Holmes, 32 Ind. 537; *Mills v. Van Voorhies*, 20 N. Y. 420; *Bell v. New York*, 10 Paige, 49.

Of the right of a surviving wife to one third of the land of which the husband was seised during coverture, she cannot be deprived by any act of the husband alone; and any attempt to defraud her of her marital rights cannot receive the sanction of the law.

Johnson v. Miller, 47 Ind. 376, 17 Am. Rep. 699.

Dower was given by our statutes for the support and maintenance of the widows, and to permit any act of the husband to lessen or injure that right would be in direct opposition to the spirit and meaning of the law.

Runk v. Hanna, 6 Ind. 22; Knapp, Partition, p. 238; *Foltz v. Wert*, 103 Ind. 413; *Elliott v. Cole*, 113 Ind. 393; *Verry v. Robinson*, 25 Ind.

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19, 87 Am. Dec. 346; *Francisco v. Hendricks*, 28 Ill. 67.

Where the inchoate right of dower is affected by decree, the wife is a necessary party to the action.

Damm v. Moon, 48 Mich. 510; *Rosekrans v. Rosekrans*, 7 Lans. 486; *Greiner v. Klein*, 28 Mich. 17.

Neither the husband nor the court, nor any other human power, can compel the wife to relinquish her right of dower, inchoate though it may be, when she is asking the aid of the court.

Royston v. Royston, 21 Ga. 172; *Lawson v. De Bolt*, 78 Ind. 567.

The universal rule of the courts of Ohio, with the single exception of *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355, has been that a wife's inchoate dower rights can in no regard be affected by an action at law or in chancery, to which she is not a party.

Black v. Kuhlman, 30 Ohio St. 196; *Unger v. Leiter*, 32 Ohio St. 210; *Dingman v. Dingman*, 39 Ohio St. 172; *McArthur v. Franklin*, 15 Ohio St. 435; *Mandel v. McClave*, 46 Ohio St. 407, 5 L. R. A. 519.

McCabe, J., delivered the opinion of the court:

Appellee sued appellant in the superior court for partition of lots 16 and 17 in Hannaman's south addition to the city of Indianapolis, and to quiet her title to her alleged proportion thereof. The action was commenced May 3, 1894. The issues formed were submitted to and tried by the court, resulting in a special finding of facts, upon which the court stated conclusions of law favorable to the plaintiff. Judgment was rendered pursuant to the conclusions of law, in favor of the appellee. The conclusions of law are assigned for error.

The material facts found are, in substance, that appellee, Mary J. Wagner, and said Peter Wagner were married on November 22, 1855, in Clay county, Indiana, where they lived together as husband and wife until May 11, 1887, when said Peter died intestate, leaving an estate of less than \$5,000, and left surviving him said Mary J. as his widow, together with five children. At and prior to May 16, 1856, said Peter Wagner, the husband of appellee, was the owner in fee simple of an undivided interest in a tract of land of about 6 acres, situated in Marion county, Indiana, out of which the lots in dispute have been carved. At said date he and some ten other persons held the aforesaid tract, undivided, as tenants in common. On said May 16, 1856, proceedings for partition were instituted by said Peter Wagner and others of his cotenants against the cotenant George Wagner in the common pleas court of said county. At the trial of that cause the land sought to be partitioned was found not to be susceptible of division, and the same was by the court ordered to be sold as an entirety, and David S. Beaty was appointed a commissioner to make the sale thereof; and in pursuance of such order he sold said real estate to William Smith, and executed to him a commissioner's deed for the same, which deed was approved by the court, and duly recorded, and the proceeds arising from the sale were paid to and divided among the parties to the action ac-

cording to their respective shares and rights. The appellee, the wife of said Peter, at the time said former action for partition was commenced, was not in any manner made a party plaintiff or defendant to said action, nor did she join in any manner therein, neither was she notified of the pendency thereof, and had no knowledge of said partition proceedings until after the death of her said husband. She never joined her husband at any time in the conveyance of any part of said real estate, nor in any manner or form did she dispose of her inchoate interest therein by her own act. Through meane conveyances from said Smith and his grantees, appellant, Patrick Haggerty, was seised by deed of conveyance of said lots 16 and 17. The conclusions of law are to the effect that appellee, Mary J. Wagner, is the owner in fee simple of an undivided one third of her deceased husband's interest in said real estate, and that appellant, Patrick Haggerty, is the owner of the residue thereof.

The ground upon which the conclusion that appellee, Mary J. Wagner, is the owner of a moiety of the real estate in question is based, as we learn from appellee's brief and a written opinion filed by the learned judge of the trial court, is that, by failure to make her a party to the prior partition proceedings, her inchoate interest in said lands as the wife of Peter Wagner was not extinguished by the partition sale. The question thus raised is a new one in this court, the same never having been directly decided before, nor has the question ever previously been before or considered by this court. The question has been considered and decided by other courts of last resort under statutes somewhat similar to our own. Some of those courts have decided the question one way, and some the other. We therefore feel called upon to consider the question upon principle before reviewing the decisions. The question, primarily, is this: Is it necessary, in a partition suit between cotenants, where one of the cotenants has a wife living at the time the partition proceedings are had, to make such wife a party thereto in order to make such proceedings binding on her in case she outlives her husband, and becomes his surviving widow? The discussion has taken a wide range, involving a consideration of various statutes. Great stress is laid upon Rev. Stat. 1894, § 2652 (Rev. Stat. 1881, § 2491), which was in force at the time the prior partition proceedings took place. It provides, among other things, that "a surviving wife is entitled, except as in § 17 . . . excepted, to one third of all the real estate of which her husband may have been seised in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law." The only exception in § 17 is in favor of creditors where the real estate exceeds in value \$10,000, in which case the widow, as against such creditors, only takes one fourth, instead of a third, and where such real estate exceeds in value \$20,000 she takes, as against such creditors, one fifth, instead of a third. These exceptions have no application to the facts in this case, and hence no bearing. The sweeping language that she is entitled to one third of all real estate of which her husband may have been seised in fee

simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law, is subject to exceptions not mentioned in the statute of descents, which arise out of other laws and the evident intent of the legislature. For instance, it has no force where the husband's title was devested before the section took effect. *Taylor v. Sample*, 51 Ind. 423. And where liens existed on the lands at the time the marriage took place, such liens may be enforced so as to extinguish her inchoate interest in the land, even though she do not join with her husband in any form of conveyance of the land. *Armstrong v. McLaughlin*, 49 Ind. 370; *Eiseman v. Finch*, 79 Ind. 511. And the same is true where the lien existed at the time the husband became seised of the land. *Kissel v. Eaton*, 64 Ind. 248; *Godfrey v. Cragcraft*, 81 Ind. 476; *Vandeender v. Moore*, 146 Ind. 44. And so it has been held by this court, and correctly, we think, that, where land was conveyed by its owner to another, so that other could mortgage it to the school fund to secure a loan for the benefit of the grantor, and then such grantee conveyed the land back to the grantor, without the wife of such first grantee joining in the conveyance, and afterwards he died, leaving his wife surviving him, she was not entitled, under this section, to any part of such land, though she came within the very letter of the statute, because, in analogy to the common-law inchoate right of dower, the seisin of the husband was only instantaneous, and hence insufficient to create the inchoate right. *Johnson v. Plume*, 77 Ind. 166. Again, where real estate is appropriated upon compensation in the exercise of the power of eminent domain, or in case of the dedication of lands of the husband to public use in making highways, canals, railroads, streets, and the like, the inchoate right of dower, or its substitute, the inchoate right of the wife to one third in fee simple in her husband's lands, is extinguished without her joining in any deed therefor, or being made a party thereto in any manner or form. *Duncan v. Terre Haute*, 85 Ind. 104; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749. In the first one of the two cases last cited above it is said, on pages 106 and 107, that "the courts of this country seem to have uniformly held, when the question has come before them, that when lands are appropriated by the exercise of eminent domain, or what is said to be equivalent to it, the dedication of lands to public use, the dower of the wife is defeated. *Gwynne v. Cincinnati*, 8 Ohio, 24, 17 Am. Dec. 576; *Moore v. New York*, 4 Sandf. 456, affirmed in the court of appeals, 8 N. Y. 110, 59 Am. Dec. 473; *Jackson v. Edwards*, 7 Paige, 386; 1 Scribner, Dower, pp. 550-555. Dillon, in his treatise on Municipal Corporations, 2d ed. § 459, says: 'As dower is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisal and payment of their value to the husband, the holder of the fee, and such taking and payment will confer an absolute title devested of any inchoate right of dower. Nor is a widow dowerable in lands

dedicated by her husband in his lifetime to the public, where the dedication is complete, or has been accepted and acted upon by the municipal authorities.' Washburn, in treating of the various modes in which dower may be defeated, says: 'One mode in which dower may be defeated remains to be mentioned, and that is, by the exercise of eminent domain during the life of the husband, or, what is equivalent to it, the dedication of land to the public use.' [1 Washb. Real Prop. 4th ed. p. 269]. In *Moore v. New York*, 4 Sandf. 456, the court, in speaking of a former decision, says: 'We then held that the wife's right of dower was merely inchoate during the life of the husband, and that she had no vested or certain interest in his lands. The right being merely an incident to the marriage relation, it seems to us that while this right is thus inchoate, and before it has become vested by the death of the husband, any regulation of it may be made by the legislature, though its operation is, in effect, to divest the right; the marriage relation itself being within the power of the legislature to modify, or even abolish, it.'"

These several exceptions to the full force and effect of the section of our statute of descents quoted above manifestly arise out of other statutes and laws creating rights in other persons paramount to the inchoate right of the wife in the lands of her husband. Dower having been abolished by the Revision of 1852, it has often been said by this court that the provision made for the widow in her husband's real estate by the same revision was a substitute for dower, and many of the rules that had been previously applied to dower have since been applied to the substitute. Two provisions in favor of the widow in lieu of, or as a substitute for, dower in her husband's real estate, have been made by the revision of 1852, and since re-enacted, and now in force. One of them is the section already quoted, and the other is the old § 17 of our statute of descents (Rev. Stat. 1894, § 2640; Rev. Stat. 1881, § 2483). This section provides that, "if a husband die testate or intestate, leaving a widow, one third of his real estate shall descend to her in fee simple," etc. The widow takes, under this section, as heir of her husband. *Rusing v. Rusing*, 25 Ind. 63; *May v. Fletcher*, 40 Ind. 575; *Bowen v. Preston*, 48 Ind. 367; *Brown v. Harmon*, 78 Ind. 412; *Derry v. Derry*, 74 Ind. 560; *Hendrix v. McBeth*, 87 Ind. 287. But the widow does not take, under § 27 old number (Rev. Stat. 1894, § 2652, Rev. Stat. 1881, § 2491), first above quoted, as heir, but by virtue of her marital rights. *Bowen v. Preston*, 48 Ind. 367; *Brannon v. May*, 42 Ind. 92; *Johnson v. Miller*, 47 Ind. 376, 17 Am. Rep. 699; *Hendrix v. McBeth*, 87 Ind. 287; *McKinney v. Smith*, 106 Ind. 404. And therefore the interest the widow takes under said section is more like dower than the interest which she takes under the other section, where it provides that one third of her husband's real estate shall descend to her. This provision impliedly requires that her husband shall die seised of the real estate mentioned therein, because it could not descend from him to her if he did not die seised of it. The other section, and the one here involved, only requires it to be real estate of which her husband may have

been seised in fee simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law. That was the precise quality of dower at common law, except that it was a life estate in one third of all lands "as were her husband's at any time during the coverture." 1 Greenl. Cruise, *165. In *Johnson v. Plume*, 77 Ind. 166,—being a case where the surviving widow was asserting her right to land once owned by her husband, and in the conveyance of which she had not joined him, founding her claim on the same section relied on by the appellee here,—this court, after quoting the section, said: "By the terms of this statute a surviving wife is entitled to one third of all the real estate of which the husband was seised at any time during the marriage, and in the conveyance of which she did not join. The appellee's husband was seised of the land in dispute, and, as she did not join him in the conveyance made to James Gallately, she is within the letter of the statute; and, if the statute is to be literally construed, her claim must prevail. At the common law a widow was entitled to dower in all lands of which her husband was seised at any time during coverture, and in the conveyance of which she did not join. This was the law in this state before the present statute was enacted. Since its enactment she is entitled to a third in fee. The statute merely enlarges her rights, by substituting a third in fee for a dower interest, but does not otherwise change them; therefore, she cannot claim a third in fee in any lands in which she could not have claimed dower before the adoption of the statute. At the common law she could not claim dower in lands held by her husband as trustee, nor in such as he had held by an instantaneous seisin. These rules apply under the statute, and, if the appellee's husband's seisin was instantaneous, or that of a trustee, she cannot recover." As before observed, it was held that the seisin of the husband was for a particular purpose, and therefore a mere instantaneous seisin, and hence she could not recover.

No reason has been suggested, nor can we think of any, why the inchoate right of the wife of a cotenant of real estate may not be extinguished by a partition sale without making her a party, as well as in cases where the husband's title is divested before the section took effect, in cases where liens existed on the land at the time the marriage took place, in cases where liens on the land existed at the time the husband became seised, in cases where his seisin was only for a temporary purpose, and in cases where the husband's land is appropriated upon compensation in the exercise of the power of eminent domain, or in cases of the dedication of lands of the husband to public use in making highways, canals, railroads, streets, market places, cemeteries, and the like. But it is earnestly and ably contended by appellee's learned counsel that another section (Rev. Stat. 1894, § 2660, Rev. Stat. 1881, § 2499), imperatively requires the wife to be made a party in such a case, or the proceedings will be void as to her. That section was in force when the prior partition proceedings took place, and it reads as follows: "No act or conveyance, per-

formed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; or any sale, disposition, transfer, or encumbrance of the husband's property by virtue of any decree, execution, or mortgage to which she shall not be party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto." It is not claimed—as it could not reasonably be—that the first clause of the section is applicable to the case. But the last clause is relied on with great confidence by the appellee. It is earnestly insisted that the latter clause expressly provides that no decree to which she shall not be a party "shall prejudice or extinguish the right of the wife to her third in his [her husband's] lands." Plain and imperative as this language is, it must receive a construction, because, as we have already seen, this court has held in the various cases above mentioned that the wife's inchoate interest in her husband's land may be extinguished by proceedings to which she was not a party; and this, too, while the section just quoted was in full force. This section must be construed along with a section of the Code of Civil Procedure hereinafter referred to, and relied on by appellee as establishing the law as to necessary parties in partition proceedings. The reason why the two sections must be construed together is that they relate to the same subject, namely, necessary parties to actions resulting in judgments and decrees. The reason why this section cannot be so construed as to require persons to be made parties who are unnecessary is that to do so brings it into conflict with the section of the Code already referred to. The law requires us to construe these two sections *in pari materia*, and to give effect to each, if possible. *State v. Rackley*, 2 Blackf. 249; *Indiana Central Canal Co. v. State*, 53 Ind. 575; *Stout v. Grant County Comrs.* 107 Ind. 243. To construe the section last quoted so as to require persons to be made parties who are unnecessary parties is to bring it into conflict with the section of the Code referred to. But it may be harmonized with that section by construing its requirements as to parties to relate to such parties, and to such parties only, as are necessary parties. Any other construction requires us to conclude that the legislature intended to declare by law that in certain cases persons should be made parties to certain actions who are wholly unnecessary, and that a failure to make unnecessary parties should cause the overthrow of the judgments and decrees of the courts in such proceedings. It is too clear for controversy that the legislature had no such intention. And the inquiry naturally arises, why it is not necessary to make the wife a party when her husband's land is to be taken to make a public highway, or when the same is to be appropriated upon compensation for a railroad right of way? The only answer to this question is that, if she were made a party, there is nothing that she could do to protect her inchoate interest. There is no answer she could make that would qualify or prevent the appropriation. She could only answer, "I am the wife of the

owner," and that fact would be disclosed by the complaint, if she were made a party. There is no issue she could tender, and no issue could be tendered to her. Therefore, if she were made a party to such a proceeding, she would not be a party to any issue, nor could she, as such a party, do anything to protect her inchoate right. The cases to which we have referred show that the section last cited has not been given such a broad scope in meaning by this court as to allow a surviving wife to recover her third in lands of her husband, taken without her becoming a party thereto, in the various modes of appropriation enumerated above, though its sweeping language would, at first blush, seem to warrant a contrary ruling. The leading idea in the section is that she must be a party to certain acts or proceedings touching her inchoate interest. It evidently was not intended by the latter clause of the section to make any new law on the subject of necessary parties. The provision was enacted in view of the law as it then and still exists as to parties. In other words, it would be absurd to suppose the legislature meant that the wife should be made a party in those cases where it could affect nothing, as well as those cases where it could. And the law requires us to adopt that construction which leads to no absurdity, if the statute is susceptible of such a construction. *Jeffersonville v. Weems*, 5 Ind. 547; *Storms v. Stevens*, 104 Ind. 46. There are many cases within the purview of the section, if the wife was made a party, wherein it would enable her to protect her inchoate interest. But we have seen that this court has held, in the face of the section in question, that in appropriations of the husband's land by the exercise of the power of eminent domain, or in dedication of lands for public uses on compensation, the inchoate interest of the wife is extinguished without her consent, and without making her a party. This is at least an implied holding that there are cases falling within the unqualified language of the section where the wife's inchoate interest may be extinguished without her consent, and without making her a party. This holding can only be upheld on the ground that the requirement of the section that she be made a party, without which her right is not extinguished, must be so construed as to require her to be made a party in those cases only in which, if a party, she could prevent the extinguishment of her inchoate right, or in some way secure some benefit to herself on account of that right. Where she could not accomplish any of these things if made a party, it is idle to say that the legislature intended by the section quoted to require her to be made a party, and for failure to do such an idle and nugatory act her interest should not be extinguished and the partition sale be overthrown. We shall hereafter see that it could not possibly benefit her to make her a party to partition proceedings of lands where her husband is a cotenant, any more than in cases of appropriation of her husband's land in the exercise of eminent domain, or in dedications thereof to public uses.

Some reliance is placed by the appellee upon the Code of Civil Procedure to support the contention that she was a necessary party to the

partition sale. 2 Gavin & H. Stat. § 626, then in force, required the pleadings and practice in partition proceedings to conform to the Code. Two sections of the Code as it then and now stands are relied upon to establish that appellee was a necessary party to the partition proceedings. 2 Gavin & H. Stat. § 17, p. 45, provides that "all persons having an interest in the subject of the action . . . shall be joined as plaintiffs." Appellee's husband was one of the plaintiffs in the partition proceedings resulting in the sale, but her learned counsel do not say whether she ought to have been a plaintiff or a defendant. Her counsel also quote and rely on § 18, p. 46, 2 Gavin & H. Stat., which provides that "any person may be made a defendant who has, or claims, an interest in the controversy, . . . or who is a necessary party to a complete determination or settlement of the questions involved." The latter clause of this section is confessedly the one, and the only part of either section, that has any bearing on the question before us. And it requires no one to be made a party defendant except he be a necessary party. This lands us back where we started, to begin afresh with the inquiry who are necessary parties? We have already seen that the wife is not a necessary party to proceedings to appropriate her husband's land, and to dedications thereof for public uses. This court has indirectly decided in *Paulus v. Latta*, 93 Ind. 84, that she is not a necessary party either in partition suits where her husband is a cotenant, or in appropriation or dedication cases, in holding that her inchoate interest is not the subject of an action. On page 88 of that case it is said: "The appellee suggests that the complaint contains a good cause of action against Paulus to remove the cloud upon her inchoate interest as the wife of the defendant Latta. But such inchoate interest is not a present estate. It cannot be conveyed by itself. *McCormick v. Hunter*, 50 Ind. 186. It gives no right of entry. *Strong v. Bragg*, 7 Blackf. 62. It is not the subject of an action; it constitutes no diminution of the husband's present estate; he may convey his entire estate without her, and the purchaser will hold it subject only to be divested of one third of it on certain contingencies." If the inchoate interest of the wife is not the subject of an action while the husband lives, it would seem to follow that it would not be the subject of a defense. And even one of the cases cited by appellee—*Thompson v. McCorkle*, 136 Ind. 484, and 497—affords strong support to this position in holding that, "by virtue of this statute, during the lifetime of the husband, the wife had an inchoate right in the real estate in controversy contingent upon her surviving him, and which could not become absolute except by his death. Her claim during the entire interval was in such a position that it could not be asserted by anyone. The case was not one of mere disability growing out of coverture. Strictly speaking she had no estate in the premises, it was a mere expectancy." If she had no estate in the premises, had nothing but a mere expectancy, which could not be asserted by anybody, what necessity was there to make her a party? Certainly none, if we are to follow logic and sound reason. If there

was no necessity to make her a party, then she was not a necessary party within the meaning of the provisions of the Code of 1852, quoted above. Barbour, Parties to Actions, at page 330, says: "No one need be made a party plaintiff in whom there exists no interest; and no one need be made a party defendant from whom nothing is demanded. . . . A mere contingent interest is insufficient. . . . No one need be made a party who disclaims all interest, . . . nor one who would not be at liberty to answer, and contest the right to the relief prayed for." The author cites the following adjudged cases that fully support the text: *Kerr v. Watts*, 19 U. S. 6 Wheat. 550, 5 L. ed. 328; *Bailey v. Ingles*, 2 Paige, 278; *Lee v. Colston*, 5 T. B. Mon. 245.

Now let us inquire whether the appellee could have effected anything in the way of the protection of her inchoate interest if she had been made a party. All the authorities on both sides of the question we are discussing agree in holding that the inchoate right of dower, or the inchoate right of the wife to one third of her husband's land, subsists by virtue of the seisin of the husband, and that this right is always subject to any encumbrance, infirmity, or incident which the law attaches to the seisin, either at the time of the marriage or at the time the husband became seised. A liability to be divested by a partition sale is an incident which the law affixes to all estates of cotenants, and the inchoate right of the wife of such cotenant is subject to this incident, unless it is superior to, and independent of, the husband's title; and that would hardly be contended for by anyone. They also likewise agree that, if she is made a party, she cannot prevent a partition, and, in a proper case, she cannot prevent a partition sale. They also agree that, in case the real estate can be divided according to the interests of the cotenants, the decree is binding on the wife of a cotenant without making her a party to the proceedings. It is also agreed by the authorities referred to that the wife's interest in the husband's share, without her presence in court, or any order of court, will at once attach to the portion set off to him. This concession carries with it the logical sequence that the wife of a cotenant is not a necessary party to a partition proceeding, whether there is a sale or not. But, suppose she is made a party in such a case where a sale is to take place, what can she do? The partition statute then and still in force practically answers the question. It provides that "the moneys arising from such sale, after payment of just costs and expenses, shall be paid by such commissioner to the persons entitled thereto, according to their respective shares." 2 Gavin & H. Stat. p. 865, § 23. We have seen that the wife of a cotenant has no share in the lands of her husband while he lives. Therefore no money can be paid to her on such a sale, even if she be made a party, unless there is some other statute or law that modifies or radically changes this statute by expanding its provisions so as to require the payment of only a part of the proportion of the proceeds of the sale due to the cotenant, according to his share of the real estate, who has a wife, and requiring the balance to be

paid to her. We know of no such statute. On the contrary, the only law that confers on her the interest she holds in her husband's real estate is the section of the statute first above quoted. By it all her rights in her husband's real estate of which he was seised at any time during the marriage, and in the conveyance of which she did not join, is created and conferred; and by it her rights therein must be measured and limited; and by it no right in such real estate can ever become consummate or vested in her so to enjoy, possess, or control it unless she becomes his surviving widow. If, therefore, any portion of it is handed over and delivered to her to enjoy and possess before the happening of that event, it must be by virtue of judge-made law. And it is universally agreed that judge-made law is bad law, not because such law may not be just, but because under our system of jurisprudence and by the Constitution all lawmaking power has been carefully withheld from the courts, and exclusively vested in the legislature. See Const. art. 4, § 1; Rev. Stat. 1894, § 97 (Rev. Stat. 1881, § 97); also Const. art. 3, § 1; Rev. Stat. 1894, § 96 (Rev. Stat. 1881, § 96). It is true that such inchoate interest, while it cannot be conveyed separate from her husband's title, yet she may release it by joining with her husband in the conveyance of his real estate. And the release thus made by the wife is a sufficient consideration to support a promise to her. *Jarboe v. Severin*, 85 Ind. 496; *Green v. Groves*, 109 Ind. 519; *Worley v. Sipe*, 111 Ind. 288; *Howlett v. Ditts*, 4 Ind. App. 28; *Worth v. Patton*, 5 Ind. App. 272.

But that is the subject of contract and not the institution of the statute. If the courts undertake to hand over to the wife a portion of the husband's share of the proceeds of a partition sale, it may result in giving her a part of her husband's real estate to own and control, though the event never happens upon which her right to do so is, by the statute, expressly made to depend, namely, to become his surviving widow. Either of two contingencies may happen by which she may never become his surviving widow. One is, she may die first; and the other is that the marriage may be dissolved by a divorce. And yet, if any portion of the husband's share of the proceeds of a partition sale were given her by the court, she would be possessing and controlling it in violation of the statute that creates, measures, and limits her rights in her husband's real estate. It was wisely supposed by statesmen and lawyers that it required an express legislative enactment to make the inchoate interest of the wife become absolute, and vest in her during the life of the husband, as seen by the act of 1875, in case of judicial sales of her husband's real estate. Rev. Stat. 1894, § 2669 (Rev. Stat. 1881, § 2508). That act does not apply to this case so as to enable the courts to give the wife a portion of the husband's share of the proceeds of a partition sale, for two reasons: First, it was not in force when these proceedings took place; and, secondly, the second section thereof provides that it shall not apply to sales of real estate upon judgments rendered prior to the taking effect of the act, nor to any sale of real property of the aggregate value of \$20,000 and

over, except to so much of such real property as shall not exceed in value the sum of \$20,000; thus indicating the legislative intent to deal with creditors' judicial sales, and not partition judicial sales. So the conclusion seems absolutely irresistible that there is no law in this state authorizing the courts to award to the wife of a cotenant any portion of her husband's share of the proceeds of a partition sale. On the contrary, the express provision of the partition statute then and now in force, imperatively requires, as we have seen, that the whole of his proportion of the proceeds of the sale, according to his share in the real estate, shall be paid over to him. Therefore the latter clause of § 2660, Rev. Stat. 1894 (Rev. Stat. 1881, § 2499), which is the same as § 85 of the law of descent of 1852, providing that no "sale, disposition, transfer, or encumbrance of the husband's property, by virtue of any decree, . . . to which she shall not be a party, . . . shall prejudice or extinguish the right of the wife to her third in his lands," etc., must be held to have no application to a case like the present, where to have made her a party could not have availed her anything, and to apply only to such cases as those in which it would have been of some possible benefit to her to have made her a party.

Some of the authorities, in view of this line of reasoning, intimate that her inchoate interest cannot be extinguished by a partition sale, whether she be made a party or not. Whether it can or not must be determined by a consideration of the probable legislative intent as disclosed in the several statutes referred to. To hold that it could not would involve the necessity of holding that the mere inchoate right, the mere expectancy, the mere possibility of a vested or consummate estate, without ever vesting or becoming consummate, may destroy the absolute vested estate of the husband, or a part of it. If such a sale cannot extinguish her inchoate right, even though she be made a party, then her husband's interest must sell for much less—perhaps a third less—than its actual value. She may die before her husband, or be divorced, in either of which cases her inchoate interest is gone, and one third in value of her husband's interest is gone for nothing; in other words it is destroyed by trying to keep alive a mere possibility of an estate in her. This brings us to the question as to whether one of these rights is paramount to the other. The authorities holding that a partition sale extinguishes the wife's inchoate right hold that the right to partition in a cotenant is paramount to the inchoate right of the wife, for the reason, we presume, that her interest or right exists by virtue of her husband's seisin, and therefore is subject to the incidents, encumbrances, and infirmities attaching to that seisin, the right to compel partition by sale being one of the incidents attaching to such seisin. But there is another reason why the right to partition by sale is paramount to the inchoate right of the wife of a cotenant, and that is, the cotenant's title is an actual present existing estate in the real property, whereas the inchoate right of the wife therein is only the possibility of such an estate accruing to the wife, dependent upon uncertain future

events which may never happen, and therefore such estate may never exist. To hold that the cotenant's right to partition is not paramount to his wife's inchoate right is to hold that a present absolutely existing estate is not superior and paramount to a mere possibility of the existence of such an estate; that a mere possibility of an estate, which may never ripen into such estate, may destroy an absolutely existing estate. In other words, it is to hold that the mere shadow may destroy the actual existing substance. The right of partition, where a sale is necessary, and the inchoate right of the wife of a cotenant, cannot both exist. One or the other of these rights must give way, and be submerged. It ought not—in reason it cannot—be the paramount right. Therefore it must be the inferior right that is submerged.

In support of the contention that a partition sale, in the absence of the wife of a cotenant as a party, was intended not to extinguish the wife's inchoate right, we are cited to § 21, p. 365, 2 Gavin & H. Stat., which has been substantially continued in force by the Revision of 1881. It reads thus: "Whenever it shall appear to the court that the purchase money for the land sold has been duly paid, the court shall order such commissioner, or some other person, to execute conveyances to the purchaser, which shall bar all claims of such owners to said lands as effectually as if they themselves had executed the same." Great confidence in this statute seems to be entertained by appellee's learned counsel as affording strong support to his contention—that is, that by its terms the deed in a partition sale is to have the same force and effect as if the owners themselves had executed the same, and no more; and, if the owners themselves had executed the deed, it could not extinguish or release their wives' inchoate rights therein. But it is believed that this confidence is wholly misplaced, for two reasons, at least: If the intent of the statute is to give no greater effect to the deed than if executed by the owners, then it establishes the unreasonable proposition intimated in some of the decisions that the inchoate right of the wife of a cotenant cannot be extinguished by such a sale, even though she were made a party; because if the deed is to have no greater effect than if made by the owners, then it is to have no greater effect than if executed by the cotenant without his wife, she not being an owner. If she is an owner, within the meaning of the statute, then her right is barred, for the statute makes the deed "bar all claim of such owners to said lands." Secondly, the manifest intent of the legislature, as disclosed by an examination of the whole partition statute, was that the deed should be effectual to convey the land to the purchaser absolutely. And the language employed is sufficient to make the deed have that effect in the generality of partition sales, and such sales alone were evidently in the mind of the legislature when they employed the language they did. And yet a full consideration of the whole statute leaves no doubt in the mind that the intent was to make the deed effectual to convey the land absolutely to the grantee, because everyone knows that many—very many—cotenants are married women, in-

fant, idiots, and persons who are *non compos mentis*, and, as owners, wholly incapacitated, to make a deed that would convey their interest in the land. The married woman could not convey, for want of her husband joining with her therein. And the strict language of the statute is that the deed is to be as effectual as if the owners had themselves executed the same; and yet no one could be found that would contend that a partition sale and deed would be ineffectual to convey the title of a cotenant who is a married woman, an infant, a *non compos mentis*, or a lunatic, under the operation of the statute quoted. This must be so, because it was the evident intent, as gleaned from the several parts of the whole statute, that a partition sale and deed should be effectual to convey the land of the several owners absolutely, and vest the owners' title thereto in the purchaser. The settled law requires us to give effect to that intent, so as to make it prevail over the literal import of particular terms used, and control the strict letter of such terms when the letter would lead to injustice, as would be the case here. *Smith v. Moore*, 90 Ind. 294; *Indianapolis v. Huesels*, 115 Ind. 581; *Lime City Bldg. Loan & Sav. Assn. v. Black*, 136 Ind. 544; *May v. Hoover*, 112 Ind. 455; *Parvin v. Wimberg*, 180 Ind. 561, 15 L. R. A. 775; *Storrs v. Stevens*, 104 Ind. 46, *Stout v. Grant County Comrs.* 107 Ind. 343.

It follows from what we have said that upon principle the partition sale and deed in question vested in the purchaser the entire title to the real property in question, and extinguished the inchoate interest of the appellee herein.

We will now consider how the question stands upon authority. It is claimed that the rule established by the courts of New York is that a partition sale does not extinguish the contingent right of the wife of one of the cotenants. The decisions of that state are conflicting. The condition of the adjudications on the question in New York is so accurately and tersely stated by Mr. Freeman in his work on Cotenancy and Partition, in § 474, at pages 630, 631, that we appropriate his language: "Hence we find Chancellor Walworth stating that 'as a *feme covert* cannot be bound by a decree against her husband in a partition suit to which she is not a party, it seems to be proper, in all cases where a sale of the property will probably be necessary, that the wife should be joined with her husband as a party to the suit, so that the purchaser's interest in the premises may be charged with her contingent claim of dower.' But Vice Chancellor McCoun, of New York, held that it was immaterial whether the wife was made a party to the suit or not, 'because a decree for sale and conveyance by a master will not bar her right of dower in her husband's share of the lands in the event of her surviving him.' He justified this decision on the ground that as nothing in the statute of that state expressly declared 'a divestment of the dower initiate of a wife of a joint tenant or tenant in common upon a sale, nothing so materially affecting her legal rights ought to be taken by implication.' The same vice chancellor, in a subsequent case, expressed similar views, and sustained them with some very clear and satisfac-

tory reasoning. On appeal this portion of the vice chancellor's decision was reversed by the chancellor, who determined: (1) That the statutes of the state, though containing no direct provisions on the subject, clearly contemplated that the wife's right of dower should be discharged by the partition sale, 'and that a purchaser under the judgment or decree will be protected against any future claim on her part, both in equity and at law;' (2) that it was the duty of the court to make such disposition of the sale 'as may be necessary to secure to the wife a fair equivalent for the value of her contingent right of dower, in case she survives her husband.' From this decision of the chancellor an appeal was prosecuted to the court of errors. In this court the only opinions given were those of Bronson, judge, and Verplanck, senator. The former agreed with the vice chancellor, holding (1) that the wife's right of dower was not affected by the sale; (2) that the direction to invest a just portion of the proceeds of the sale for the benefit of the wife was an assumption of legislative prerogative. Senator Verplanck concurred with the chancellor. Both the judge and the senator united in the view that the decision of this question was immaterial, and the case was, therefore, disposed of on other grounds. So the question of the effect of a sale in partition upon the dower interests of the wives of cotenants, in the absence of provisions in the statutes directly controlling the subject, may be considered as still unsettled in New York. Its further discussion was rendered unnecessary by the passage, in the year [1840] succeeding the final decision of *Jackson v. Edwards*, of a statute providing for the interest of the wife in accordance with the suggestions and directions contained in the opinion of the chancellor, to which we have before referred. But in other states where the question has arisen the courts have been disposed to treat the sale in partition as conveying title paramount to the wife's right of dower." And that is what the New York statute provides for. So it must be regarded that, the New York decisions being both ways, and no final determination of the question ever having taken place in the court of last resort in that state, the adjudications there do not place that state on either side of the question.

In *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355, it is held in a very able opinion by Brinkerhoff, J., speaking for the whole court, that a partition sale and deed without making the wife of a cotenant a party extinguishes her inchoate right of dower under statutes similar to our own, and passes the entire estate to the purchaser. Appellee's learned counsel contend that the case just cited has been overruled by the supreme court of Ohio in the following cases: *Black v. Kuhlman*, 30 Ohio St. 196; *Unger v. Leiter*, 32 Ohio St. 210; *Dingman v. Dingman*, 39 Ohio St. 172; *Mandel v. McClave*, 46 Ohio St. 407, 5 L. R. A. 519. We have examined these cases, and find they do not even touch the subject, much less do they overrule the doctrine laid down in *Weaver v. Gregg* that a partition sale extinguishes the inchoate right of dower of the wife of one of the cotenants without making her a party. The following cases hold to the same doctrine 89 L. R. A.

announced by the Ohio supreme court: *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262; *Hinds v. Stevens*, 45 Mo. 209; *Davis v. Lang*, 153 Ill. 175; *Sire v. St. Louis*, 22 Mo. 206; *Mitchell v. Farriah*, 69 Md. 285; *Holley v. Glover*, 36 S. C. 404, 16 L. R. A. 776. The only case of a court of last resort holding a contrary doctrine is *Greiner v. Klein*, 28 Mich. 12, and this adjudication stands alone against the great current of adjudged cases in the United States. It alone supports appellee's contention. There is sufficient difference between the Michigan partition statute and our own to furnish some plausible reasons for reaching the conclusion arrived at by the Michigan supreme court, and especially as the Michigan statute was literally borrowed and copied from the New York partition statute and at the time the Michigan decision was made the prevailing view of the New York courts was such as to lead to the Michigan decision. And yet the reasoning is very faulty by which the majority of the Michigan court reached their conclusion. An able dissenting opinion was delivered by Justice Campbell in a course of reasoning so conclusive and unanswerable as to greatly weaken, if not destroy, the force of the prevailing opinion as authority outside of the state of Michigan. We therefore conclude that the overwhelming weight of judicial opinion is against appellee's contention.

Washburn on Real Property states the law thus: "The wife of a tenant in common holds her inchoate right of dower so completely subject to the incidents of such an estate, that she not only takes her dower out of such part only of the common estate as shall have been set to her husband in partition, but if, by law, the entire estate should be sold in order to effect a partition, she loses by such sale all claim to the land, although no party to such proceeding." 1 Washb. Real Prop. 208, *158. We therefore conclude, both upon principle and the overwhelming weight of authority, that appellee was not a necessary party to the former partition proceedings, and that the sale and deed therein extinguished her inchoate right to one third of her husband's share therein. Hence the superior court erred in its conclusions of law.

The judgment is reversed, with instructions to the trial court to restate its conclusions of law in conformity to this opinion, and to render judgment accordingly.

Jordan, J., dissenting:

I am compelled to dissent from the conclusion reached in the opinion for the majority of the court in this case. The material and undisputed facts are, in brief, as follows: Appellee, Mary J. Wagner, and Peter Wagner were married on November 22, 1855, in Clay county, Indiana, where they lived together as husband and wife until May 11, 1887, on which date the husband died intestate, leaving an estate of less than \$5,000, and left surviving him, as his widow, said Mary J., together with five children. At and prior to May 16, 1856, Peter Wagner, the husband, was the owner in fee of an undivided interest in a tract of land of about 6 acres situated in Marion county, Indiana, out of which the lots in dispute have been carved. At said date he

and some ten other persons held the aforesaid tract, undivided, as tenants in common. On said 16th day of May, 1886, proceedings for partition were instituted by said Peter Wagner and others of his cotenants against their cotenant George Wagner in the common pleas court of said county. At the hearing of the cause the land sought to be partitioned was found not to be susceptible of division, and the same was by the court ordered to be sold as an entirety, and David S. Beaty was appointed a commissioner to make the sale; and in pursuance of such order he sold said real estate to William Smith, and executed to him a commissioner's deed for the same, which deed was approved by the court, and duly recorded, and the proceeds arising from the sale were paid to and divided among the parties to the action according to their respective shares and rights. Appellee, the wife of said Peter, at the time said action for partition was commenced, was not in any manner made a party plaintiff nor defendant to said action, nor did she join in any manner therein; neither was she notified of the pendency thereof, and had no knowledge of the said partition proceedings until after the death of her said husband. She never joined her husband at any time in the conveyance of any part of said real estate, nor in any manner or form disposed by her own act of her inchoate interest therein. Through mesne conveyances appellant became the owner of the lots now in controversy. The only question presented, under the above facts, for decision, is: Was Mrs. Wagner's inchoate interest in the land as the wife of Peter Wagner, one of the tenants in common, extinguished by the judicial sale in the partition proceedings to which she was not a party, and is she, by virtue of the decree in said action, barred from asserting her interest in the lands after the death of her husband? Counsel for the appellant affirm that the inchoate right of the wife must yield to the requirements of the paramount vested interests of more than one, when under the provision of the statute which compels partition among cotenants, her husband's land is sold by order of the court, in order that the proceeds may be distributed among such tenants; that in such actions the presence of the wife of any of the latter as a party to the partition proceedings was not intended or contemplated by the legislature in the enactment of the statute relating to the partition of lands. Upon the part of the appellee it is contended by her counsel that, where the premises are ordered sold in such actions, she is a proper and necessary party in that event, in order that the commissioner's deed may convey a perfect title, and, if not a party to the action, her inchoate interest is not barred. It is a well-settled rule that when actual partition is made of lands in which the husband holds an undivided moiety, the inchoate interest of the wife therein will instantly attach to the share allotted in severalty to her husband, unless fraud has been practised upon her in the partition proceedings. This result does not depend upon any order or action of the court, but equity will shift this interest of the wife to the part set off to the husband without the former being a party to the pro-

ceedings. By this result her right is protected and preserved without her presence as a party to the suit. The result and effect of the decree, when the wife is not a party, and the property in common is ordered by the court to be sold, is a debatable proposition, upon which the authorities conflict. This leads to an examination and review of those bearing upon this question. In *Jackson v. Edwards*, 7 Paige, 886, the holding seems to be that a sale so made does not divest the inchoate right of dower, for the reason, as expressed by the chancellor, that the court possessed no power to compel the wife to accept provisions out of the proceeds of the sale in lieu of her interest and consequent right to the enjoyment of the land itself. This case (*Jackson v. Edwards*) was carried to the supreme court of New York. See 22 Wend. 498. Two opinions were given in this last appeal, one by Judge Bronson and the other by Senator Verplanck. The former doubted whether the right of the wife to dower would be barred when the lands of the husband were ordered sold in a partition suit, though she be made a party thereto. Senator Verplanck was of a different opinion, and said, on page 517: "I agree, however, with the positions of the chancellor that a sale in partition divests the inchoate rights of dower of the wife of a tenant in common *if she has been made a party to the suit*; and that purchasers under the judgment or decree will be protected against all future claims on her part." (The italics are my own). And further, in this connection, on page 519, the learned senator said: "But the policy of the law is clearly only the protection of the wife's dower against the abuse of the husband's power and his acts. Now, a sale in partition cannot be the mere act of the husband. It must be shown to be necessary for the general benefit of all interested in the lands. To such a necessity, when allowed by the court, the husband's right of property gives way, either with or without his consent; then the inchoate right of dower, being but an incident, must follow. It does so, not only in this case but in many analogous ones, where private property is taken, . . . and pecuniary compensation allowed, as in lands taken for streets in cities, for roads or for canals. In this instance of a partition sale the sale is not allowed to be made for the purpose of divesting the wife's dower, but it is made because the interest of numerous joint owners demands it. The wife's future claim of dower is then divested, not by the act of her husband, but by the necessary operation of law." The judges in this case, it appears, were all of the same opinion that the wife's dower right could not be extinguished by a decree in an action to which she was not a party, but differed as to whether such a result could be obtained, even though she were a party to the proceeding. The statute of New York relative to partition was amended in 1840 so as to authorize the making of the wife a party to such actions, and providing, further, that in the event of the sale of the premises, her dower interest should pass to the purchaser, and that she should be remunerated therefor out of the proceeds of the sale. See *Jordan v. Van Epps*, 85 N. Y. 427. In the states of Ohio and Missouri it is held by the

courts that sales made in actions for partition extinguish the wife's right of dower as against the purchaser, although she was not a party to the action. *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 855; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262. In the decision of *Lee v. Lindell*, 22 Mo. 202 (which was by a divided court, Leonard, J., dissenting), the fact that the statute did not require the wife to be a party seems to have exerted much influence upon the court in reaching the conclusion which it did. It is there said: "There being no law requiring her to be made a party, it is not perceived how the arbitrary use of her name can impart validity to a proceeding which without it, would not affect her." The case of *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 855, apparently controlled to a great extent the decisions in other cases to which we refer. The rule asserted in the Ohio case was followed in *Davis v. Lang*, 153 Ill. 175; and in *Holley v. Glover*, 36 S. C. 404, 16 L. R. A. 776. In *Rouland v. Prather*, 53 Md. 282, in which the wife was held to be bound, the order of sale was made prior to the marriage, although the sale of the land was subsequent. The Maryland court of appeals in this case, referring to and quoting from *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 855, said: "It is not necessary for us to hold that a wife who was not a party to the suit, as was the case there, would be bound in this state, and that the purchaser in such case would be protected by the decree and sale; and we do not mean, by making the quotation, to be understood as so deciding, for in this case no marriage had taken place when the decree was passed, and no inchoate right even had attached before the decree was obtained. As a matter of fact, the widow had knowledge of the decree, sale, and distribution of the proceeds of sale. So far as the distribution of proceeds of sale was concerned, she was brought in and made a party by the interlocutory petition of her husband's creditors to subject his portion to the payment of his debts. She could and ought then to have applied for a portion, in money, in lieu of her dower. . . . If she had been brought in before sale, all she could have obtained would have been an allowance in money." In the appeal of *Mitchell v. Farriah*, 69 Md. 285; *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 855, was again referred to. But the question as to whether it was necessary to make the wife of the tenant a party to the proceedings in partition was held to be not necessarily in controversy. Judge Brinkerhoff, delivering the opinion of the court in *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 855, said: "The fact that the wife was not a formal party to the proceeding in partition, does not, we think, at all alter the case. The terms of the statute do not require that she should be made a party, and we see no good reason why it should be required. On the whole, our view of the question is this: The right of dower in the wife subsists in virtue of the seisin of the husband; and this right is always subject to any encumbrance, infirmity, or incident which the law attaches to that seisin, either at the time of the marriage or at the time the husband became seised. A liability to be divested by a sale in partition is an incident which the

law affixes to the seisin of all joint estates and the inchoate right of the wife is subject to this incident. And when the law steps in and divests the husband of his seisin, and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which it has been transmuted." In *Greiner v. Klein*, 28 Mich. 12, it has been held that a sale in a partition suit to which the wife of one of the tenants was not made a party did not serve to bar her of the right of dower. In this decision, Cooley, J., and Christianity, Ch. J., concurred with Judge Graves. Campbell, J., dissented. Graves, J., speaking for the court, said: "Before acceding to the view that such a right may be extinguished through a suit in partition by the husband, instituted and carried to completion without her being a party or being represented and without her having any chance to be heard, we ought to find the rule of law compelling it most clear and decisive. It may be said that the provisions of the partition law are not so framed and arranged, unless we go outside and supplement the law by judicial legislation, as to make it practicable to guard the wife's right, whether she be a party or not where a sale becomes necessary. Were this to be admitted, it would not follow that we should assume the legislature to have intended that the right should be invaded and destroyed in her absence. At the utmost, nothing further could be inferred than that, having made no adequate provision to protect her right in the event of a sale, it was not designed that a sale should interfere with the right." A standard author on Judicial Sales says: "Nor will a sale in partition cut off the dower of a married woman, not made a party, although her husband be made such." Rorer, Jud. Sales, p. 168, § 402, citing, in support of the text, *Greiner v. Klein*, 28 Mich. 12; *Wilkinson v. Parish*, 3 Paige, 653; *Jackson v. Edwards*, 23 Wend. 498. In *Knapp*, Partition, p. 35, the author says: "The wife must be made a party. She has an inchoate right of dower in the lands owned by her husband, and she must be either plaintiff or defendant in the action. The court, before it will order a sale of land in partition, requires that all those that have an interest in them shall be made parties to the action, to the end that the purchaser may get a perfect title. Hence the wives of those entitled to the land should be made parties,"—citing *Knapp v. Hungerford*, 7 Hun, 588. Again, on page 108, the same author says: "The wives of the several owners are proper parties, but not necessary parties, except in case where a sale of the premises may be necessary, and in such a case the party suing may properly make his own wife a defendant. The other defendants have no right to complain, . . . if she does not." The decisions to which I have referred appear, to some extent at least, to rest or depend rather upon local laws and local procedure than upon any settled principle. To determine what should be the declared rule governing the case at bar resort must be had to our own statutes relative to the interest of the wife in the husband's lands, and the character of such contingent

interest, as disclosed by former decisions of this court, must be considered. An examination must also be made of the statute under which the partition proceedings in 1856 were instituted, and the procedure by which such actions were, by the Code of 1852, intended to be controlled. Section 2652, Rev. Stat. 1894 (Rev. Stat. 1881, § 2491), of our law of descent, in force since 1852, secures to the wife of a deceased husband one third in fee simple of all the real estate of which he may have been seised during the marriage, and in the conveyance of which she may not have joined in due form of law. Section 2660 of the same statute (Rev. Stat. 1881, § 2499) provides that "no act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer, or encumbrance of the husband's property, by virtue of any decree, execution, or mortgage, to which she shall not be party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands, . . . or preclude her from the recovery thereof, if otherwise entitled thereto." In *Grisson v. Moore*, 106 Ind. 296, 55 Am. Rep. 742, in reference to these sections, Mitchell, J., speaking for the court, said: "The inchoate right of the wife attaches as an incident to the seisin of the husband during marriage. It cannot be divested or defeated by any act or charge of the husband, nor otherwise, except in the manner above provided. It can only be barred by a conveyance in which she joins, or by some proceeding to which all estates are subject, such as the exercise of the power of eminent domain and the like. Her interest in lands thus owned and conveyed by the husband, in the conveyance of which she has not joined, becomes consummate on his death. It accrues by virtue of the marital relation. She does not take as heir in lands so conveyed. *Rank v. Hanna*, 6 Ind. 20; *Verry v. Robinson*, 25 Ind. 14, 87 Am. Dec. 348; *May v. Fletcher*, 40 Ind. 575; *Brannon v. May*, 42 Ind. 92; *Bowen v. Preston*, 48 Ind. 367; *Derry v. Derry*, 74 Ind. 560; *Hendrix v. McBeth*, 87 Ind. 287; *Mark v. Murphy*, 76 Ind. 534." In the appeal of *Bever v. North*, 107 Ind. 544, it was held that the wife's interest in her husband's real estate was not an encumbrance, but an estate in the land. This court, per Elliott, J., there said: "The estate of a wife, under our statute, is more than a right of dower, for it is paramount to the estate of one claiming through her husband, and sweeps entirely away all title of the purchaser to one-third interest given her by the statute. The estate of the wife is not a mere encumbrance, but is an interest in the land which goes beneath the title acquired by a purchaser from her husband. *Mark v. Murphy*, 76 Ind. 534. When the rights of the wife prevail, the title of the purchaser from the husband disappears. If this title does disappear, then, of course, the purchaser had no title which he could convey, and he cannot be permitted to aver, as against his grantee, that it was part of the consideration of the deed that the grantee should not acquire title to the land owned by the wife of a former owner unless he paid her for it. We cannot regard the

interest of the wife as an encumbrance, for it is an estate in the land itself. We cannot regard the estate of the wife as a mere right of dower, for there is no reversionary interest in the party who claims through the husband. The title of the wife, when it vests, is absolute as against a grantee of the husband, so that it does not merely encumber the land, but tears up the title from the very roots. It is not like the lease of a life estate, for there the reversion is in the lessor, and he succeeds to the fee upon the determination of the life estate. Here the fee never vests in the grantee of the husband. We cannot, therefore, regard as of controlling force the authorities which hold dower rights and life estates to be mere encumbrances." Where the husband is seised of lands during the coverture, but the same have been conveyed without the wife joining, under § 2491, *supra*, she does not take as heir, but as a purchaser for value, as marriage is the highest consideration known to the law. *Richardson v. Schulte*, 98 Ind. 429, and authorities cited; *Grisson v. Moore*, 106 Ind. 296, 55 Am. Rep. 742. In *Thompson v. McCorkle*, 186 Ind. 484 and 497, it was held that the wife's inchoate interest was not, under the facts there stated, divested in the real estate of her husband sold for taxes. On page 499, 186 Ind., this court said: "It is true the legislature may declare that a wife's inchoate interest shall be divested by a tax sale, and a conveyance of the land thereunder, but our lawmakers have not so provided, and until it has been so enacted by clear and express words her contingent interest should not be destroyed by judicial decision. This interest is in lieu of, and is analogous to, dower, except it has been enlarged from a life estate to a fee, and is guarded with more jealous care by legislative enactment and judicial decision."

These decisions will fully serve to show the character of the interest with which the wife is vested in the realty of her husband under the provisions of the statutes of this state, and the manner in which it is favored and protected under the law as interpreted by the adjudications of this court. Courts of sister states hold similar views in regard to the dower interest of the wife in the lands of the husband. Judge Bradbury, speaking for the court, in *Mandel v. McClave*, 46 Ohio St. 407, 5 L. R. A. 519, on page 414, 46 Ohio St., said: "It is property; its value can be ascertained. More than this, it is a favorite of the law. . . . A provision for her support. . . . She is a purchaser. The inception of her right. . . began with the marriage and seisin of the husband; . . . this favorite of the law is entitled to protection equal to that accorded to her other property." To the same effect is the holding of the court in *Black v. Kuhlman*, 30 Ohio St. 196; *Unger v. Leiter*, 32 Ohio St. 210. In *Shell v. Duncan*, 81 S. C. 547, 5 L. R. A. 821, on page 567, 81 S. C., of the opinion of Mr. Justice McIver, it is said: "Nothing that the husband may do can in any way affect it. From this, it follows that when the right, title, and interest of the husband is sold, either directly by himself or through the medium of an officer of the law, the purchaser takes no more than what was sold—the right, title, and interest of the husband, which does not include the dower

interest,—and hence the purchaser must take his title subject to the wife's right of dower." See 5 Am. & Eng. Enc. Law, p. 885. In *Simar v. Canada*, 53 N. Y. 298, 13 Am. Rep. 523, on page 304, 13 Am. Rep. 526, of the opinion of the court, it is said: "We think that it must be considered as settled in this state, notwithstanding *Moore v. New York*, 8 N. Y. 110, 59 Am. Dec. 478, and some *dicta* in other cases, that, as between a wife and any other than the state, or its delegates or agents, exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end." It is seen that this interest is an actual one in the lands of the husband, which, in the event of the death of the latter, passes into a fee, and that it is considered by the law in the sense of property, and as such, ought to be accorded protection by the court. Keeping in view the principles enunciated by the decisions heretofore cited, and the sweeping force and effect of the above-mentioned sections of the statute of descent, I may proceed, in the light of these, and other statutes and decisions to which I will refer, with the investigation of the cardinal question involved. It is clear that when this inchoate right once attaches to the real estate of the husband, there is no privity of the wife with him respecting such interest in his lands. It is a universal, undisputed rule that a judgment or decree of a court is not binding on anyone not a party thereto, or in any way represented by, or in privity with, a party to the action or proceedings. Hence it cannot be said that the appellee herein is concluded upon the grounds of privity with her husband. An act concerning the partition of lands was approved May 20, 1852. 2 Gavin & H. Stat. p. 361. The first section of this statute provided that "all persons holding lands as joint tenants, or tenants in common, etc., may be compelled to divide the same in the manner provided in this act." The second section provided that the petition should set forth a description of the premises, and the rights and titles of the parties therein interested. Section 18 made provision for the sale of the lands, in discretion of the court, when the commissioners reported that a division could not be made. Under § 20 such sale was required to be made by a commissioner appointed by the court. Section 21 provided upon the payment of the purchase money "the court shall order such commissioner," etc., "to execute conveyances to the purchaser *which shall bar all claim of such owners to said lands as effectively as if they themselves had executed the same.*" (The italics are mine.) Section 23 provided for the distribution of the proceeds of the sale by the commissioner to the persons entitled thereto, according to their respective shares, under the direction of the court. On June 18, 1852, an act concerning the civil procedure of courts and their jurisdiction was approved, being the Code of 1852. See 2 Gavin & H. p. 83; § 626 of this Code providing that "actions may be brought for the partition of lands held by joint tenants and tenants in common in all cases, and the pleadings and practice in such actions shall conform to the provisions of this act." By § 17 it was required

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that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs," etc. Section 18 provided as follows: "Any person may be made a defendant who has, or claims, an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved." Section 22 provided that: "The court may determine any controversy between the parties, before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had, without the presence of other parties, the court must cause them to be joined as proper parties," etc. It appears that under the requirements of § 626, *supra*, the pleadings and practice in partition suits must conform to the provisions of the Code, which certainly included those provisions pertaining to parties to an action. In *Martindale v. Alexander*, 26 Ind. 104, 39 Am. Dec. 458, it is said: "The Code provides a uniform proceeding for all existing rights, whether in law or equity, including the partition of real estate." In *Milligan v. Poole*, 35 Ind. 64, in referring to proceedings in partition, it is said: "Ample provision is made for ascertaining and settling the rights of the parties interested in the land, and if the land cannot be divided without damage to the owners, and consequently has to be sold, the court has power to adjust and secure the rights of the parties in the proceeds of such sale. And whether those rights be legal or equitable, they are equally within the cognizance and protecting power of the court. . . . To give validity and effect to a partition, all persons interested should be made parties to the suit. If they are not, their interests will not be affected by the proceeding, but will remain as before. See also *Schissel v. Dickson*, 129 Ind. 139. This court in construing § 18 of the Code, *supra*, in *Buttinger v. Bell*, 65 Ind. 445, declared that, "the parties who ought to be and must be made defendants under this section of the Code, as we construe it, are the parties in interest adverse to the plaintiff, an interest involved in the issues, and who, of necessity, will be and must be affected by the judgment in the cause. So, also, any person 'who is a necessary party to a complete determination or settlement of the questions involved' must, by the letter of the statute, be made a defendant to the action. These are the rules which govern pleadings in chancery in relation to necessary parties, and these rules were substantially re-enacted in our Code of Practice, as applicable alike to all suits at law as well as in equity, 'without distinction between law and equity.' *Newcomb v. Horton*, 18 Wis. 566; Story, Eq. Pl. chap. 4; Lube, Eq. Pl. chap. 3; Mitford, Eq. Pl. 164; and Moak's Van Santvoord's Pl. 105."

The question in regard to the necessity of making the wife of a cotenant a party in an action in partition seems to have been again considered and decided by the supreme court of New York in the case of *Ripple v. Gilborn*, 8 How. Pr. 456. The case of *Jackson v. Edwards*, 22 Wend. 498, and the purpose of the statute of 1840 were both referred to and considered by Crippen, J., in delivering the opin-

ion of the court in that appeal. In the course of the opinion in that case it is said: "The next question in the case is whether the plaintiff's wife is a necessary party to the action. The statute declares that the widow shall be endowed of the third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage." Rev. Stat. 4th ed. chap. 1, pt. 2, title 8, § 1. By the 16th section of the same act it is declared that no act, deed, or conveyance, executed or performed by the husband without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law, to pass the estate of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin, or crime of the husband, shall prejudice the right of the wife to her dower, or preclude her from the recovery thereof. The wife, in equity, has an inchoate right of dower resting upon the contingency of her surviving her husband; and in cases of partition, when the premises cannot be divided, and are ordered to be sold, the inchoate right of the wife becomes vested in her, so that she is at once entitled to her equitable portion of the avails of such sale. . . . I have examined the case in 7 Paige, of *Jackson v. Edwards*, with much care. The chancellor in that case has very fully discussed the question as to the rights of the wife in cases of partition, and I am unable to see, according to the law of that case, how the plaintiff can go on with this action without making his wife a party plaintiff. I am satisfied that the act of 1840 (chap. 177) in no manner interferes with the question of parties to the action. It only provides for settling the rights of married women, by adopting the same rule suggested by the chancellor, in the case above cited, for ascertaining the value of the inchoate right of dower of married women in the premises, in cases where a sale is ordered, and of securing to them the money, by investment, etc. This act also authorizes a married woman to release her contingent inchoate right of dower to her husband. I have no doubt that the provisions made by this statute were induced by the law as expounded and settled by the chancellor, in the case of *Jackson v. Edwards*, above cited. It was argued in January, 1839, and no doubt decided prior to the passage of the act of April 28, 1840. I regard it as a legislative approval and confirmation of the law as expounded by the chancellor. If the plaintiff's wife is not brought in as a party to the action, I am not aware of any course of practice by which the court is to be informed that he has a wife who is entitled to an inchoate right of dower in the premises. It may be that on an application in behalf of the wife, at any time before the money arising from the sale of said premises, if one should be ordered, is paid over by the purchaser, her interest therein might be protected by an order of the court; probably the same result might be attained on the application of the purchaser to the court, in order to protect him in his title. Allow that such proceedings might be had, it only goes to show more emphatically the necessity and propriety of bringing in the plaintiff's wife as a party to the action, in order that the premises

shall be freed by the decree and sale, of all entanglements with the claim of the plaintiff's wife, and she at the same time be properly secured in her equitable rights, arising from a sale of said premises. It seems to me that the most simple and direct practice, as well as that required by the strict rules of law, is to make all persons parties, who have, by any means or contingency, an interest in the premises. Barbour, in his Chancery Practice, directs that whenever there is a married woman having merely an inchoate right of dower, it is advisable that she be made a party to the action, especially if a sale will be necessary. 2 Barbour, Ch. Pr. 288. Whether a sale will be ordered or not is a question that cannot be determined at the commencement of the action. All necessary parties should be joined at the time the suit is brought, and, if omitted, the defendant may demur, in case the defect appears upon the face of the complaint, and, if not, may appear, and object by plea and answer. *Braker v. Devereaux*, 8 Paige, 518, and also the cases cited to the first point. The plaintiff in this action joined the defendant's wife as a party thereto, in order that her right of dower might be barred by the proceedings therein and by the judgment of the court; no doubt the same necessity exists for bringing in the plaintiff's wife and making her a party, and for the same reasons. Whittaker, in his Practice, says that all persons directly or indirectly interested in the corpus of the estate must be made parties, including the wives of parties living, in respect to their inchoate right of dower. (Whittaker, Pr. & Pl. 60). This authority seems to be directly in point, and is undoubtedly correct. If a sale of the premises shall be ordered, it is entirely clear that a complete determination of the rights of the parties cannot be had without the plaintiff's wife being brought into the case at some period of its prosecution." The legislature which enacted our statutes of descent substantially adopted the provisions of § 16 of the statute of New York referred to in the opinion of the court in the case from which I have just quoted, and incorporated them into § 2660, Rev. Stat. 1894 (Rev. Stat. 1881, § 2499). In view of this fact, the above decision of *Ripple v. Gilborn*, placing an interpretation on this section of the New York statute, from which our statute was borrowed, is entitled to much weight in the solution of the question here involved; for it is a familiar rule, in general, that where a statute of one state is borrowed from that of another, it will be held by the courts of the borrowing state to have the meaning and force given it by the courts of the state from which it was borrowed. *Valparaiso v. Gardner*, 97 Ind. 1, and 49 Am. Rep. 416, and authorities cited.

The provision of the partition statute of 1852, which authorized the court, in its discretion, to order a sale of the premises when they were not susceptible of division, is but a recognition, to an extent, of the old chancery rule, which permitted courts of equity in proceedings for partition to do equity upon consent of all parties in interest, by ordering a sale of the land in lieu of partition, and dividing the proceeds instead, except the power under the statute does not depend upon the consent of parties. In a

suit in chancery for partition the decree was only binding upon those parties who were before the court, and those whom they virtually represented; and the interests of third persons were not affected. In the exercise of equity jurisdiction in cases of partition, the court was vested with extensive power to bring all interested parties before it, in order that complete justice might be attained. Story, Eq. Jur. 11th ed. § 656; Pom. Eq. Jur. § 1890. By no means is it an easy matter to trace accurately the distinction between necessary, and what may be termed merely as proper, parties to an action. Each case, in a greater or lesser degree, must depend upon the facts and circumstances upon which it rests. We think, however, that it is evident, in view of the provisions of the Code relative to parties to an action, and to which the practice in partition suits, by § 626, *supra*, is required to conform, that, in the event a sale of the lands is ordered, the wife of a tenant in common is not only a proper, but a necessary, party defendant, in order to protect her interest involved; and also that there may be a complete determination of the controversy, and that the decree and conveyance thereunder may pass a perfect title to the purchaser; and it is the duty of the court, under such circumstances, to cause her to be made a party, and, in the event that she is not, her rights are not barred. This, we think, was the manifest intent of the legislature. We are confirmed in this conclusion when we consider the fact that this body at the same session, and only a few days prior to the approval of the act of 1852 concerning partition, passed the statute of descents, which embraced § 2660, Rev. Stat. 1894 (Rev. Stat. 1881, § 2499). There is no reasonable presumption that the legislature intended, in the very teeth of the prohibitory features of this section, that, in the exercise, of the power granted to the court under the partition statute to decree a sale of the land, the presence of the wives of the tenants as parties might be dispensed with, and still that their inchoate interests therein should be devested and barred. A feature in the Ohio and Missouri cases referred to was the fact that the statutes of those states made no provision for making the wives of the tenants parties to a partition proceeding. The force, therefore, of these decisions, in view of the requirements of the Code of 1852, to which I have referred, is materially impaired, and they cannot be accepted as controlling. In *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355, it was said that the wife was remitted to her share of the proceeds of sale in lieu of her dower. But if she is in no manner a party, or notified of the pendency of the action, how may she have an opportunity to demand her interest in the proceeds, and thereby protect her rights? When is she entitled to her day in court, and a protection of her right under due process of law?

It is virtually asserted in the prevailing opinion of my Brother McCabe that it would be an idle ceremony to make the wife of a cotenant a party in partition proceedings, as she could not be heard to oppose either partition in kind or the sale of the lands. That she could not defeat a partition is true, but that she is entitled to oppose the sale of

the premises by showing that they are susceptible of division is in reason and justice, under the laws of this state, undoubtedly her right. She is interested in the part to be set off to her husband, in case a partition in kind is made, and she should, therefore, also have the right, certainly, to be heard in exposing any fraud or inequality in the proceedings affecting the moiety apportioned to her husband. That she had an interest in the subject of the partition—the land sought to be partitioned—is not, and cannot be, controverted. That, in the event it was ordered to be sold, she had an interest in the relief demanded, is equally evident; and a complete determination of the controversy, in this respect at least, could not be had without her presence. Therefore, under such circumstances, the provisions of the Code referred to required her to be joined as a party. Under the holding that the wife's right will be barred by the order of sale to which she is not a party, an opportunity might be presented for two or more husbands, holding valuable property as tenants in common, by acting in concert to procure, through a partition suit, a sale thereof, without making their wives parties thereto, and the money arising from such sale might be dissipated, or seized by creditors of the husbands, and the wives of the latter be afforded no notice of such action, or opportunity to protect their interests, if any, in such proceeds. The case at bar affords a fair illustration of the result that might follow as it appears that the appellee had no knowledge of the partition sale until after the death of her husband. Certainly, the legislature did not intend that such rank injustice should result to the wife when it ingrafted upon the statute the equitable rule permitting the court to order the sale of the real estate. But it is claimed by counsel for appellant that a holding that the wife is not barred by the sale under the circumstances would result as a hardship upon the purchaser at such sales. In answer to this it may be said that the original purchaser of the land in question, through whom appellant claims, was bound to know, under the law, what and whose interests he acquired by the sale and conveyance in controversy. He was bound to know that § 2660, Rev. Stat. 1894 (Rev. Stat. 1881, § 2499), denied the right to divest her of her inchoate interest in the land under a decree of sale to which she was not a party. He was bound to know what title passed to him by the commissioner's deed, as provided by § 21 of the partition statute. With all these presumptions existing against him, he apparently did not investigate the question of title, or make any application to the court to be relieved from his purchase. The court will not compel a bona fide purchaser to complete his purchase, and accept a deed, when it appears that the title to the land will be doubtful, and may subject him to a contest to protect it. See *Harlan v. Stout*, 23 Ind. 488, and the many authorities cited in footnote to *Toole v. Toole* (N. Y.) 2 L. R. A. 465; *S. C.* 112 N. Y. 338.

When the force and effect of these several statutes to which I have referred are considered, and the fact that the right of the wife in the real estate of the husband under the laws of

this state has heretofore been regarded and held by this court as an actual contingent interest therein, that she holds such interest as a purchaser for value, and that the law favors her in the protection thereof, the conclusion is irresistible, in my opinion, that appellee is not barred by the decree and sale from asserting her interest in the lands in dispute. Such holding is in harmony with reason, justice, and the laws of our state. She was endowed by the statute with this interest in her husband's lands for her support and maintenance in the event she became a widow; and to hold that under the facts, she is precluded from a recovery, is in direct opposition to the spirit and meaning of the law. The language of § 2660, Rev. Stat. 1894 (Rev. Stat. 1881, § 2499), is a complete answer to the contentions of the appellant. The decision in this case may be said to be sweeping in its effects, and established a precedent that will ultimately serve to plague and worry the court. If the doctrine asserted is sound, then it must follow that, when lands of the husband are sold under an order of sale in a partition action, the wife will virtually have no interest, either in the realty, after it is sold, or in the proceeds arising out of the sale of the husband's moiety, that she can claim; and in such a case the creditors of the husband would occupy a position that they do not in any other case when the husband's lands are sold, and where the wife has not been estopped by her own act, and not barred by being a party to a judgment or decree of the court. Such creditors, under this view of the question, would be permitted to assert their right to, and appropriate the entire proceeds of the husband's interest in, payment of his debts, regardless of the rights or claims of his wife.

The act of 1875 (Rev. Stat. 1894, § 2660; Rev. Stat. 1881, § 2508) in effect provides that when the title of the husband in real estate shall become vested in a purchaser under a judicial sale, where the inchoate interest of the wife has not been ordered sold, or barred by virtue of such sale, then and in that event, her said interest shall become absolute, and vest in her in like manner and to the same extent as it would upon the death of the husband. It has been held by this court that a sale of the husband's lands by a register in bankruptcy, or by an assignee for the benefit of creditors, is a judicial sale, within the meaning of this statute. See *Roberts v. Shroyer*, 68 Ind. 64; *McCracken v. Kuhn*, 73 Ind. 149; *Lawson v. DeBolt*, 78 Ind. 563; *Hall v. Harrell*, 92 Ind. 408. In view of these decisions, and others of like import on the same point, surely it must be said that sales made since the taking effect of the act of 1875, *supra*, under the order of the court in a partition proceeding, would be judicial sales within the meaning of that statute, and, unless the wife was barred by the judgment therein by being a party thereto, her interest would vest and become absolute upon such sale and conveyance; and, in the event that it had been barred by the judgment of the court, she being a party thereto, certainly her interest would be shifted or transferred to the proceeds of the sale, and she would have the right to protect it. From this conclusion I think there can be no escape, yet the holding in the case at bar in effect affirms or establishes a rule to the contrary, and to this extent the laws of the state which give her this inchoate right in the lands of her husband are rendered nugatory. The judgment ought to be affirmed.

IOWA SUPREME COURT.

L. W. THOMAS, *Appl.*,

v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY.

(.....Iowa.....)

1. A license to use a railroad track as a footpath may be found from the facts that it had been so used for a number of years to the extent that plainly visible paths had been worn upon the ground, and that a ladder had been placed from the highway to reach the roadbed with the knowledge of the employees of the road, to which no objection had been made.
2. Implied assent by a railroad company to the use of its tracks as a footpath will impose upon its employees the duty of exercising care, diligence, and watchfulness to discover if persons are on the track at that point.

NOTE.—For implied license to cross railroad track, see note to *Central R. & Bkg. Co. v. Rylee* (Ga.) 13 L. R. A. 634; also *Chenery v. Fitchburg R. Co.* (Mass.) 22 L. R. A. 575.

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when running trains which will be likely to injure them if there.

(October 30, 1897.)

APPEAL by plaintiff from a judgment of the District Court for Marshall County in favor of defendant in an action brought to recover damages for injuries to plaintiff's minor son through the alleged negligence of defendant. *Reversed.*

The facts are stated in the opinion.

Mr. J. L. Carney for appellant.

Messrs. Charles B. Keeler and *T. Binford* for appellee.

Kinne, Ch. J., delivered the opinion of the court:

1. This is the second appeal in this case. The opinion on the former appeal will be found in 93 Iowa, 248. After the reversal upon the former appeal, certain amendments were made to the petition, the substance of which are incorporated in the statement of the

case. Just before noon, on May 15, 1890, Earl B. Thomas, a minor son of the plaintiff, aged three years and nine months, was, with another child younger than himself, upon an open and uncovered bridge, which was located upon the defendant's line of railway, about 1,900 feet west of the station of Rhodes, in Marshall county, Iowa, and, while there, was run over by a train going west, and his right foot was so crushed as to require its amputation. The petition charges that, without fault on the part of his parents, the child went upon the track and bridge, and was in plain sight from the station, and at all points upon the road between the station and the place of the accident; that the defendant's employees, knowing that the children were on the track, started a train from the water tank at the station, a distance of about 90 rods from the bridge, westward (the engine being in front, but with the pilot attached to the cars), and negligently and carelessly ran the train over the plaintiff's child; that all of the persons upon the engine knew that the child was upon the track and bridge, but did not look along the track over which they were going, or exercise any care or caution whatever in the operation of said train or to discover whether or not the track was clear; that it was a wild train, not running on schedule time, and was running with the engine backward; that the train was not manned with a sufficient number of brakemen, and the engine was without steam or air brakes. It is also charged that the engineer and other employees on the train saw the said child in time to have stopped the train and prevented the accident; that they negligently allowed the engine and cars to approach and reach said bridge without signal of bell or whistle, and without any effort to stop said train, and ran over the foot and leg of said child; that the roadway and track of defendant's line of railroad extending from the overhead bridge, just west of the bridge where the injury occurred, to the station of Rhodes, was daily and almost hourly frequented by men, women, and children, traveling upon foot, east and west upon said line of railway; that, for the purpose of convenience in access to said railway track from the overhead bridge in connection with the highway, there had been constructed a ladder by the defendant's employees, or with their knowledge and consent, so that persons could have ready access from the highway to the railway track, and also from the railway track to the highway; that with the knowledge and consent of the defendant, and for more than ten years prior to the accident, people residing in the vicinity of the bridge and in the town of Rhodes had constantly used the track of the defendant's railway for the purpose of traveling to and from the depot, school, and village of Rhodes, and had used said ladder for the purpose of reaching the track of the defendant; that the public generally had leave and license to use said railway track as a footway, and the child Earl was not a trespasser thereon; that defendant's employees were negligent in not exercising watchfulness and care in reference to the train while it was passing over such part of the track where pedestrians had license to walk, and such negligence caused said acci-

dent. To the answer the defendant interposed a general denial, except that it admitted its corporate capacity, and that the accident was caused by one of its trains. When plaintiff's evidence was in, the defendant moved the court for a verdict in its favor, because there was no evidence warranting a verdict for plaintiff; that there was no evidence sufficient to sustain a finding of negligence on part of the defendant company or its employees which was the cause of the accident; that the evidence did not warrant a finding that the defendant owed to the child any legal duty of watchfulness and care before his position was known, and it is not shown that there was any want of care after his position was known; that no license or right upon the part of the child to be upon the track and bridge had been shown, but he was a trespasser; that the evidence failed to show any invitation or consent by the defendant to use its track and bridge as a footway; that the evidence failed to show that the engineer or other trainmen actually saw the child upon the bridge before the accident, or, if they did see him, that they had failed to use all the means and appliances at their command to stop the train and avert the accident. This motion was sustained.

2. An important question in this case is as to whether the child Earl was upon the track and bridge of the defendant company by leave or license of the defendant. The former trial was had upon the theory that the child had no right upon the track; that he was a trespasser; and that there was nothing in the situation or surroundings requiring the trainmen to be on the lookout for persons on the track. If the child was a licensee, instead of a trespasser, another rule of law may obtain. The evidence which it is claimed shows a license to use the track and bridge as a footway by pedestrians may be briefly stated as follows: For many years prior to the accident, the bridge and track of the defendant company, from the place of the accident to the station of Rhodes, had been in almost constant use by people living in the vicinity of this bridge as a footway in going to and from the depot, school, and village. Children of from four or five years old and upward used it as a means of going to and from school. The bridge passed over a private highway, and access to the bridge and track were had by the use of a ladder reaching from this highway to the head block of the bridge above. It does not appear as to who erected this ladder. The bridge was 14 feet above the highway. There were paths leading from the track to this ladder. These paths were well worn. This track and ladder were also used by persons living in the village who had occasion to visit those living in the vicinity of this bridge. The distance to the village was much less by way of the track than by the highways. There was no evidence to show that the defendant company ever gave leave or license to use this bridge and the track as a footpath, nor does it appear that the defendant company ever made any attempt to prevent such use. The ladder could be seen from the track. The road master of the defendant company and other of its employees had seen this ladder. The superintendent of the company was present at one

time while the bridge was being raised, and the ladder was then attached to the bridge. There is nothing to show that the use of this ladder was ever interfered with by the defendant company. From all of the evidence, it is clear that the footpath and ladder were seen by some of the defendant's employees, and that they were so situated as to be seen by any employee of the defendant company engaged in the operation of its trains.

We held in *Murphy v. Chicago, R. I. & P. R. Co.* 38 Iowa, 543, that an instruction in the following language was proper: "If you find from the evidence that the deceased had for a considerable time prior to the accident been accustomed to walk over and upon the track of the railroad company, at and near the place where the accident occurred, by the acquiescence of the company, then the deceased was not a trespasser upon the track, and such permission may be implied if deceased was long in the habit of so walking over the track, with the knowledge of the company or its employees in charge of that part of the road, without objection on their part,—and it is for you to determine from all the facts in evidence before you whether or not the deceased had such implied permission." It was said in that case that facts which would be sufficient to constitute ordinary diligence as against a trespasser might not establish such diligence as against a person there by permission. In *Masse v. Chicago, R. I. & P. R. Co.* 68 Iowa, 604, it is said: "The evidence tended to show that the track, at that point, was traveled to some extent by footmen, and that there had been such an amount of travel as to make a path." It was held the facts did not show a license. The court, however, said: "If the travel had been at a point where the defendant's employees were stationed, and it were shown that the footmen occupied the track without their dissent, it may be that the company's assent should be implied." In *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, it was held that an allegation in a petition that "for more than ten years, defendant's roadbed and right of way, from a point west of where the accident happened to the city of Des Moines, has been used by the public as a thoroughfare to and from said city of Des Moines, which fact was well known to the defendant and its employees," did not state facts from which the law would infer a license. In that case it was said: "We are not saying that there might not be such a use of the track as that the assent of the company might be understood or implied therefrom; but no such state of facts is pleaded." In *Richards v. Chicago, St. P. & K. C. R. Co.* 81 Iowa, 480, it was held that the facts did not show a license or invitation to people to walk along the defendant's tracks, and that the fact that it did not forbid their doing so could not be given the force of an invitation. The court said: "It may be there was evidence of such habitual use of the tracks by the public, which use was known to the employees of defendant, and not disproved, that the jury would have been authorized to find that plaintiff had an implied license to use the right of way as he did. But, if that be true, defendant was under no obligation to protect

plaintiff from harm by taking steps to prevent it, unless it had so acted as to mislead him. It was the duty of defendant not to injure him wantonly or wilfully, but if it had done no act to mislead, and had no reason to anticipate the danger to which plaintiff exposed himself, it owed him no active duty." In *Clampit v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 71, it was held that, where a railway track is used for crossing at a place daily used for a considerable time by a number of persons, some of whom had constructed a stairway by the track for the use of pedestrians, and when a crossing over a ditch had been made by someone unknown, and the defendant had done nothing to prevent persons from crossing said track, and the use of such place as a crossing was known to the employees of the defendant, it would be presumed to assent to such use, and that it was a license, and the plaintiff, in using it, was not a trespasser. On the former trial of this case it was said: "It may also be remarked in this connection that a license to use the track of a railroad company may be inferred from the frequent use, in connection with other circumstances from which an implied invitation may be inferred." 93 Iowa, 248.

From the foregoing cases it appears that this court has often recognized the doctrine that a license to use a railroad track may be inferred from facts and circumstances short of an actual invitation or consent on the part of the railway company. The question, then, before us, is: Are the facts and circumstances disclosed in this record such as to warrant a jury in finding an implied invitation or license to use the track by footmen? It may be admitted that the facts in this case touching the circumstances surrounding the use of the track are in some respects not the same as in *Clampit's Case*; yet they are in all essential respects save one much alike. In the case at bar the use of the track was not merely for crossing purposes. In that case the court said: "The stairway and the ties across the ditch, as well as the path made by footmen, prominently advertised the place as a crossing used by pedestrians. No engineer or fireman passing along the tracks at that place with his eyes open, in the exercise of reasonable watchfulness and care, could have failed to see these indications of a footpath, and to understand therefrom that it was used by pedestrians, if he possessed ordinary intelligence." This language applies as well to the facts in the case at bar. Here was an almost constant use of this track. Here were well-defined footpaths, and a ladder in use for years, for the purpose of reaching the track. The track repairers knew the ladder was there. The road master had actual knowledge of it. The superintendent had once, at least, been where, if he used his eyes, he must have seen it. It was in plain view of all the train operatives. It does not appear that the ladder was ever used for any purpose except as a means of getting onto the track; and, with the fact undisputed of the use of the ladder, paths, and track for years without objection from the defendant or any of its employees, all these and other facts would warrant a finding by a jury that the use of the

track was by the consent of the defendant, and therefore the child Earl was not a trespasser.

8. If the rule of law as to care to be exercised by the employees of the company operating its train is the same towards one who is a mere licensee by virtue of an implied invitation from the defendant as it is in case of a trespasser upon the track, it was not necessary to submit this case to the jury for the purpose of determining which of these relations this child occupied towards the defendant company. As is said in the opinion on the former appeal in this case, if the child was a trespasser, then the company owed him no duty until its employees actually saw him on the track in a place of danger; that they were not bound to keep a lookout for trespassers, and were not negligent in failing to discover trespassers upon its track. *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106; *Morris v. Chicago, B. & Q. R. Co.* 45 Iowa, 29; *Richards v. Chicago, St. P. & K. C. R. Co.* 81 Iowa, 428; *Thomas v. Chicago, M. & St. P. R. Co.* 93 Iowa, 248. Appellant contends that this should not be the rule even as to trespassers. Such has been the uniform holding in this state, and unless there are cogent reasons for departing from it, it should not be changed. We discover no sufficient reason for changing this rule, which has always been consistently adhered to by this court. The important question now is, does this rule apply with like force and effect to one who may be found to be a licensee by invitation of the company, implied from all the surrounding circumstances? The general current of authority undoubtedly is that the same rule ordinarily applies in both cases. 3 Elliott, Railroads, §§ 1154, 1249-1251, and cases cited; Beach, Contrib. Neg. § 212, and cases cited. Indeed, it is held that one using a railway track as a place of crossing, or a footpath, with the silent acquiescence of the company, or with the knowledge or passive permission of the company, is, at most, a bare licensee, who takes his license with all of its concomitant risks and perils; and, as a general rule, the company owes him no greater duty than that which is due to a mere trespasser. 3 Elliott, Railroads, § 1154, and cases cited. Such is undoubtedly the general trend of the authorities in this country. In our own state, in *Richard's Case*, this doctrine seems to be recognized and applied as to one walking along the track; while in *Clampitt's Case* (the last expression of this court upon this subject), it is expressly held that one crossing the track of a railroad company under circumstances as to uses of the track much like those of the case at bar "is entitled to all the rights and protection of one rightfully upon it with the license of the defendant. He

may recover for injuries resulting from the defendant's want of care, if not contributing thereto by his own negligence." Owing to the age of the child Earl, there can be no question of contributory negligence in this case. If the rule laid down in *Clampitt's Case* is to be adhered to as to one crossing the track, we see no escape from the conclusion that this case should have been submitted to the jury under proper instructions of the court, for them to determine whether the child was a trespasser or licensee, and, if a licensee, whether the employees of the defendant exercised that care to discover his presence upon the track, where, from the license given, they had a right to expect persons might be. We believe the rule announced in *Clampitt's Case* a just one, as applied to the facts in that case. It amounts to saying that, when the company had impliedly assented to the use of its track by persons as a footpath, its employees operating trains are charged with the duty of exercising care, diligence, and watchfulness to discover if persons are on the track at these places where they have recognized their right to be. We are not holding that at every place and continuously along the line of a railway, the employees operating trains must be on the watch for trespassers. What we do hold is that as to persons rightfully on the track by the license and consent of the company, whether such consent be expressed in words or arise by implication, a duty rests upon the company and its employees to be on the watch for such persons at the places they may be expected to be, in view of the license and consent given. So, in this case, if the boy Earl was a licensee, and not a trespasser, and at a place where the company had impliedly assented to the use of its track as a footpath, it was the duty of those operating the train to exercise watchfulness and care to ascertain if persons were on said track at said place. If the jury should find that Earl was a licensee, then they must determine, in view of all the evidence, whether the employees of the company properly discharged that duty, and, if they did not, whether the failure so to do resulted in causing the injury.

4. Without referring specifically to the several complaints as to the rulings upon the introduction of evidence, it may properly be said that most of the rulings against the plaintiff impress us as technical, and some of them as incorrect. We do not say more, as it is not likely that on a retrial the same questions and rulings will appear. We have, in view of another trial, refrained, so far as possible, from discussing the weight of the evidence. The appellee's objection to the record is not well taken, and appellant's motion to strike the additional abstract is overruled. For the reasons given, the judgment below is reversed.

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KENTUCKY COURT OF APPEALS.

Allie W. DAVIS, *Appt.*,

v.

W. T. DAVIS.

(.....Ky.....)

1. The lapse of five years after the conviction of a crime and sentence to imprisonment for life entitles the wife of the person convicted to a divorce, under Stat. § 2117, making it a ground for divorce that the parties have been living apart without cohabitation for five years before the application.

2. An action for divorce need not be brought within five years after the conviction for a felony of one sentenced to imprisonment for life, under Stat. § 2117, making "condemnation for felony" a ground for divorce, and Civ. Code, § 423, subd. 3, requiring plaintiff in a divorce suit to prove that the cause of divorce "occurred or existed within five years next before the commencement of the action."

(December 14, 1897.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Woodford County in favor of defendant in an action brought to obtain a divorce. *Reversed.*

The facts are stated in the opinion.

Messrs. J. T. Wilson and E. M. Wallace, for appellant.

Mr. W. H. Julian for appellee.

Hazelrigg, J., delivered the opinion of the court:

Appellant and appellee were married in 1881, and lived together until 1884, when appellee was convicted of murder, and sentenced to the penitentiary for life, where he still remains. In January, 1896, appellant instituted this action for divorce, relying on two grounds therefor: (1) Living apart, without any cohabitation, for five years next before the application; (2) condemnation for felony in this state. These grounds are set out in subsections 2 and 3 of § 2117 of the Kentucky Statutes. Appellant also averred that her cause of action accrued and existed within five years next before the commencement of her action. In § 2120 of the Statutes it is provided that the "action for divorce must be brought within five years next after the doing of the act complained of;" but in § 423 of the Civil Code it is provided that a plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause of divorce, (3) that the cause of divorce occurred or existed within five years next before the commencement of the action. The chancellor denied the appellant relief, solely on the ground that the living apart "was not voluntary," and that the condemnation for felony meant conviction for felony; and, as that had not occurred within five years next before this action was instituted, she was not entitled to a divorce on that ground. We think the chancellor was in error as to both grounds. It is true that in *Pile v. Pile*, 94 Ky.

NOTE.—As to the effect of conviction and sentence upon the marriage relation, see *note* to *State v. Duket* (Wis.) 81 L. R. A. 515.

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808, the husband was denied a divorce on the grounds of lunacy and abandonment for five years; but the court said: "Here the wife has a mind diseased, without her fault, [and] has never abandoned the husband, but is now confined in the asylum for lunatics by his consent and direction."

Here the husband is confined in the penitentiary for life, after a conviction for crime; and the separation certainly cannot be said to be without his fault, though it is wholly without the fault of plaintiff. Again, we think the condemnation for felony existed within the five years before suit was brought, although the judgment of conviction was entered more than five years before. Such condemnation must exist at least as long as the judgment is in force. The statute may be thus construed, even if held applicable to this particular ground of divorce. We are inclined to think, however, that it is not applicable. The doing of the act complained of, mentioned in the statute, would seem to have reference to some of the many acts set out in the statute, to be committed by either the husband or wife, entitling the other to a divorce. Here the condemnation was not the act of the husband, but an act by the state. It follows further, from what we have said, that the order of allowance to Edwards as guardian *ad litem*, to be paid by the wife, is erroneous, as under the statute this is to be paid by the husband. (Ky. Stat. § 900.)

Judgment is reversed for proceedings consistent herewith.

J. W. HUTSELL *et al.*, *Appts.*,

v.

DEPOSIT BANK OF PARIS.

(.....Ky.....)

1. The direction in a distress warrant to levy on property of subtenants found in the county is immaterial, when the levy is not in fact made on any property that is not found on the leased premises.

2. The right of distress does not pass to the assignee of a rent note in the absence of statutory provision therefor, and is not given by Stat. § 2804, authorizing the assignment of the rent and its recovery by the assignee.

(December 11, 1897.)

A PPEAL by defendants from a judgment of the Circuit Court for Bourbon County sustaining a motion for judgment on a bond executed for the discharge of a levy under a distress warrant for the collection of rent. *Reversed.*

The facts are stated in the opinion.

Messrs. McMillan & Talbott, for appellants:

Section 2807, Ky. Stat., provides that a distress warrant may be levied upon the personal

NOTE.—As to distress for rent, see also *Hessel v. Johnson* (Pa.) 5 L. R. A. 861, and 11 L. R. A. 856; *Hodges v. Cooksey* (Fla.) 24 L. R. A. 812, and *note*; *Marr v. Ray* (Ill.) 26 L. R. A. 801, and *note* as to distress where lease is invalid.

property of the subtenant on the leased premises.

The subtenants were not directly liable for the rent; the relation of landlord and tenant did not exist as to them, and a distress warrant could not issue against them, and their only liability was to the extent of property found on the leased premises.

While the relation of landlord and tenant has existed since the beginning of our state legislation and state courts, still we find no effort on the part of the assignees of rent notes to exercise the rights of a landlord. This uniform construction which the bar of the state have placed upon the statute of landlord and tenant is worthy of consideration.

In order that a distress warrant may issue the following things are necessary: "There shall have been an actual demise or letting of the premises, and that the relation of landlord and tenant exist between the parties; that there be a reversion in the landlord."

6 Lawson, Rights, Rem. & Pr. § 2819.

Nor will an authority in writing to a tenant, to pay the rent to a third person, authorize a distress by such person.

Taylor, Land. & T. § 567; *Epperson v. Blakemore*, 2 Bush, 241.

The Statute of 32 Hen. VIII. chap. 34, has not been adopted in our state. That statute in so many words "gives the power of distress upon the lands out of which the rent is reserved, so long as they continue in the hands of him to whom the rent is due, or of any person representing or claiming title through or under him, by purchase, gift, or descent."

Comyn, Land. & T. § 873.

By the common law the right to distraint is in the landlord only.

1 Jones, Liens, § 598.

Measrs. Mann & Ashbrook for appellee.

Du Relle, J., delivered the opinion of the court:

Mrs. Taylor leased to C. E. Wood her farm for the year ending March 1, 1896, for \$1,800, and the tenant, with three others as sureties, executed a note for that amount, due March 1, 1896, payable to Mrs. Taylor, and negotiable and payable at the Agricultural Bank of Paris. Before maturity, Mrs. Taylor indorsed and assigned the note to Irwin Taylor, who indorsed it to McClintock, who discounted it to the Deposit Bank of Paris. In April, 1895, the tenant, with the consent of Mrs. Taylor, sublet the farm—or, rather, assigned the remainder of his term—to J. M. and J. W. Hutsell, appellants, for \$1,800, for which they executed their note, with surety, to Wood, who assigned the note to J. B. Wood, who assigned it to the Agricultural Bank of Paris. The \$1,300 note was not paid at maturity, and on April 11, 1896, the appellee, the Deposit Bank, through its president, made affidavit before the police judge and procured a distress warrant to be issued in favor of the bank against Wood, the tenant, and J. W. and J. M. Hutsell, the subtenants. The warrant was placed in the hands of the sheriff, who levied upon the property of the appellants, who executed a bond, with sureties, to discharge the levy. Motion was made by appellee, under § 654 of the Code, for judgment upon the bond against appellants, and 89 L. R. A.

defense was made upon the ground of irregularity in issuing the distress warrant, and that the distress warrant was in favor, not of the landlord, but of a remote assignee of a negotiable note given for rent. These defenses were presented both orally and by written answer and amended answer.

The objection to the distress warrant was upon the ground that it was issued both against the tenant and the subtenants, directing the levy to be made upon their property found in the county, whereas only the property of the subtenants found on the leased premises was subject to the levy. Inasmuch as the warrant was not levied upon any of the property of the subtenants found elsewhere than on the leased premises, we do not regard this objection as material.

The other objection is that the relation of landlord and tenant did not exist between the Deposit Bank and the Hutsells. This presents a question now, we believe, for the first time presented for decision, whether the remedy by distress or landlord's attachment, under §§ 2301, 2302, Ky. Stat., is available in favor of the assignee of a note given for rent who is not the assignee of the reversion. It is noticeable that this summary, and frequently oppressive, remedy by distress is, by the terms of the statute, given to the landlord, the language used being: "The landlord may, before a justice of the peace, by himself or agent, file an affidavit," etc. The language in the other section providing for an attachment for rent, while not quite so explicit, in our opinion means the same thing, the language being: "The person to whom the rent is owing, or his agent or attorney, may file an affidavit. . . ." At common law, the right to rent was incident to the reversion, and the remedy by distress for arrears of rent was lost by assignment of the reversion, either absolutely or by way of mortgage. 1 Woodfall, Land. & T. 1st Am. ed. p. 421. It became a mere chose in action. And so not until the Statute of 32 Hen. VIII. could executors or administrators distraint for arrears of rent incurred in the lifetime of the owner. 1 Woodfall, Land. & T. p. 427. By the same statute (32 Hen. VIII.) was given the power of distress upon the lands out of which the rent is reserved, so long as they continue in the hands of him to whom the rent is due, or of any person representing or claiming title through or under him, by purchase, gift, or descent; and it is argued that as this part of the statute of Hen. VIII. has not been copied into our statute while the part of it giving the power of distress to a personal representative has been so copied, the remedy by distress does not follow even an assignment of the reversion. In this state, however, it has been held (*Breading v. Taylor*, 13 B. Mon. 477) that, if a sale be made of land in possession of a tenant, the tenant, and all coming into possession under him, becomes the tenant of the vendee, and may not attorn his possession to a stranger. *Saunders v. Moore*, 14 Bush, 97. It would seem, therefore, that in this state the remedy might be held to follow the reversion, after notice to the tenant of the alienation, and would undoubtedly do so after an attornment, as that would establish the relationship of landlord and tenant. This question, however, is not

before the court. In 6 Lawson, Rights, Rem. & Pr. § 2819, it is said: "The requisites of a valid distress are, that there shall have been an actual demise or letting of the premises, and the relation of landlord and tenant exist between the parties; that there shall be a reversion in the landlord; that the rent be certain or capable of being made certain; and that the rent shall be due; and that there shall be a reservation of a certain rent." And in Taylor, Land. & T. § 568, referring to the New York statute, in substance the same as the statute of 83 Hen. VIII., it is said: "But, in order to confer upon such assignee a right to distrain, the lease or land should be included in the assignment; for a mere transfer of the rent remaining unpaid [which is only the transfer of a chose in action] does not carry with it the remedy by distress." We think it clear from the authorities that the right of distress does not pass to the assignee of a rent note, in the absence of statutory provision therefor.

It is claimed that this statutory authority is contained in § 2804 of the Kentucky Statutes: "If the owner or holder alien or assign his estate or term, or the rent thereafter to fall due thereon, his alienee or assignee may recover such rent,"—it being argued that the right given to alienee or assignee to recover the rent carries with it the right to the mode of recovery to which the assignor or alienor would have been entitled. It is to be observed that, in several instances, the statute upon this subject explicitly authorizes the remedy by distress,—in § 2805, against the assignee or undertenant of the lessee; in § 2818, against the tenant for life; in § 2819, to a person entitled

to rents depending upon the life of another, after the death of the latter; in § 2821, to a personal representative; and in § 2824 to enforce the lien given under contracts by which the landlord is to receive a part of the crop. These express provisions indicate that, whatever might have been the legislative intent in the adoption of the statute embodied in § 2804, it was not thereby intended to grant to the assignee of a mere chose in action this extraordinary and frequently oppressive remedy. Moreover, § 2812 allows double damages for wrongful distress against the landlord, who, by reason of his ownership of the property, may generally be supposed to be financially responsible. It is fair to presume that the reason no bond is required is because of this financial responsibility, the existence of which is not to be presumed in the assignee of the chose in action. Exactly what was the legislative intent in § 2804 is somewhat difficult of ascertainment. It may very well be considered that the statute was enacted to enable the assignee to sue for and recover the rent as rent, instead of being remitted to a recovery for use and occupation, which seems to have been the common-law remedy in such case. *Castleman v. Belt*, 2 B. Mon. 157. But we are not disposed, by implication, to extend this harsh and summary remedy so as to make it applicable to a case to which it has never, so far as we are informed, been applied in this or any other country. For the reasons given the judgment is reversed, and the case remanded, with directions to set aside the judgment sustaining the demurrer to appellants' answer, and for further proceedings consistent with this opinion.

MICHIGAN SUPREME COURT.

Louis RABIDON, by Next Friend,
v.

CHICAGO & WEST MICHIGAN RAIL-
WAY COMPANY, *Plff. in Err.*

(.....Mich.....)

1. **The distance from depots and the frequency of use for switching purposes**, do not control in determining whether a certain point on the railroad a mile distant from the depot is or is not within the depot grounds or yard limits so as to be exempt from the statutory provision as to fencing the railroad.
2. **The opinion of a witness is of no value** on the question whether or not a particular place at which there is a railroad switch to which the switch engine frequently runs is within the depot grounds or yard limits.
3. **A fence on one side of a railroad in front of a dwelling house** to prevent children from getting on the track cannot be required of a railroad company at a place at which

it is not required to build a statutory fence with cattle guards and wing fences because it is within depot grounds or yard limits.

4. **A switch about a mile from a railroad depot** to which a switch engine runs frequently and at irregular intervals without receiving orders as against other trains is within depot grounds or yard limits so that it is not required to be fenced.

(*Moore, J., dissents.*)

(December 21, 1897.)

ERROR to the Circuit Court of Muskegon County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinions.

Mr. Frank H. Smith, for plaintiff in error:

The statute does not apply to such portions of the track of railway companies as are within the yard limits or station grounds in towns or villages, or even at unimportant sidings where it is customary to take on or discharge freight.

McGrath v. Detroit, M. & M. R. Co. 57

NOTE.—As to the obligation of a railroad to fence its track on depot grounds and elsewhere, see *Gallagher v. New York & N. E. R. Co.* (Conn.) 6 L. R. A. 787, and *note*.

39 L. R. A.

Mich. 559; *Grondin v. Duluth, S. S. & A. R. Co.* 100 Mich. 598.

The very condition that exempts a yard limit from the application of the statute, here existed, viz.: A switch leading into the cooper shop which was placed there for the purpose of reaching such freight as could be furnished at that point.

Flint & P. M. R. Co. v. Lull, 28 Mich. 518; *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141; *Davis v. Burlington & M. River R. Co.* 26 Iowa, 549; *Durand v. Chicago & N. W. R. Co.* 26 Iowa, 559; *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471; *Jeffersonville, M. & I. R. Co. v. Parkhurst*, 84 Ind. 501.

In so far as freight is received and delivered by the railway company at this point, it of itself constitutes a station, or at least a part of the station, at the city of Muskegon.

Grondin v. Duluth, S. S. & A. R. Co. 100 Mich. 598.

It would be dangerous to establish a statutory fence at this point.

Chicago & G. T. R. Co. v. Campbell, 47 Mich. 265; *Rinear v. Grand Rapids & I. R. Co.* 70 Mich. 620.

The fact that it would have been dangerous to inclose with fences this portion of the track was undisputed in the case, and should not have been submitted to the jury.

McGrath v. Detroit, M. & M. R. Co. 57 Mich. 560.

Messrs. Macdonald & Marr, for defendant in error:

The legislature never intended to limit the benefits and protections which this statute affords "to the citizens living along the line of a railroad against danger of injury to his cattle and other animals, and deny it to his infant children who are not yet old enough to enable them to comprehend such perils and dangers.

Keyser v. Chicago & G. T. R. Co. 68 Mich. 397; *Flint & P. M. R. Co. v. Lull*, 28 Mich. 514.

A point remote from a depot, where freight is occasionally received, does not fall within the rule of exemption.

Jaeger v. Chicago & St. P. R. Co. 75 Wis. 130; *Dinwoodie v. Chicago, M. & St. P. R. Co.* 70 Wis. 160; *Smith v. Chicago, M. & St. P. R. Co.* 60 Iowa, 512; *Chicago, B. & Q. R. Co. v. Hans*, 111 Ill. 114.

The mere existence of a switch at a certain point does not make that point a part of the depot grounds, which under the statute need not be fenced. All grounds must be fenced but those necessary to the use of the public and the transaction of business.

Vanderwerker v. Missouri P. R. Co. 51 Mo. App. 166.

The burden is on the railway company to show that it could not safely maintain fences and guards.

Indianapolis, D. & W. R. Co. v. Clay, 4 Ind. App. 282, 287; *Gulf, C. & S. F. R. Co. v. Adams* (Tex. Civ. App.) 24 S. W. 834; *Cox v. Atchison & C. P. & F. R. Co.* 128 Mo. 362; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382.

Where the evidence is conflicting as to whether or not the track could have been fenced, it is a matter for the jury to determine.

Terre Haute & I. R. Co. v. Schaeffer, 5 Ind. App. 86.

89 L. R. A.

The question as to what are station grounds is a question for the jury.

Straub v. Eddy, 47 Mo. App. 189.

How far the convenient use of depot grounds requires them to be left unfenced is a question for the jury.

Toledo, St. L. & K. C. R. Co. v. Thompson, 48 Ill. App. 36.

Any exceptional case must be proved by the railway company. Its existence cannot be inferred.

Flint & P. M. R. Co. v. Lull, 28 Mich. 514.

The trial judge was right in submitting, as a question of fact, to the jury, the extent of the supposed depot grounds.

McDonough v. Milwaukee & N. R. Co. 73 Wis. 228; *Fowler v. Farmers' Loan & T. Co.* 21 Wis. 78; *Blair v. Milwaukee, P. du Ch. R. Co.* 20 Wis. 254; *Dinwoodie v. Chicago, M. & St. P. R. Co.* 70 Wis. 160; *Grosse v. Chicago & N. W. R. Co.* 91 Wis. 482; *Toledo, St. L. & K. O. R. Co. v. Woody*, 5 Ind. App. 831.

The danger to trainmen from wing fences and cattle guards, at this point, was very slight in the occasional use of the switch or side track compared with the dangers to the public generally from the exposed condition of the track.

Brandenburg v. St. Louis & S. F. R. Co. 44 Mo. App. 224.

Grant, J., delivered the opinion of the court:

Plaintiff, who was five years old, passed from the highway opposite his father's house onto the railroad right of way, which was unfenced, caught hold of one of the box cars of a train, and was drawn under the cars and injured. Plaintiff, at the conclusion of the evidence, withdrew from the consideration of the jury all grounds of negligence except the failure to fence its right of way as provided by the statute. The defendant insisted that the portion of its right of way where the plaintiff was injured was within its station grounds or yard limits, which the law did not require it to fence. This presents the sole controversy. The court below left it to the jury to determine whether this was a necessary part of its station grounds or yard limits, and therefore exempt from the statutory duty to fence. That portion of the city of Muskegon is fairly well settled. It is laid out in streets and blocks, the distance between Hamburg and Israella streets being 264 feet. Defendant's road runs north and south, parallel to and adjoining Ambrosia street. Plaintiff lived on the northwest lot of the block, on the east side of the street. Directly opposite his residence was a cooper shop with a side track running to it; the switch being in close proximity to Israella street. Directly south of Israella street is a large manufacturing establishment. There are three side tracks,—two upon the east and one upon the west side of the main track. The main switch to these side tracks is located in close proximity to Israella street. The following facts are established: (1) The right of way at this point is within the yard limits, as fixed by the defendant; (2) to inclose the right of way with wing fences and cattle guards on both sides of each street would render switching and the management of trains at

this point dangerous to employees; (3) plaintiff's own expert witness shows that "yard limits are the space within which yard engines may work without receiving orders, as against other trains;" (4) the right of way at the point of the accident was within the yard limits, as thus defined. The father of the plaintiff testified: "The switch engine runs up there frequently, and draws freight cars to the Monroe Manufacturing Company. It goes at irregular intervals; is likely to run up at most any time." The engineer of the defendant testified as follows: "It becomes necessary, in handling trains with a switching crew, to protect that crew against trains on the main line, other than the ordinary way of protecting a train on the main line outside; and a yard-limit sign is placed at a proper distance outside of the extreme limit to which the switch engines go. And the men are notified, also, of the point of the yard limit, which is at a sufficient distance outside of where switch engines have to go in doing their switching to protect them against main-line trains. That sign which indicates the yard limits is a notice to incoming trains that they are likely to meet switching engines any time after passing that limit. Switching engines are allowed to work over the track, within the yard limits, without special orders, and without the precaution of flagging. Men have to couple and uncouple cars at those points,—pass back and forth from the train to the switch; and they are quite liable to be caught by anything of the nature of a cattle guard, and thrown down, injured, especially in the darkness." This evidence is uncontradicted. It is clear that defendant's employees who do the switching would be compelled to cross over these cattle guards. Plaintiff's counsel appear to recognize this fact, and advance the proposition that fencing does not necessarily mean wing fences and cattle guards at highway crossings. To meet the case made by the defendant in regard to switching, and the danger from inclosing its right of way with fences and cattle guards, they introduced one witness who had been a railroad employee; and he testified that, in his opinion, "the spot, where the cooper shop is, is not a part of the depot and station grounds."

It appears that the depots—passenger and freight—were nearly a mile distant. Distance from depots is not the controlling consideration, in determining "depot grounds" or "yard limits," which are synonymous terms. It is well known that in large cities these grounds extend for several miles. Neither does the question of frequent or infrequent use for switching purposes control. The question is, Are they reasonably necessary for that purpose, or liable to become so? It is not necessary to go outside of our own decisions, in determining this question. It was settled in *McGrath v. Detroit, M. & M. R. Co.* 57 Mich. 555. In that case the opinion was delivered by Mr. Justice Sherwood, and concurred in by the entire court. It was there said: "The existence or extent of these grounds is not to be determined by the continued actual use of any part thereof. When station grounds are laid out, their contemplated future use is not unfrequently of more consideration than the actual demands at the time in determining

their shape and extent." The construction and operation of new lines of railroad always tend to the development of the resources of the section through which it passes, and is followed by increased population and business. This is a matter of such common observation that ordinary prudence and foresight determine such an appropriation for station purposes as shall be commensurate with such reasonably anticipated growth. When these grounds are appropriated and set apart by the company it would be neither safe nor wise to allow their limits to be curtailed or extended by a jury in a proceeding where they collaterally come in question, as in this case, upon the mere showing that any part of the same was not in actual use at any particular time." This was followed and approved in *Grondin v. Duluth, S. S. & A. R. Co.* 100 Mich. 598; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382; *Rinear v. Grand Rapids & I. R. Co.* 70 Mich. 620; *Schneekloth v. Chicago & W. M. R. Co.* (Mich.) 65 N. W. 668. Moreover, switch grounds, as well as stations and freight depots, are exempt from constructing fences. 3 Elliott, Railroads, § 1194. It is there said: "The exemption of switch grounds is founded on the danger to employees which would necessarily result were the tracks fenced. The safety of the employees at points where they almost continually pass up and down the track in the performance of their duties is far more important than would be the safety afforded to animals and property from the erection of fences at such tracks." See also *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510.

The opinion of plaintiff's witness was of no value. The question was confined to the spot where the cooper shop is. It did not meet or contradict the defendant's evidence that switching was done there; that it was part of the yard limits, as defined by the same witness, and that fencing with wing fences and cattle guards would be extremely dangerous. In fact, both counsel and the witness appear to have recognized the danger in thus fencing; for the attention of the witness is immediately drawn to the construction of the fence on the east side of the right of way along Ambrosia street, and particularly where the cooper shop is, and he said: "In my opinion, it would not interfere with railroad operations at all to maintain a fence on the east side of the railway right of way, and particularly where the cooper shop is." The proposition is seriously made that the defendant was required to construct a fence along the east side of its right of way, in front of plaintiff's house, without wing fences or cattle guards, as a protection to children living on the east side of the highway. The position is untenable. The statute requires no such fence. The common law imposes no duty to fence. Justice Cooley said in *Marcott v. Marquette, H. & O. R. Co.* 49 Mich. 99: "We have no statute requiring fences for protection against personal injuries." If, however, such protection were contemplated, the statutory fence must be constructed; that is, one with cattle guards and wing fences. If a fence had been maintained along the street, which would serve to keep a boy out, a few steps would have taken him around the end of the fence, to the right of way. It is

absurd to say that such a fence would serve as a protection. Under this record, the defendant had conclusively established that this was a part of its yard limits, and that it was exempt from fencing. We do not intend to express any opinion upon the question whether the failure to erect and maintain such a fence as the statute requires is a negligent act, as against persons who enter upon the right of way and are injured. That question is not raised by defendant, and it is before us.

Judgment reversed, and new trial ordered.

Long, Ch. J., and Montgomery and Hooker, JJ., concurred with **Grant, J.**

Moore, J., dissenting:

In September, 1895, the plaintiff, a boy about five years old, was living with his father on the east side of Ambrosia street, in Muskegon. North of his father's residence, Hamburg street crossed Ambrosia street at right angles. Israella street was the next street south of Hamburg street. West of Ambrosia street, and parallel to it, was the main track of defendant company. West of the track was a cooper shop fronting on Hamburg street, with a side door near the rear end of the shop, opening upon defendant's right of way. A short distance from the shop, coming from the south, ran a side track to the cooper shop. This siding would hold two or three freight cars, and freight could be passed through the side door to and from the shop, to and from the freight cars, by using a gang plank. The residence of Mr. Rabidon fronted on Ambrosia street. There was no fence between Ambrosia street and the main line of defendant company, and no cattle guards on Hamburg or Israella streets. The cooper shop is something more than a mile from the freight house of defendant company, and still further from its passenger station. South of the cooper shop, something more than a block was the Monroe manufacturing plant, running to which were several side tracks from the main line. This portion of Muskegon was quite thickly settled. On the day in question the plaintiff passed from Ambrosia street, upon the right of way of defendant company, with two boys older than himself, and was lifted by one of them to a seat upon the door sill of the cooper shop. This door was from two to four feet above the ground. A freight train came slowly along, and, after the engine had passed, the plaintiff ran and caught upon some projection from one of the cars, for the purpose of riding, and was carried forward, towards the switch, until he finally fell and received severe injuries. It is claimed on the part of the plaintiff that the injury to the child was the result of the neglect of the company to build a fence on the westerly line of Ambrosia street from Hamburg to Israella street. It is the claim of the defendant that it is under no obligation to build a fence on Ambrosia street, and cattle guards on Hamburg and Israella streets for the reason that the convenience of the public and the safety of the employees of the company required that these spaces should be unfenced. Each of the witnesses who so stated testified on the cross-examination that the construction of a fence on Ambrosia street would not in-

terfere with the convenience of the public, the operations of the train, or the safety of the employees, unless there were wing fences and cattle guards on Hamburg and Israella streets. It was claimed that cattle guards at those streets would make the work of the employees of the company more hazardous, and the reason assigned was that it was necessary to pass over the street crossings, in coupling and uncoupling cars, to reach the siding at the cooper shop and at the Monroe manufacturing plant. It was also claimed by the railroad that this ground was in the yard limits of the road; the witness so testifying explaining that yard limits were those portions of the road where the switching engine and crew might work without special orders, and without the precaution of flagging. This witness claimed that the entire road of the company in Muskegon was within the yard limits. Testimony was offered on the part of the plaintiff that it would not inconvenience the public, or interfere with the operation of defendant's trains, or the safety of its employees, to have constructed a fence between Ambrosia street and defendant's right of way. Plans and photographs of the premises were introduced in evidence. There was no testimony offered upon the part of the defendant showing how much the company used the siding at the cooper shop, or how frequently cars were coupled or uncoupled between Hamburg and Israella streets. The witness made the general statement that it was not practicable or safe to fence the road at this place. There was testimony on the part of the plaintiff tending to show that the cooper-shop switch was not used more than once a month, and that this portion of the road was no part of the depot and station grounds, and that the switching into the freight yards of the company, and the making up of its trains, was not done within a long distance of this locality.

The judge charged the jury, in part, as follows: "It is the duty of the railroad company to maintain fences on each side of its railway track, and to maintain cattle guards at highway crossings and street crossings. In other words, it is the duty of the railway to inclose its tracks by fences on each side, and by guards where the streets and highways come, so that their track between those places would be inclosed. There are certain exceptions to that law, and one question is whether this particular place comes within that exception. It is claimed on the part of the plaintiff that it was the duty of the railroad company to establish a fence along the westerly line of this street,—a straight fence, 18 feet from the railroad track. Gentlemen, that would be no compliance with the statute at all. The statute provides, as I have said, that the railroad track should be inclosed. Now, was it proper to inclose this track? I am going to submit that question to you. The evidence shows here that there is a switch between these two streets near the cooper shop, and a cooper shop, which is used sometimes, and sometimes it is unused. The first question for you to take into consideration is whether it would inconvenience the railroad company in the operation of its business, and the public, to go and inclose that switch,—the shops there from

street to street,—on each side. If you find it would, the company are not required to furnish a fence at all. If you find that it would not, the next question that you may take into consideration is as to whether, if a fence were maintained there on each side, and the proper guards put in to make an inclosure, whether it would be dangerous to the parties who are operating the railroad,—the men who are working on the trains. If you find that it would not be proper to put those things in there for the purpose of completing the fence, without being dangerous to the employees of the railroad company, so that they might be responsible for an injury to them if one occurred, then they would not be required to fence. In that case, plaintiff cannot recover at all. You will take these two propositions into consideration: First, would it inconvenience the railroad company in the operating of their trains and the switch there, and that factory, and the public, or either of them, so it would be inconvenient and improper for them to have that inclosed in a fence? If so the plaintiff cannot recover at all, because they are not required to fence it. Next, if they did that, and put in the guards, as required by the statute, at the street crossings, would it be dangerous to the parties who are operating trains, in switching or otherwise, using that switch or the main track? If so, they were not required to put it in, and not required to do the fencing; and upon either of these propositions, if you find that it would be improper to have it inclosed and have those guards in, plaintiff cannot recover. If you find that it would be proper, and would not inconvenience the railroad company or the public in the operating of this cooper shop, and their road in connection therewith, and the approaches, etc., to it, to the cooper shop, by the public, and that it be proper to have a guard in there, and would not be dangerous to those who are operating the train or doing the switching, then it was the duty of the railroad company to inclose this with a fence. The next question to be taken into consideration is as to whether the fact,—if you find that it was the duty of the railroad company to maintain a fence there,—whether that fact alone was the cause of the child's being injured. If it was not, then the plaintiff is not entitled to recover at all. He is not entitled to complain unless he was injured by reason of that; and, for the purpose of determining that question, you should take into consideration the age of this boy, the kind of a fence that it is the duty of the railroad company to maintain (you have heard that section read, so that you know what kind of a fence,—an ordinary board fence 4½ feet high); whether, if a fence had been there, that fact would have kept this boy off from the track. If you say that it would not, why, of course, that ends the case, so far as the plaintiff is concerned; he would not be entitled to recover. The boy would probably have climbed over the fence. If you are satisfied of that, or that it would not have stopped him,—he would have gone around the end, or got onto the track in some other way,—of course he has no right to complain because there was no fence there. . . . If you find that the boy would probably have gotten over the fence and gone

down on the track, then there are certain other things for you to take into consideration. It is conceded, so far as this case is concerned, that the railroad company were operating their trains just exactly as they had a right to operate them; that they were not running too fast; that they were keeping proper lookouts, and doing everything that was necessary for them to do to protect themselves, except this fence.

. . . If, after taking the age of the boy, and all the surroundings, and those remarks, into consideration, you are satisfied that the boy at that time knew that it was dangerous for him to get onto that train, why, he cannot recover at all. Because he ran into danger, he would be negligent himself. . . . And if you find that he knew, after making this talk there, notwithstanding the fence,—if he knew, after having this talk there, that it was dangerous for him to touch that train and do what he was going to do,—he cannot recover at all. He is not entitled to recover. Railroad companies are no insurers of parties, of boys, who are seeking injury to them, boys who are seeking to catch onto railroad trains, if they know better; and that is one of the questions in this case."

The court was requested to instruct the jury that defendant was not obliged to fence its road at this point, and its refusal to do so is assigned as error. Where the material facts in a case are undisputed, and those facts show that the portion of a road unfenced is a part of the station or depot grounds, then it is undoubtedly the duty of the court to instruct the jury that the railroad is not obliged to fence. *McGrath v. Detroit, M. & M. R. Co.* 57 Mich. 555; *Grondin v. Duluth, S. S. & A. R. Co.* 100 Mich. 598.

I am unable to find a case, decided by this court, where, under the testimony shown, it was doubtful whether the place of the accident or the cause of the injury for which suit was brought was within the station or depot grounds, within the definition given by this court of what constitutes station and depot grounds. In *Terre Haute & I. R. Co. v. Schaeffer*, 5 Ind. App. 86, the railroad company claimed that its road could not properly be fenced, for the reason that to have fenced it there would have included the putting in of cattle guards, which would have endangered the safety of its employees in the use of that part of the railroad in switching and making up trains; and it was held by the court that, as the evidence upon that question was conflicting, the verdict of the jury would not be disturbed. In *Cox v. Atchison, T. & S. F. R. Co.* 128 Mo. 362, it was held that the burden of showing, as a reason for not fencing, because so doing would endanger the employees, was upon the defendant, and that, where the testimony was conflicting, it raised a question of fact, to be decided by the jury. See *Toledo, St. L. & K. C. R. Co. v. Thompson*, 48 Ill. App. 86; *Indianapolis, D. & W. R. Co. v. Clay*, 4 Ind. App. 282, 287. In *Brandenburg v. St. Louis & S. F. R. Co.* 44 Mo. App. 224, it is held that when it is fairly debatable, under the evidence, whether it is necessary to have unfenced a part of its road, to avoid danger to its employees, and for the safe and convenient transaction of its business with the public, it raises a question of fact, which should be submitted to the

jury. See also *Toledo, St. L. & K. C. R. Co. v. Woody*, 15 Ind. App. 831. In the recent case of *Grosse v. Chicago & N. W. R. Co.* 91 Wis. 482, it is held that, "no doubt the question of what, or how much grounds at any particular station will be necessary for the convenience of business at that station must, in the first instance, be determined by the company itself. But that determination cannot, considering the nature of the interests involved, in all cases be conclusive. . . . Cases may arise in which it may properly be a question for the jury whether the place where the animals were injured was within the limits of the grounds which were reasonably necessary for depot uses." And in that case it was said that it was a question for the jury. The following cases are to the same effect: *Dinwiddie v. Chicago, M. & St. P. R. Co.* 70 Wis. 160; *McDonough v. Milwaukee & N. R. Co.* 78 Wis. 223. In *Plint & P. M. R. Co. v. Lull*, 28 Mich. 514, the court cited with approval a case in which it was held that while the statute requiring fences has no application to points where it would be illegal or improper that roads should be fenced, such as the crossings of streets or alleys in a town, or at mills, etc., where public convenience requires the way to be left open, yet that this is the limit of the exception, and the track within the limits of the city or town, at points where no such reasons apply, is as much within the statute as the track elsewhere. And in the same case it is held that, if it is claimed that any reason of public or private convenience requires the right of way to be unfenced, it is for the railroad company to show it. This accident occurred in a thickly-settled portion of the city, one mile from the freight station of the defendant company, near a short siding that was used to accommodate a cooper shop employing only from two to four men, and which furnished to defendant road but a small amount of freight, the burden was upon defendant to show that it was not required to fence its road at this point. The testimony was conflicting. Under such circumstances, a question of fact was raised, which was properly left to the jury. The jury found against the defendant, under a charge so favorable to the defendant that it has no right to complain of it.

No other questions are raised by brief of counsel. I think the judgment should be affirmed.

Minnie SMITH

v.

DETROIT LOAN & BUILDING ASSOCIATION, *Plff. in Err.*

(*15* Mich. *340*.)

1. The landlord's common-law right of re-entry after default in payment of rent and notice served upon the tenant to terminate the lease, if such re-entry is made peaceably, is not abridged by How. Ann. Stat. § 8299 et seq.,

NOTE.—As to liability of landlord to tenant for forcible expulsion after termination of tenancy, see *Allen v. Kelly* (R. I.) 16 L. R. A. 798, and *note*. See also *Vinson v. Flynn* (Ark.) post, 415, and *Page v. Dwight* (Mass.) post, 418.
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respecting legal proceedings to recover possession.

2. A landlord who has peaceably regained possession during the temporary absence of a tenant who is in default, and on whom notice has been served to terminate the lease, may defend such possession against the tenant, if he uses no more force than is necessary.
3. An entry which has no other force than that employed in every trespass is not within the statute respecting forcible entry.

(*Moore, J., dissents.*)

(December 21, 1897.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged trespass on plaintiff's property. *Reversed.*

The facts are stated in the dissenting opinion.

Messrs. Levi J. Fick and Robert Young, for plaintiff in error:

The contract having been terminated, the plaintiff could not be allowed to prove a new purchase or a revival of the old by evidence of oral agreement.

Bartlett v. Bartlett, 108 Mich. 296.

The written contract having been terminated, and no valid evidence of a new agreement for purchase or revival of the old contract with changes having been presented, it follows conclusively that the case relied upon in the declaration had fallen.

Ives v. Williams, 58 Mich. 688; *United States Mfg. Co. v. Stevens*, 52 Mich. 384.

Under any possible theory, the defendant was, and the plaintiff was not, entitled to possession of the premises at the time of the alleged trespass. If she was not entitled to possession, her personal injuries, if she sustained any, were received while she was committing a trespass on the property of another.

United States Mfg. Co. v. Stevens, 52 Mich. 384.

The vendee in a land contract has no right of possession unless expressly given it by the land contract, the right of possession being in the holder of the title.

Gamble v. Ross, 88 Mich. 315; *Buell v. Irwin*, 24 Mich. 145.

The judgment of the commissioner cannot be attacked collaterally, and is conclusive.

Allured v. Voller (Mich.) 4 Det. L. N. 71; *Landon v. Comet*, 62 Mich. 90; *Somers v. Losey*, 48 Mich. 294; *Corbitt v. Timmerman*, 95 Mich. 581; *Agry v. Betts*, 12 Me. 415; *Lightsey v. Harris*, 20 Ala. 409.

A verbal contract can neither "be set up as a ground of action nor as a defense."

Bartlett v. Bartlett, 108 Mich. 296.

The service of the notice to quit was sufficient; especially in view of the fact that the notice is attached to her bill of complaint filed a week after the service and a month before the alleged trespass.

McSloy v. Ryan, 27 Mich. 110.

He who denies his liability as tenant cannot insist that the landlord observe his rights as a tenant, such as notice to quit, etc.

Kunze v. Wizom, 89 Mich. 384; *Steinhauser v. Kuhn*, 60 Mich. 387; *Sims v. Cooper*, 106

Ind. 87; *Shepardson v. McDole*, 49 Ill. App. 350; *Appleton v. Ames*, 150 Mass. 34, 5 L. R. A. 206; *Simpson v. Applegate*, 75 Cal. 342; *Drey v. Doyle*, 28 Mo. App. 249; *Evans v. Enloe*, 70 Wis. 345; *Willard v. Earley* (Pa.) 14 Atl. 426; *Walden v. Bodley*, 89 U. S. 14 Pet. 156, 10 L. ed. 398; *Duke v. Harper*, 6 Yerg. 288, 27 Am. Dec. 462.

The defendant being entitled to possession of the premises at the time of the alleged trespass, it had the right at law to, and did, enter peaceably.

2 Taylor, Land. & T. 8th ed. §§ 531, 532, and note 1; *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258; *Ives v. Ives*, 18 Johns. 235.

The entry was a peaceable one, and the mere fact that some of plaintiff's furniture was in the house did not make it other than peaceable.

Hoffman v. Harrington, 22 Mich. 55; *Mussey v. Scott*, 32 Vt. 82; *Smith v. Reeder*, 21 Or. 541, 15 L. R. A. 172; *M'Dougall v. Sticher*, 1 Johns. 42.

One who complains of a trespass has no right by neglecting the obvious and ordinary means of preventing or lessening the damages, to make them more than they otherwise would have been.

Talley v. Courter, 93 Mich. 473; *Dennis v. Huyck*, 48 Mich. 620, 42 Am. Rep. 479.

Mr. Jay Fuller, for defendant in error:

When one is temporarily absent on business from his residence there is no such a vacancy of the dwelling house as would suspend possessory rights of the tenant or occupant, and to break and enter the house in such a case would be burglary.

Stupetski v. Transatlantic F. Ins. Co. 43 Mich. 378, 88 Am. Rep. 195; *Harris v. People*, 44 Mich. 305; *People v. Nolan*, 22 Mich. 229; *Denis v. People*, 27 Mich. 151; *People v. Horri-gan*, 68 Mich. 491.

A holder of a tax title, whose occupancy consists in making improvements and not in actual residence, can bring ejectment against one who has forcibly entered without right and by stealth.

VanAuken v. Monroe, 38 Mich. 725; *Appleton v. Buskirk*, 67 Mich. 407; *Harrington v. Scott*, 1 Mich. 17.

Plaintiff had been in the actual and peaceable possession of the premises in dispute for nearly six years. And she could not be ousted therefrom except by proper and legal process, after a proper and legal notice.

Richter v. Cordes, 100 Mich. 278.

If the declaration alleges a substantial grievance and is not demurred to, it is sufficient.

Briggs v. Milburn, 40 Mich. 512; *Norton v. Colgrove*, 41 Mich. 544; *Antcliff v. June*, 81 Mich. 477, 10 L. R. A. 621.

If the declaration in this case contains a succinct statement of the plaintiff's cause of action. It sets forth fully the plaintiff's claim, the injury sustained, and the special and general damages resulting from the injury, and it fully apprises the defendant of what plaintiff claims, and is sufficient.

Merkle v. Bennington Twp. 68 Mich. 183; *Stange v. Clemens*, 17 Mich. 402; *Eddy v. Court-right*, 91 Mich. 265; *Weiss v. Whittemore*, 28 Mich. 366; *People v. Miller*, 15 Mich. 854; *Gooding v. Underwood*, 89 Mich. 187.

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The damages awarded by the jury under the instruction of the court are well grounded upon the allegations for damages as laid in plaintiff's declaration.

1 Chitty, Pl. *412; *Thompson v. Quincy*, 88 Mich. 173, 10 L. R. A. 734; *Finn v. Adrian*, 98 Mich. 505; *Page v. Mitchell*, 18 Mich. 63, 86 Am. Dec. 75; *Josselyn v. McAllister*, 22 Mich. 300, 25 Mich. 45; *Johnson v. McKee*, 27 Mich. 471.

Defendant, by accepting payments on the contract, after forfeiture, waived the forfeiture, and the contract stood, in relation to the parties, as though there had been no forfeiture of the contract by the parties.

Cobbs v. Fire Asso. of Philadelphia, 68 Mich. 463; *Peninsular Stove Co. v. Osmun*, 73 Mich. 570; *Marthinson v. North British & M. Ins. Co.* 64 Mich. 372.

The entry made under the circumstances of this case was a forcible entry.

Seitz v. Miles, 16 Mich. 455; Taylor, Land. & T. 6th ed. ¶ 532; *Newton v. Doyle*, 38 Mich. 645; *Wakefield v. Sunday Lake Mtn. Co.* 85 Mich. 622; *People v. Johnson*, 86 Mich. 175, 18 L. R. A. 168.

If the defendant obtains a judgment for restitution, the plaintiff still has five days in which to comply with the notice, pay the rent and costs, and continue his possession.

How. Anno. Stat. chap. 286, §§ 8284, 8286, 8306; *McSloy v. Ryan*, 27 Mich. 110; *Judd v. Fairs*, 53 Mich. 518; *Chamberlin v. Brown*, 2 Dougl. (Mich.) 120, note; *Hoggett v. Ellis*, 17 Mich. 351.

Where one commits a trespass he will be held for all damages which legitimately follow the trespass, whether the damages done, at the time of the trespass, were contemplated or not.

Allison v. Chandler, 11 Mich. 542.

Everyone must be sure of his legal rights, when he invades the property of another.

Ile Royale Mtn. Co. v. Hertin, 37 Mich. 332, 26 Am. Rep. 520; *Cubit v. O'Dett*, 51 Mich. 847.

Montgomery, J., delivered the opinion of the court:

I cannot agree with the conclusion of Mr. Justice Moore. On the contrary, I think that when the plaintiff failed to pay the rent due within the time fixed by the notice served upon her, her right to occupy the premises terminated. In my opinion, it was not the purpose of § 8299 and § 8308 to abridge the common-law right of re-entry in such cases. These sections should be construed as providing a remedy by proceedings in court, and the limitations are to be construed as limitations placed upon such remedy. To give to these sections of the statute the construction adopted by the trial judge, and approved by Mr. Justice Moore in his opinion, is to extend the term of the tenant beyond the time fixed by agreement. In Taylor, Land. & T. § 532, it is said, after a consideration of many authorities: "The right of the landlord forcibly to enter and expel the tenant who holds over after the conclusion of his term, or the expiration of a notice to quit, subject only to indentment under the statutes for excessive force against the person, is now generally estab-

lished." In *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258, it is said: It is well settled that a person having title—that is a right to enter—is not liable to an action of trespass for entering with force, although liable to indictment for forcible entry. To the same effect is *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364. In the case of *Freeman v. Wilson* it is said: "At the expiration of a notice to quit the tenant becomes a trespasser, and the landlord may enter the premises, during the tenant's absence, take possession, and eject the tenant's goods, without legal process, and the tenant has no right to re-enter. 17 Atl. 931 [16 R. I. 524]; *Low v. Ethell*, 121 Mass. 809, 28 Am. Rep. 272; *Ives v. Ives*, 13 Johns. 235. In *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484, it is said: "Where one having title to land and a right of entry enters thereon, although the entry be by force, the common law affords no civil remedy to the party dispossessed; he must resort to the statutory remedy by action of forcible entry and detainer." How. Anno. Stat. § 8284, provides: "No person shall make any entry into lands, tenements, or other possessions, but in cases where entry is given by law; and, in such cases, he shall not enter with force, but only in a peaceable manner." The succeeding sections provide how possession may be restored if one does enter by force. In construing statutes containing similar provisions, the courts have not been agreed as to what is meant by force and in a peaceable manner. In *Smith v. Reeder*, 21 Or. 541, 15 L. R. A. 172, it is held, in a case where a lease of property had by its own limitations expired, and the tenant refused to surrender possession, but continued to hold over, and the landlord, during the temporary absence of the tenant, leaving no one in possession, entered in a peaceable and orderly manner, and, having so entered, forced open in a peaceable manner and unlocked the door of a dwelling house on the premises which had been fastened by the tenant, and in a careful manner removed the tenant's goods, and stored them in an outbuilding, and moved his own household goods and family into the house, sending word to the tenant that he could have a reasonable time in which to come upon the premises to remove his goods and stock, it was held that this was not a forcible entry, within the meaning of the statute. In the same case it was held that a forcible entry, within the meaning of the statute, is to enter with some circumstance of force or violence to the person, or one accomplished in a riotous or tumultuous manner, endangering the public peace. An entry which has no other force than that implied in every trespass is not within the statute. In the case of *Fort Dearborn Lodge No. 214, I. O. O. F. v. Klein*, 115 Ill. 191, 56 Am. Rep. 133, it is held: "The word 'force,' as here used, means actual force, as contradistinguished from implied force. Any entry requires force, in the literal sense of the term, but that, of course, could not have been meant, for it would involve an absurdity. Nor does it mean that force which the law implies where a peaceable entry is made by one having no right to enter, for the act absolutely prohibits a person of that kind from making an entry at all. The conclusion,

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therefore, is irresistible that the force which the statute inhibits is actual force." See *Willard v. Warren*, 17 Wend. 257. In the case of *Hoffman v. Harrington*, 23 Mich. 54, it is said, with respect to real property, the owner having right of entry may, since the statute, enter peaceably upon one who is in possession without right, by the very terms of those statutes, and that a forcible entry is not made unless the tenant is forcibly expelled, and is not complete until the expulsion. In the case of *Shaw v. Hoffman*, 25 Mich. 162, it is said that in construing our statute much respect should be given to the decisions of the courts construing like statutes. Justice Christy said: "The statute was not intended to apply to a mere trespass, however wrongful; the entry or the detainer must be riotous, or personal violence must be used, or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out; [in other words], the force contemplated by the statute is not merely the force used against or upon the property, but force used or threatened against persons, as a means or for the purpose of expelling or keeping out the prior possessor." In *Franck v. Wiegert*, 56 Mich. 474, it is said: "If the defendant, at the time he entered into possession of the property, had the right to that possession, and he entered peaceably, such possession would be lawful, and neither the plaintiff nor her husband would have the right to forcibly put him out." In the case of *Marsh v. Bristol*, 65 Mich. 378, it is said: "Under the law as it existed before the statute, the default of plaintiff under the lease would have justified Bristol in entering, and using sufficient force to put him out. The statute changing this right does not make the continuance in possession any less unlawful, but, in the interest of public tranquility, provides against breaking the public peace. In doing so it adopts the definitions of the law as existing on the subject of forcible entries, which were already indictable in other cases. It provides that a person put out by forcible entry may be restored to possession. How. Anno. Stat. §§ 8284, 8285. But where there has not been a forcible entry, it does not forbid retaining possession by force unless the possession is unlawful, and against the rights of the person kept out." And in commenting upon the case of *Hoffman v. Harrington* it is said: "It was further said that leaving goods on the premises could not prevent making a peaceable entry, as force against property was no breach of the peace, and the force, to make it unlawful, must be against the tenant himself. In that case the property was actually put off, but that was held not to bring it within the statute. It is entirely well settled that unless the tenant is driven off either by actual force applied to him, or as the only apparent way of avoiding its use against him at the time, he cannot be regarded as forcibly expelled, and there is no forcible entry." It is also said: "The object of the statute against forcible entries is not to aid men in violating their obligations, and holding what they have no right to hold, but merely to prevent riotous and forcible measures in breach of the peace. Bristol and his principal were the parties

wronged by the plaintiff's continuance in possession against right. By going into possession without breaking the peace, Bristol committed no wrong in claiming possession, and in remaining there peaceably; and, this being so, by plaintiff's own showing plaintiff himself was the aggressor to regain a wrongful occupancy. This the law will not permit." In the case of *Gillespie v. Beecher*, 85 Mich. 355, which was a case where the plaintiff was in possession of an hotel as a tenant (which hotel was owned by the defendant) after the lease had expired, it was held the jury should have been instructed that, if they were satisfied from the testimony that the lease had terminated, Mr. Beecher was entitled in the law to the possession of his premises, and that he had a right to enter peaceably into the possession thereof, and that plaintiff and her husband had no right to remove him by force; that in doing so they made an assault upon him that was unlawful, and he had a right to resist such assault by force sufficient to repel it; and, if he used no more force than was necessary to repel the assault, he would not be liable to the plaintiff in this action. We think it follows from the cases cited that the jury should have been instructed that, if the plaintiff had leased the lands from defendant, as testified to by its attorney, and the lease had been terminated for nonpayment of rent, and the defendant, through its attorney, had obtained possession of the house peaceably, that it was not liable in this action, unless more force was used by its agents than was necessary to repel the effort of plaintiff to regain possession of the house.

As to the other assignment of error, in relation to the charge of the court upon the question of damages in relation to the personal property, we think there is testimony in the case that justified the giving of the charge. The plaintiff, in his brief, argues that the court erred in charging the jury that the proceeding before the circuit court commissioner ended the relation of vendor and vendee between the parties. As the plaintiff has not appealed, or assigned error in relation to this matter, we are not inclined to discuss the question. For the reasons stated, *judgment is reversed*, and a new trial ordered.

Long, Ch. J., and Grant, J., concurred with Montgomery, J.

Moore, J., dissenting:

Plaintiff recovered a judgment against the defendant for a trespass committed upon her person and to her personal property, from which judgment defendant appeals.

Plaintiff's declaration alleged, in substance, that she purchased upon land contract from defendant, on the 20th day of March, 1890, the west half of lot 29, of Hunt & Leggett's subdivision. The declaration then stated the terms of the contract as originally made: "That plaintiff went into possession of the premises by virtue of it, and that November 1, 1895, the contract was modified, stating the terms of the modification, and that on March 30, 1896, while she was in the possession of the premises by virtue of the contract, the defendant entered upon said premises, and without process of law, and contrary to the just rights of the

plaintiff in said premises, and while the plaintiff was sick, wickedly and wrongfully caused the said plaintiff to be knocked down and bruised, and to be thrown bodily from and out of the said building on said premises, and to be dragged out from said premises, etc.; . . . and that the said defendant caused the goods and chattels of the plaintiff in said buildings on said premises to be thrown in the street, and deprived plaintiff wrongfully of her goods and chattels," etc. Another count in the declaration charged that the plaintiff came into possession of said premises March 20, 1890, by virtue of said contract and agreement, and while she was rightfully in possession of said premises an assault was made upon her by defendant, and her goods were thrown into the street. The plaintiff introduced testimony tending to show all of the facts stated in her declaration. The modification of the contract which plaintiff claims was made in October or November, 1895, was an oral modification, and not in writing. It is the claim of the defendant that in the fall of 1895 the plaintiff was in default in her payments under the contract, and that proceedings were commenced before a circuit court commissioner to obtain possession of said premises, which resulted in a judgment for restitution in favor of the defendant corporation; that, after this judgment was obtained, an arrangement was made with the plaintiff by which she was to pay rent at the rate of \$10 per month, and that her possession from that time was to be as tenant, and not as vendee. The record discloses that on February 21, 1896, the defendant caused a notice to quit or pay rent to be served by leaving it at the house with Mr. Engel, who occupied the lower part of the house as a tenant under Mrs. Smith. Within a week plaintiff had knowledge of the serving of this notice, and filed a bill in equity. In her bill of complaint she claimed to be in possession of the premises as vendee by virtue of the terms of the contract, setting it up, and stating she was ready to perform all of its conditions, and praying for an accounting, and for specific performance, and for a writ of injunction. A temporary injunction was granted, according to the prayer of the bill. Defendant answered to said bill, and upon his motion, on March 30, 1896, the injunction was dissolved. At this time plaintiff was keeping house in the upper part of the house upon the premises. No one was living in the lower part of the house. She had occasion to go to the business part of the city during the day, and before doing so locked the house, and carried the key with her. During her absence, and shortly after the injunction was dissolved, the attorney for the defendant unlocked one of the doors of the house, caused the plaintiff's goods to be removed to the barn upon the premises, and put a family in possession. Upon the same day, and shortly after, the plaintiff returned to the premises, unlocked the side door of the house, and entered. She claims she was then set upon by the persons in possession, and very cruelly beaten; that during her absence her furniture had been thrown out of the house, and that she had never seen it from that time until the time of the trial; that, as the result of the beating, she was sick, and confined to the house for some time; that

as soon as she was able to do so she saw the defendant corporation, was referred by it to its attorney; that she informed the attorney she wanted a deed of the premises, and was ready to comply with the terms of the contract; that he informed her she had been fired out of the premises, and that he had instructed the person who had put her out to keep her out; that, if she went back again, she would be kicked out, and he would have her arrested. On the part of the defendant it was claimed that Mrs. Smith was not treated as she testified; that no more force was used than was necessary to repel her attacks; that she finally left the premises voluntarily; that no injury was done to the personal property, and that she was notified where it was, and that she could have it at any time. The circuit judge charged the jury, in effect, that they could not go back of the proceedings before the circuit court commissioner, which proceedings must be regarded as conclusive, and that the relation of vendor and vendee was ended by them; that the relation of vendor and vendee could not be restored by an oral agreement between the vendor and the vendee. He further charged them that the notice of February 21, 1896, that plaintiff should either vacate the premises or pay the rent due, did not terminate the relation of landlord and tenant; that under such circumstances, if the tenant does not vacate, it is the duty of the landlord to commence proceedings in court, and get a judgment, before a tenancy can be ended; and that in this case, while the entry was, in the eyes of the law, a peaceable entry, it was nevertheless an unlawful entry, and he charged the jury they must find a verdict for some amount in favor of the plaintiff. He then charged them upon the question of damages to her person, and in reference to the damages of the goods he charged the jury as follows: "Respecting the wrong done her goods, if you find that all the defendant did was to set her goods outside, and notified her that she could take them, it was her duty to take them, and thereby lessen the damage to that extent. If, on the other hand, she was deprived of the goods entirely, and if she could not have them; why then she would be entitled to the value of the goods."

The defendant insists there are three reversible errors in this case. One is that the proofs do not sustain the cause of action alleged in the declaration, because the cause of action alleged is that the plaintiff was in possession as vendee under the contract, while the proofs show that she was in as a tenant, and that her tenancy had been terminated by the notice, and the court erred in not directing a verdict for the defendant as requested. Another ground assigned to be error is that, as the entry was a peaceable entry of premises to the possession of which the defendant was lawfully entitled, therefore the plaintiff cannot recover. The third claim is that the court erred in his instruction to the jury as to the damages which might be allowed in relation to the personal property. The declaration was not demurred to, but the plea of the general issue, with notice of the defenses heretofore mentioned, was interposed. The gist of the declaration is, not a trespass upon real prop-

erty, but a trespass upon the person, and to personal property, while the plaintiff was rightfully in the possession of certain real property. We quite agree with the learned trial judge that it was immaterial whether the possession of the real estate by the plaintiff was as vendee, as claimed by her, or as a tenant, as claimed by defendant, if she was in fact lawfully in the possession of the premises; and we see nothing in the pleadings that would prevent a recovery if the facts warranted it. If it be assumed, as it must be, for the purposes of this case, under the proofs, that, after the agreement of November, 1895, the plaintiff's occupancy was that of a tenant, the next question to be considered is, Did the notice of February, 1896, terminate the tenancy, so that defendant was justified in taking possession of the premises as it did, and using force to put the plaintiff out, when she attempted to repossess herself of the house? Defendant insists it did, and cites How. Anno. Stat. § 5774; Taylor, Land. & T. §§ 531, 532, and note 1; *Hoffman v. Harrington*, 22 Mich. 55; *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258; *Ives v. Ives*, 13 Johns. 235; *Mussey v. Scott*, 32 Vt. 83. An examination of the authorities cited will show that the decisions were rendered in cases brought either for trespass to the real estate, or to obtain the possession of the real estate, or where the tenancy was ended beyond any contingency that it might be restored by the act of the tenant. We think with the trial judge that How. Anno. Stat. § 5774, is to be construed in connection with § 8295, which provides how possession of premises may be recovered, and § 8299, which provides that upon the trial to recover possession of the premises, if it is claimed that complainant is entitled to the possession of the premises in consequence of the nonpayment of any sum of money due, either as rent or as a part of the purchase money, this amount shall be ascertained, and be stated in the judgment, and with § 8308, which provides that no writ of restitution, for five days after judgment, shall issue, if the defendant shall pay during the five days after the rendition of judgment, the amount so found due, and double the amount of costs. If effect is to be given to the provisions of all these sections, we do not see how the construction contended for by the defendant can be given. The tenant has a right to rely upon these provisions of the statute, and that right cannot be cut off by the plaintiff's arbitrarily taking the law into his own hands, and determining for himself that the tenancy is ended. Where there is a dispute between the vendor and vendee, or the landlord and tenant, or the mortgagor and the purchaser at a mortgage sale, as to the right of possession, it cannot be said that the person who is seeking to obtain possession is given entry by law until that dispute is settled by the courts in the manner prescribed by law. An entry under the circumstances claimed by the plaintiff to exist in this case was, as the learned trial judge stated, an unlawful entry (How. Anno. Stat. § 8284), and cannot be excused or justified, where the action is brought for injury to the person and the personal property of the one

evicted. No great hardship can come to anyone by following the provisions of the statute in asserting possessory rights. It is undoubtedly the purpose of these statutory provisions to change the common law in relation to the right of entry where that right is controverted, and to provide a peaceable and summary way to dispose of a disputed right of possession. A hearing may be had within a very short time, and must be had within thirty days, and no appeal can be taken without giving a bond in twice the amount of the annual rental of the premises in dispute. The

statute should be given such a construction as to make it effective, and do away with such disputes and encounters as occurred in this case.

As to the other assignment of error, in relation to the charge of the court upon the question of damages in relation to the personal property, we think there is testimony in the case that justified the giving of the charge. I think the judgment should be affirmed.

Hooker, J., did not sit.

ARKANSAS SUPREME COURT.

T. C. VINSON, *Appt.*

v.

Dock FLYNN.

(.....Ark.....)

1. A landlord forcibly taking possession of the premises after the lease has expired, if he does not use excessive force, is not subject to a civil action by the tenant unless it is provided by statute.
2. Only actual damages are recoverable for injuries unnecessarily committed in the ejection of a tenant after his term has expired, unless it is done under circumstances of aggravation.
3. An action before a court without jurisdiction of the subject matter is not the basis of an action for malicious prosecution.
4. A want of probable cause is necessary to a cause of action for malicious prosecution.

(Hughes, J., dissents from proposition 3.)

(November 27, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Woodruff County in favor of plaintiff in an action brought to recover damages for alleged wrongful ejection from certain property. *Reversed.*

The facts are stated in the opinion.

Mr. M. T. Sanders for appellant.

Messrs. P. R. Andrews and N. W. Norton, for appellee:

Proof of malice need not be direct, but may be inferred from circumstances.

Lemay v. Williams, 32 Ark. 166; *Com. v. Snelling*, 15 Pick. 321.

Liability to punishment in a prosecution for the same act as an offense against the state is held not to affect the civil remedy; the jury have, notwithstanding, the same discretion to allow damages, beyond compensation, for punishment.

1 Sutherland, *Damages*, p. 788; *Barlow v. Louder*, 35 Ark. 494; *Citizens' Street R. Co. v. Steen*, 42 Ark. 828; *Lemay v. Williams*, 32

Ark. 176; *Clark v. Balza*, 15 Ark. 458; *Texarkana Gas & E. L. Co. v. Orr*, 59 Ark. 215.

Battle, J., delivered the opinion of the court:

This action was instituted by Dock Flynn against T. C. Vinson to recover damages. He alleges that he and his family were residing on a place known as the "Upp Place," as tenants of the defendant, and that the defendant unlawfully and maliciously entered and ejected him and his family from the place, and threw his goods and chattels in the road, to his damage in the sum of \$500.

The defendant denied these allegations, and alleged that the term of plaintiff as tenant had expired, and that he had refused, after legal notice and demand, to deliver possession of the place to his landlord, the defendant, and that his family and goods were removed from the place, by the constable of his township, in obedience to legal process, in a prudent and careful manner, without the slightest insult or injury to his family, or damage to his goods.

The facts, as shown by the evidence adduced in a trial before a jury, were substantially as follows: In September, 1892, Vinson rented the Upp place to Flynn for the term of two years. After the termination of the lease, in 1894, Vinson demanded possession of the place, in writing, and Flynn refused to comply with his demand. He (Vinson) thereupon consulted two or more persons as to his right to sue for possession before a justice of the peace. They advised him that he could not do so. Not content with their advice, he applied to a justice of the peace, who, after an examination of the statutes, informed him that he had jurisdiction in such cases. He thereupon instituted an action against Flynn for the place before the justice of the peace, and sued out a writ therein, directed to the constable of the township, and commanding him, if the plaintiff gave security according to law, to deliver possession thereof to Vinson without delay. Vinson gave security as required, and the constable executed the writ in his presence, by turning Flynn and his family, consisting of a wife and three children (one a babe), out of the house upon the premises, and by removing their goods and chattels off the place. This was in January, 1895. The

NOTE.—See preceding case of Smith v. Detroit Loan & Bldg. Assn. (Mich.) ante, 410, and footnote thereto; also Page v. Dwight (Mass.) post, 418.

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weather at the time and place was cold, and snow was upon the ground. One witness testified that the goods and chattels were handled roughly by the constable, and were thereby injured, but others testified to the contrary.

Evidence was adduced on the trial, over the objections of the defendant, which tended to show that Flynn acquired, before he was dispossessed, a claim of some kind to a part of the Upp place,—the demised premises.

The court, over the objections of the defendant, instructed the jury as follows:

"(2) If you find from the proof, by a preponderance, that the plaintiff was unlawfully dispossessed, you will find for the plaintiff.

"(3) If you find for the plaintiff, he is entitled to either actual damages, or actual and punitive damages, according to whether you find the unlawful act was or was not done with malice. The damages you assess must not exceed the amount claimed in the complaint, in such an amount as may be sustained by the proof.

"(4) 'Malice,' in the sense in which the word is used in civil actions, is not confined to spite or hatred, but consists of a violation of law to the prejudice of the plaintiff, done wilfully, or done with indifference as to whether it is right or wrong, and from being actuated by improper motives.

"(5) A justice of the peace has no jurisdiction to issue writs of possession for real estate, and, if he does issue such writ, it is void and without authority of law.

"(6) The burden is upon the plaintiff to prove malice, but malice may be inferred from circumstances proved; and if you find from the evidence, by a preponderance, that the defendant acted from improper or indirect motives, and without authority of law, malice on the part of the defendant may be inferred.

"(7) 'Punitive damages' means such an amount, as it is called, 'smart money,' or punishment for maliciously violating the legal rights of another; and if you find from the evidence that the defendant wantonly and maliciously, in utter disregard of the rights of the plaintiff, forcibly put him out of possession of the premises, then you may assess his damages at such sum as will be a punishment to him, and deter others from like actions. And in fixing the amount you may consider the vexation and injury to his feelings—his inconvenience—on account of the wrong done the plaintiff."

The plaintiff recovered a verdict and judgment against the defendant for \$150, and the defendant appealed.

At common law no civil action can be maintained against the landlord by the tenant for forcibly taking possession of his land, which constituted the demised premises, after the expiration of the tenancy, unless there was an excess of force, and then only for the excess. There was no remedy by which he could be compelled to restore the possession forcibly taken. The law in this manner held forth strong temptations to the landlord to retake his land by force from the tenant refusing to deliver the same after the term of his lease had expired. Such actions were calculated to provoke breaches of the peace. To prevent this the statute was enacted which prohibits all

persons from taking possession of land, and detaining or holding the same, except where an entry is given by law, and then only in a peaceable manner, and to protect the actual possession, not to determine the rights of property, provides the remedy of forcible entry and detainer. To restore the possession to him, who has been turned out by force, as he held it before, until the right to the possession can be adjudicated, this remedy is designed; its object being, as said by Mr. Justice Eakin, "to prevent any and all persons, with or without title, from assuming to right themselves with strong hand, after the feudal fashion, when peaceable possession cannot be obtained, and to compel them to the more pacific course of suits in court, where the weak and strong stand upon equal terms." *Littell v. Grady*, 38 Ark. 584; *Hall v. Trucks*, 38 Ark. 257; *McGuire v. Cook*, 13 Ark. 448; *Anderson v. Mills*, 40 Ark. 192; *Johnson v. West*, 41 Ark. 585; *Logan v. Lee*, 58 Ark. 94.

But a party who was in possession of land without right, and has been turned out by the owner, has no civil remedies, except those provided by statute. They are designed for the protection of his possession against force. If he abandons them, and seeks to recover damages for a trespass, then he must rely on his right, and claim the property which has been injured. The owner who has dispossessed him is then remitted to his title, and can use it to show that he has not been injured, and is not entitled to redress.

In New York the statutes at one time provided redress for dispossession by force, by an indictment for forcible entry and detainer. In *People v. Leonard*, 11 Johns. 508, the court said: "This was a trial for a forcible entry and detainer. The complainant, on opening his case, proposed to confine his proof to his possession only; but the judge ruled that the complainant must prove in himself an estate in fee, or an estate for years, at least; that the title was in question, and that the complainant must give the like evidence of title as was required in ejectment. Admitting the complainant must give the like evidence of title, as was required in ejectment, he offered to show what would have entitled him to recover in ejectment. If the lessor shows himself in the peaceable possession of land, and that he was forcibly dispossessed, it will be sufficient to entitle him to recover possession, and the defendant will not be permitted to set up title to defeat it. He must restore the party to his possession, wrongfully taken from him, in the first place. But I apprehend, there was a mistake in saying the title was in question. In the case of *People v. King*, 2 Cal. 98, on a motion to quash a conviction, and for restitution, Kent, Ch. J., says: 'We cannot decide on the title or rights of the parties. The complainant has nothing to do with that. He must give up the possession irregularly obtained, put the defendant *in statu quo*, and then proceed legally to the question of title.' In the case of *People v. Runkle*, 8 Johns. 468, Spencer, J., says: 'The court cannot, on this indictment, inquire into title. Right or title to the property is no excuse. The statute was made to prevent persons from doing themselves right by force.' And the court, in giving its opinion, seems to

assume that possession is enough for the complainant to show."

In a later case (*Jackson, Stansbury, v. Farmer*, 9 Wend. 201), Mr. Justice Nelson, speaking for the court, said: "It was decided by this court in *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258, and the same principle was again applied in *Ives v. Ives*, 13 Johns. 285, that a person having a legal right of entry on land may enter by force, and though indictable for a breach of the peace at common law, or under the statute for a forcible entry and detainer, he is not liable to a private action for trespass for damages at the suit of a person in possession without right, and who is thus turned out of possession. This position, apparently harsh, and tending to the public disturbance and individual conflict, is abundantly supported by authority, and must be considered the law of the land. . . . It was the abuse of this summary power to right one's self by entry, where the right of entry existed, which gave rise to the numerous English statutes against forcible entry and detainer, of which our old act was substantially a copy; and in these acts, and the common-law remedy by indictment, are to be found the only protection of the party thus forcibly dispossessed. They punish criminally the force, and in some cases make restitution of the possession. *People v. Leonard*, 11 Johns. 509; *People, Brinkerhoff v. Nelson*, 13 Johns. 340; but so far as the civil remedy is concerned, there is none but what is afforded by those acts."

The same rule obtains when the statutory remedy for forcible ejection from land is the civil action of forcible entry and detainer, the principle in both cases being the same. *Krevet v. Meyer*, 24 Mo. 107; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; 4 Am. Law Rev. 429 *et seq.*, and cases cited.

In the case we have under consideration, appellee was a tenant of appellant. The term of the lease had expired. The former could not dispute the title of the latter to any part of the demised premises without surrendering possession. Before he could do so, he must surrender the whole, regardless of the title of his landlord. *Miller v. Turney*, 18 Ark. 385; *Clemm v. Wilcox*, 15 Ark. 102; *Bryan v. Winburn*, 43 Ark. 28; *Hershey v. Clark*, 27 Ark. 527; *Hughes v. Watt*, 28 Ark. 153. Yet the lower court instructed the jury that if they found from the evidence that appellant "wantonly and maliciously, in utter disregard of the rights of the" appellee, "forcibly put him out of the possession of the premises," then they might find for the appellee, and "assess his damages at such sum as will be a punishment to" appellant, "and deter others from like actions; and in fixing the amount" they might "consider the vexation and injury to his feelings, and his inconvenience, on account of the wrong done." This was an improper instruction in this action, and it was prejudicial to appellant.

The jury were told by the circuit court that "a justice of the peace has no jurisdiction to issue writs of possession for real estate, and, if he does issue such writ, it is void and without authority of law;" and in this connection they were further instructed that, if they found that the appellant wantonly and mali-

ciously, in utter disregard of his rights, forcibly evicted him, then they might award him exemplary damages. Taking these and all other instructions given, as a whole, we see no theory upon which they could have been based, unless it be there was evidence to show that appellant was guilty of a malicious prosecution. Upon that theory they should not have been given.

Hare and Wallace, in their notes to American Leading Cases, after a review of the cases upon what is necessary to sustain an action for malicious prosecution, say: "The gist of the action above considered is the putting of legal process in force, regularly, for the mere purpose of vexation, annoyance, or injury; and the inconvenience or harm resulting naturally or directly from the suit or prosecution, is the legal damage upon which it is founded." *Munns v. Dupont*, 1 Am. Lead. Cas. 5th ed. 279, 3 Wash. C. C. 31. In *Sutton v. Johnstone*, 1 T. R. 511, Lords Mansfield and Loughborough said: "The essential ground of this action is, that a legal prosecution was carried on without a probable cause." That being true, the action cannot be maintained on account of a prosecution or suit, the subject-matter of which was without the jurisdiction of the court in which it was instituted and continued. In that case all process issued, orders made, judgments rendered, and proceedings had, would be absolutely void; and the action of the parties would stand as though unaltered by any judicial act, process, or proceeding, and completely divested of judicial authority, and the parties would be liable as they would have been had they acted without the authority, real or pretended, of any officer or court. We are aware that some courts have held that an action for a malicious prosecution before a court without jurisdiction of its subject-matter can be maintained, if the other essentials are shown, but we think the better opinion is that it cannot be sustained. *Bixby v. Brundige*, 2 Gray, 129, 61 Am. Dec. 448; *Whiting v. Johnson*, 6 Gray, 246; *Painter v. Ives*, 4 Neb. 122; *Braceboy v. Cockfield*, 2 Mull. L. 270, 278; *Turpin v. Remy*, 3 Blackf. 210, 216; *Marshall v. Betner*, 17 Ala. 882, 886; *Munns v. Dupont*, 1 Am. Lead. Cas. 5th ed. 259; 1 Jaggard, Torts, 605.

Lemay v. Williams, 32 Ark. 166, 175, was an action for a malicious prosecution. The malicious prosecution complained of was an action brought by Lemay against Williams before a justice of the peace to recover a judgment on a note, and to foreclose a mortgage executed to secure the note. The court held that the action on the note was within, but the foreclosure of the mortgage was without, the jurisdiction of the justice of the peace. Mr. Justice Walker, in delivering the opinion of the court, said: "If, in the case under consideration Lemay had based his right of action solely upon his claim of mortgage lien, and not also upon his note for the satisfaction of a debt within the jurisdiction of the justice of the peace, the subject-matter would clearly have been one over which a justice would have no jurisdiction, and trespass, not case, would be the appropriate remedy."

In this case appellant brought an action against appellee, before a justice of the peace,

to recover the Upp place, and sued out a writ of possession therein. He attempted to use the writ for a lawful purpose, but the justice of the peace had no jurisdiction of the subject-matter of the action, and the writ was void. He therefore stands in the same position he would have occupied had he taken possession of the land without any writ, and is liable accordingly. The action for a malicious prosecution does not lie against him.

In giving instructions upon the ground that there was evidence to show that appellant was guilty of a malicious prosecution, another error was committed. The instructions failed to inform the jury that, before they should return a verdict against appellant on the ground that he was guilty of a malicious prosecution, they must find that he prosecuted the action before the justice of the peace without probable cause. In this the instructions were fatally defective. *Seaton v. Brock*, 15 Ark. 845; *Lemay v. Williams*, 82 Ark. 166; *Lavender v. Hudgens*, 82 Ark. 763; *Ohrisman v. Carney*, 83 Ark. 316; *Foster v. Pitts*, 63 Ark. 387.

If the appellant in evicting appellee and removing his goods from the demised premises, unnecessarily committed any injury to his person or goods, the latter can recover of the former, in this action, the damages occasioned thereby. Unless there be circumstances of aggravation attending the commission of the injuries, he is only entitled to actual damages.

The court erred in admitting the evidence objected to by appellant.

Reversed and remanded for a new trial.

Hughes, J., concurs in the judgment of the court, and also in the opinion, except the part which holds that the action for malicious prosecution will not lie if the subject-matter of the prosecution or suit was not within the jurisdiction of the court in which the prosecution was instituted and carried on, from which he dissents.

MASSACHUSETTS SUPREME JUDICIAL COURT.

George E. PAGE

v.

R. O. DWIGHT.

(.....Mass.)

One forcibly put out from a peaceable possession lawfully obtained, if evicted by one who had the title and the right of possession, cannot maintain forcible entry and detainer under Pub. Stat. chap. 175, as this gives such action only to "the person entitled to the premises," and a former statute which extended the right to a person forcibly dispossessed by a person entitled to possession has been repealed.

(December 8, 1897.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Hampshire County made during the trial of summary proceedings to recover possession of land which resulted in a verdict in defendant's favor. *Overruled.*

The facts are stated in the opinion.

Messrs. A. L. Green and J. F. Stapleton, Jr. for plaintiff:

If the forcible entry or detainer be found by the jury, then, beside the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them.

4 Bl. Com. p. 143; *Presbrey v. Presbrey*, 13 Allen, 281; *Hodgkins v. Price*, 182 Mass. 198; *Sampson v. Henry*, 11 Pick. 379; *Lawton v. Savage*, 186 Mass. 111; Pub. Stat. chap. 126, § 15; *Hudreth v. Conant*, 10 Met. 298.

NOTE—See *Smith v. Detroit Loan & Bldg. Assn.* (Mich.) ante, 410, and footnote thereto; also *Vinson v. Flynn* (Ark.) ante, 415.

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The cases which seem to militate against this view are cases brought to recover damages in tort for breaking and entering, or for assault, etc.

See *Barts v. Morse*, 126 Mass. 226; *Winter v. Stevens*, 9 Allen, 526; *Stone v. Lahev*, 183 Mass. 426; *Low v. Ehccl*, 121 Mass. 309, 28 Am. Rep. 272; *Miner v. Stevens*, 1 Cush. 432; *Fifty Associates v. Howland*, 5 Cush. 218; *Mugford v. Richardson*, 6 Allen, 76, 68 Am. Dec. 617; *Morrill v. De la Granza*, 99 Mass. 888; *Curtis v. Galvin*, 1 Allen, 215; *Moore v. Mason*, 1 Allen, 406; *Meador v. Stone*, 7 Met. 147; *Lackey v. Holbrook*, 11 Met. 458.

The title to the property cannot be inquired into for any purpose.

Riverside Co. v. Townshend, 120 Ill. 9; *Kepley v. Luke*, 106 Ill. 895; *McGuirk v. Barry*, 93 Ill. 118; *Smith v. Hoag*, 45 Ill. 250; *McCartney v. McMullen*, 88 Ill. 237; *Shoudy v. School Directors*, 32 Ill. 290.

Title cannot be shown in defendant to prevent a restitution of the premises.

Respublica v. Shryder, 1 U. S. 1 Dall. 68, 1 L. ed. 40; *Peyton v. Stith*, 30 U. S. 5 Pet. 485, 8 L. ed. 200.

Neither the title nor the right to the possession is at issue, nor can they be put in issue in such an action.

Sheehy v. Flaherty, 8 Mont. 365; *Giddings v. 76 Land & Water Co.* 83 Cal. 96.

The instructions in this case affirmed the principle that the strongest shall take and keep until the law may examine the title—a rule which Lawrence, J., says in *Reeder v. Purdy*, 41 Ill. 279, "befits only that condition of society in which the principle is recognized that

"He may take who has the power,
And he may keep who can."

In Massachusetts the court has held that the consequence of a forcible entry or detainer is not limited to a criminal action.

Com. v. Shattuck, 4 Cush. 141. See Taylor, Land. & T. § 717, note; *Mitchell v. Davis*, 23 Cal. 881; *People v. Fields*, 1 Lans. 240; Neb. Comp. Stat. § 1019; *Myers v. Koenig*, 5 Neb. 419; *Grohowsky v. Long*, 20 Neb. 862; Ill. Rev. Stat. chap. 57, §§ 1, 2; *Thompson v. Sornberger*, 59 Ill. 326; *McCartney v. McMullen*, 38 Ill. 237. Mr. William G. Bassett for defendant.

Barker, J., delivered the opinion of the court:

The plaintiff bought and went into peaceable possession of land subject to mortgage. His estate was ended by a foreclosure sale, under which the defendant acquired title and the right to possession, which he could have recovered by a summary process under Pub. Stat. chap. 175. He was forbidden by Pub. Stat. chap. 126, § 15, to take possession by force. Instead of resorting to the statute process, he employed force of numbers and violence, and by an actual breach of the peace put out the plaintiff and his family, and so obtained possession by force. The plaintiff thereupon brought this action, under Pub. Stat. chap. 175, and he contends that because the defendant ousted him by force his own possession is to be restored. At the trial the plaintiff asked rulings that no question of title is in issue in the action; that the issue is whether, once being in rightful possession, he was forcibly put out; and that, if so, he is entitled to judgment, even if at the time of the forcible entry the defendant had the title and right of entry, and was lawfully entitled to possession. The court refused these rulings, and charged the jury that if the mortgage had been duly foreclosed by sale, and the title had passed to the defendant, he had a right, so far as the plaintiff was concerned, to eject him as he did, and the action could not be maintained. The defendant had a verdict, which, under the rulings, did not negative the force, but which shows that the jury found the title and right of possession in the defendant. In one sense, the ruling that the defendant had the right, so far as the plaintiff was concerned, to evict him by force, was wrong, because all such forcible entries are forbidden, and the plaintiff as a citizen, is within the protection of the standing laws. But if, notwithstanding this unlawful use of force, the plaintiff cannot have this process against one who is entitled to possession, his exceptions must be overruled. The doctrine that possession destroyed by force should be restored because of the force had much to do with the Roman interdicts *unde vi* and *uti possidetis* and with the *exceptio spoli* or *remedium spoliationis* of the canon law. See Inst. lib. 4, title 15; Cod. lib. 8, titles 4, 5; Gratian, Corp. Jur. Canon, Dec. Greg. 9, title 12; De Causa Poss. et Prop. Freidburg, pt. 2, p. 275 *et seq.*; Godol. 650, 24, 25; Sohm's Inst. Roman Law, § 54.

The earliest English special remedy to protect possession was the assize of novel disseisin, which dates either from the time of the constitutions of Clarendon, in 1164, or of the assizes of Northampton, a few years later, and is said to correspond or at least to have been

suggested by the possessory remedies of the Roman and the canon law. See Gutenberg's Bracton and his relation to Roman Law, chap. 20; Reeve, Eng. Law, Finlason's ed. pp. xiv., xv.; Maine, Anc. Law, Am. ed. 1870, pp. 280-282; Pol. & M. Hist. Eng. Law, pp. 91, 114, 116; Mackenzie, Roman Law, pt. 5, chap. 4; Muirhead, Roman Law, p. 218. Bracton, writing in the first half of the thirteenth century, says that in the judgment of novel disseisin, "*quod ex maleficio oritur*," one sues for the land, "*ipsam rem*," and for a penalty, "*pœnam*," "*et ibi pœna triplex*," one for "*spoliationem contra pacem*," "*ubi infligenda est pœna corporalis*," another for the unjust detention, "*ubi infligenda erit pœna pecuniaria*," and another for his own damages, "*damna sua*," sustained "*tempore spoliationis*," and even an added penalty; that the principal disseisor, when convicted, should give the sheriff an ox, by custom. Bract. f. 161, b. Before 1620 there were many English statutes and decisions upon the general subject of forcible entry and detainer. See Stat. 2 Edw. III. chap. 3, prohibiting force; 5 Rich. II. chap. 7; 15 Rich. II. chap. 2; 4 Hen. IV. chap. 8; 8 Hen. VI. chap. 9; 81 Eliz. chap. 11; 21 Jac. I. chap. 15; Cromp. 76, 163; Dalt. chap. 125; Lamb, 138; Com. Dig. title, *Forcible Entry*, 4 Bl. Com. 148. The state of the early law was considered in the decisions of this court in *Com. v. Shattuck*, 4 Cush. 141; *Howard v. Merriam*, 5 Cush. 563; *Presbrey v. Presbrey*, 13 Allen, 281; *Hodgkins v. Price*, 132 Mass. 196. It would seem that every forcible entry by a private individual was unlawful, and might subject him to punishment, and that in addition, in most cases, the person forcibly put out of possession might be put back by legal proceedings, without regard to the question of the true title or right of possession. Ordinarily, the status of possession before the force was restored by the interference of the public power acting through public officers.

Although this state of the law was operative here as the common law of the colonies, there were also statute provisions concerning the use of force, and forcible entry and detainer, in the Plymouth and Massachusetts Bay colonies and in the province. In the General Laws and Liberties of New Plymouth Colony, revised and published by order of the general court in the year 1671 (chap. 3, § 18), are provisions against forcible entry or detainer after judgment. Plymouth Colonial Laws, pp. 248, 249. A substantially similar provision is found in the General Laws and Liberties of Massachusetts Bay Colony, in chapter 15, entitled "An Act as to Judgment Respecting Real Estate." See Anc. Laws & Charters, p. 54; Colonial Laws (Rev. 1658) p. 11. In the Province Laws, in chapter 11 an act for the punishing of criminal offenders (1692) § 6, gives power to justices of the peace to stay and arrest breakers of the peace, and to "make inquiry of forcible entry and detainer, and cause the same to be removed." Anc. Laws & Charters, pp. 239, 240. In 1701 there was a province act directing these proceedings against forcible entry and detainer. It required the justices of the peace, upon complaint of any wrongful and forcible entry made into any lands, tenements, or other possessions, or of

any wrongful detainer thereof with force and strong hand, to go to the place, taking sufficient power to arrest the offenders, and providing that two justices, *quorum unus*, should inquire by the oaths of the people, "as well of them that make such forcible entry into lands, tenements, or other possessions, as of them that hold the same with force," and to cause the same to "be resealed, and thereof the party to be again put into possession, who in such sort was put out or holden out." The inquiry was to be made by a jury sworn to inquire of such forcible entry or forcible detainer. The justices might impose a fine upon the offenders, or bind them to appear at the next general sessions, with a proviso that the act should not extend to persons who had had occupation or been in quiet possession for three whole years, their estates therein not ended or determined. Prov. Laws, chap. 72; Anc. Laws, & Charters, pp. 853-855.

After the adoption of the Constitution of 1780 there was a new "Act Directing the Proceedings against Forcible Entry and Detainer." Stat. 1784, chap. 8. This statute gave to two justices of the peace, *quorum unus*, authority to inquire by a jury against those who make unlawful and forcible entry into lands or tenements, or who, having a lawful and peaceable entry, unlawfully and by force hold the same, and to cause the party complaining to have restitution. Forms are prescribed for the proceedings, which were in the name of the commonwealth, upon complaint of the party aggrieved. See *Com. v. Dudley*, 10 Mass. 408; *Com. v. Bigelow*, 3 Pick. 81. In the form of verdict is a recital that the jury do find that the lands or tenements, upon a day stated, were "in the lawful and rightful possession of" the complainant, and that the defendant "did upon the same day unlawfully and with force and arms and with a strong hand enter forcibly upon the same (or being lawfully upon the same did unlawfully with force and a strong hand) expel and drive out" the complainant, "and that he doth still continue wrongfully to detain the possession from him, . . . wherefore the said A. B. ought to have restitution thereof without delay." Upon the return of a verdict for complainant, the justices were to enter judgment for restitution, and award a writ of restitution, and no appeal was allowed, although the proceedings might be removed by certiorari into the supreme judicial court, and there be quashed for irregularity. The judgment was not a bar to any after action brought by either party, and there was also a proviso that the act should not extend to any person who had had occupation or been in quiet possession for three years, and whose estate was not ended or determined. Laws & Res. Mass. 1784-85, pp. 19-24. It is to be noticed that this statute omitted any provision for the punishment of those found to have entered or retained possession by force, and gave, in terms, jurisdiction only against such as made "unlawful and forcible entry," or "unlawfully and by force" held after a lawful and peaceable entry; while in the Province statute of 1701 the section conferring jurisdiction gave it upon complaint of any "wrongful and forcible entry" or any "wrongful detainer . . . with force and strong hand;" and if the find-

ing was of a forcible entry or forcible holding, without a finding that it was wrongful, restitution was to be made.

The statutes so far considered dealt with forcible entry and forcible detainer only. In the year 1825, a summary remedy was given by Stat. 1825, chap. 89, entitled "An Act Providing Further Remedies for Landlords and Tenants," to persons having the right of possession of houses and tenements. Actions under this statute were in the name of the party aggrieved. The defendant was not allowed to offer, under a general issue, any evidence that might bring the title of the freehold in question, and, if he pleaded title in himself or a third person, he was required to recognize to enter the action in the higher court, and, if he refused, judgment went against him as upon a refusal to answer. But the proceedings plainly allowed the title to the freehold to be tried, at the will of the defendant, and there was no provision that the judgment should not be a bar in future actions. Although this statute was broader than its title, and under its terms an "occupant" who had entered forcibly might be dispossessed after notice to quit, it did not afford a remedy against an occupant who had entered forcibly, but who had the right of possession, because only a person who had the right of possession could summon him to answer or could sustain the complaint.

These statutes of 1784 and 1825 were in force when the commissioners appointed under the resolve of February 4, 1832, to revise the general laws, made their report to the legislature, in 1834. The commissioners placed in chapter 104 of their report, entitled "Of Forcible Entry and Detainer," two sets of provisions, one concerning forcible entry and detainer, and the other concerning tenants who hold over after the expiration of their right. At the head of the chapter was a section declaring that no person shall make any entry into lands or tenements except where his entry is allowed by law, and that in such cases he shall not enter with force but in a peaceable manner. The next section provided generally, without qualification, that when any forcible entry should be made or possession should be held by force, the person forcibly put out or held out might be restored upon complaint to two justices, who should command a jury; and if the verdict showed the lawful possession of the complainant, and a forcible entry or an unlawful and forcible detainer from him, who was lawfully entitled to possession, there should be judgment for restitution. The provision that the judgment should not be a bar was retained. After the provision concerning forcible entry and detainer were sections providing for the summary removal of lessees holding without right after the termination of a lease. In their notes the commissioners say that the rule embodied in § 1 is fully recognized as part of our common law, and plainly implied from the provisions of Stat. 1784, chap. 8, and that they insert it as it is in the English statutes as the basis of all the provisions on this subject; and they point out that while the provisions for the removal of lessees who hold over are narrower than those of Stat. 1825, chap. 89, the cases which could be dealt

with by that statute, and not by the reported sections concerning landlords and tenants, could be dealt with, if possession were obtained or held by force, under the sections concerning forcible entry and detainer; and that, if the party who had acquired the possession did not retain it with force, the injured party would find a sufficient remedy in an action of trespass or a writ of entry. This report was made on December 31, 1884, and the Revised Statutes were approved November 4, 1885, to take effect from and after April 30, 1886. It is to be noticed that under the commissioners draft, the summary remedy given by Stat. 1825, chap. 89, to whoever has the right of possession, where a "tenant or occupant" holds without right and after notice to quit, could not be availed of in cases of forcible entry or detainer, where the defendant was not a tenant holding over. In April, 1885, before the enactment of the Revised Statutes, an additional statute was passed declaring that the provisions of Stat. 1825, chap. 89, should be "construed to apply to all cases of forcible entry and detainer, and all cases of detainer of any lands or tenements wherein the person or persons hold the same without right, or as mere trespassers," thus excluding the case where the person guilty of the force had the right of possession, and "to all cases where any tenant shall make default in the payment of rent according to the terms of any written agreement or lease between the parties," and that in all such cases the like proceedings might be had as if the relation of landlord and tenant had theretofore existed between them. Stat. 1885, chap. 114. It would seem that while this statute extended the remedy by proceedings under Stat. 1825, chap. 89, to those cases of forcible entry or forcible detainer where the person who was guilty of the force had no right or was a mere trespasser, it did not extend them to those cases where the owner of the title, or one who had the right of possession, was guilty of a forcible entry or detainer. For some reason, and perhaps wholly or partly in consequence of this statute of 1885, the provisions reported by the commissioners for an inquiry by a jury in case of forcible entry and detainer were omitted from chapter 104, as embodied in the Revised Statutes. The declaration that no person shall enter except where his entry is allowed by law, and not with force, but in a peaceable manner, was retained as the first section; and the second section provided that when a forcible entry was made, or, after peaceable entry, possession was unlawfully held by force, and also when a lessee or any person holding under a lease holds possession without right after determination of the lease, "the person entitled to the premises" might be restored to the possession thereof in a peaceable manner. This language seems to leave without remedy, under the statute, the case where one not legally entitled to possession is forcibly put out by the true owner or by one entitled to possession; for in such case the party forcibly put out is not a "person entitled to the premises," and by the terms of the statute such persons only are to be restored. From the subsequent sections prescribing the manner in which the proceedings should be conducted, it is plain that

the title to the freehold might be brought in question in all cases, and, if so, the cause was to be transferred, at the request of either party, to a higher court. Rev. Stat. chap. 104, §§ 9, 11. Either party might appeal (Rev. Stat. chap. 104, § 8); yet the judgment was declared by the statute not to be a bar to any action thereafter to be brought by either party to recover the premises in question or to recover damages for any trespass thereon (Rev. Stat. chap. 104, § 12).

In 1849 it was held by this court in *Com. v. Shattuck*, 4 Cush. 141, that, in addition to the statute remedy, an indictment lies at common law for a forcible entry, and that it is a sufficient charge of the offense to allege the entry to have been made unlawfully, with force and arms and with a strong hand. The provisions of Rev. Stat. chap. 104, § 1, are mentioned in the decision; and it is said that, if the case required it, it might be proper to consider whether that section would not make a forcible entry a statute offense, and punishable under Rev. Stat. chap. 139, § 1. See also *Com. v. Haley*, 4 Allen, 318.

The attention of the legislature was called to the condition of the law concerning forcible entry and detainer, in January, 1851, by the report of Benjamin R. Curtis, Nathaniel J. Lord, and Reuben A. Chapman, commissioners appointed to revise and reform the proceedings in the courts of justice. Speaking of the process for forcible entry they say: "The object of this process is not to settle title, but only the right of present possession; and not even this, except in cases where the possession has been disturbed, or an entry is prevented by force. It is really to quell force and violence, and to protect the public peace, by promptly depriving the wrongdoer of the fruit of his wrong. This is very different from a case where a tenant holds over after the end of his term, and requires a different remedy; and the ancient and long-existing law of the state provided one adapted to the case, but differing widely from landlord and tenant process. The former, as we have said, did not involve title. If the person entering or detaining by force was the lawful owner, and the complainant had, as against him, no mere right whatever to the property, such owner was to be turned out of the possession which he had unlawfully gained by force." Criticising the provisions of Rev. Stat. chap. 104, the report says further: "If it was meant that the title can and may be put in issue in a process for forcible entry, it is plain it ceases to be of any value when the party who entered with force had title, and the process becomes a clumsy writ of entry, which tries the title without settling it. We have concluded, therefore, to recommend the restoration of the law substantially as it existed from ancient times." Life and Writings of B. R. Curtis, vol. 11, pp. 162, 164; Mass. Leg. Doc. 1851, House No. 17. This recommendation was adopted by the legislature, and the sections drafted by the commissioners for the purpose were enacted in the original practice act (Stat. 1851, chap. 233, §§ 76-95), which repealed so much of Rev. Stat. chap. 104, as related to forcible entry and detainer, and substituted a process in the name of the commonwealth by inquisi-

tion by a trial justice and a jury upon complaint by the party aggrieved. This statute was in effect from August 31, 1851, to August 7, 1852. It is plain that under it a person in possession without right, if forcibly dispossessed by the true owner, or by a person entitled to possession, could be restored to the possession from which he had been ousted by force. But Stat. 1852, chap. 812, which took effect August 7, 1852, repealed Stat. 1851, chap. 233; and, as there was then no permanent statute declaring that the repeal of an act should not revive statutes in force before the act repealed took effect, the repealed provisions of Rev. Stat. chap. 104, were thus revived, and again governed proceedings for forcible entry and detainer. See Stat. 1869, chap. 410, cl. 1; Pub. Stat. chap. 8, § 3, cl. 1.

This sudden return to the system under which the writ was in the name of the party, and not of the commonwealth, which gave the process only to a "person entitled to the premises," which required him to prove that he was entitled to this possession, and which said that the defendant should have judgment if the plaintiff failed to prove his right to the possession, has the greater significance because of the clear and forcible explanation of the old law, and of the defects of that substituted for it, given in the report of the eminent lawyers who prepared the report of 1851, and at whose recommendation the system by which the effect of the force was removed, without regard to the right of possession, was restored by one legislature only to be discarded by its successor.

The provisions of Rev. Stat. chap. 104, as restored by the repeal of Stat. 1851, chap. 233, with those of some additional acts not now material, were re-enacted in Gen. Stat. chap. 137, retaining in § 2 the words, "The person entitled to the premises may be restored to the possession;" and in § 5 the words, "The person entitled to the possession of the premises may take . . . a writ;" and in § 7 the provision that if it appears "that the plaintiff is entitled to the possession of the premises," used in the corresponding provision of Rev. Stat. chap. 104, as also the provision that if the plaintiff becomes nonsuit, "or fails to prove his right to the possession," the defendant shall have judgment. At the same time the summary process was extended to cases where the lessee's estate is determined by the landlord's entry for breach of condition, by the introduction by the legislature of the words "or otherwise" into Gen. Stat. chap. 137, § 2, in consequence of the decision in the case of *Fifty Associates v. Howland*, 11 Met. 99. By Stat. 1879, chap. 237, it was provided that when a mortgage of real estate is foreclosed by sale under a power, and a person having a valid title to the estate is kept out of possession by any person without right, he may recover such possession in the manner provided by Gen. Stat. chap. 137. The statutes were again revised and embodied in the Public Statutes, approved November 19, 1881, to take effect from January 31, 1882. The provision forbidding forcible entries is now contained in Pub. Stat. chap. 126, § 15, and the others are substantially re-enacted in Pub. Stat. chap. 175, except that Gen. Stat. chap. 137, § 3, is

now Pub. Stat. chap. 121, § 11, in part, and Gen. Stat. chap. 137, § 6, is merged into Pub. Stat. chap. 161, § 27. The language of Pub. Stat. chap. 175, § 1, is that "the person entitled to the premises may recover possession thereof;" of § 5 that if it appears "that the plaintiff is entitled to the possession of the premises, he shall have judgment and execution for the possession and for his costs;" and of § 2 that "such person may take . . . a writ"—that is to say, "the person entitled to the premises,"—as stated in the preceding section. The provision that if the plaintiff becomes nonsuit, "or fails to prove his right to the possession," the defendant shall have judgment, is retained. Pub. Stat. chap. 175, § 5.

From all this it appears that both the course of legislation and the language of the present statutes show that the process cannot be maintained by one who has been forcibly put out from a peaceable possession lawfully obtained, if he was so evicted by one who had the title and the right of possession. But, in arriving at the true construction of a statute, we must consider, not only the course of legislation and the language used, but the decisions of the court in causes which have required a construction of the statute. A construction so given by the court remains the authoritative exposition of the statute, until reversed by the court or abrogated by some action of the legislature.

It is contended by the plaintiff that the decision in *Hodgkins v. Price*, 132 Mass. 196, has given a construction to the statutes under which he can maintain this action. That case was begun in 1878, under Gen. Stat. chap. 137, and was decided in 1882. As has been seen, there is no substantial difference affecting the present question between the statute now in force and that under which *Hodgkins v. Price* was brought. In that case the plaintiff had an assignment to himself of a lease of certain land of which he never had been in possession, and upon which were tenements occupied by persons who held under another title. He entered by force and gained a temporary foothold and was in turn at once put out by force by those whose possession he had forcibly interrupted. Thereupon he brought the statute process, asserting a right of possession under his lease, and relying upon that, and the forcible entry which put him out of the tenements when he had himself got a temporary possession by force. His entry was in the morning before business hours, and he was promptly put out by the occupants as they arrived at the accustomed time. He was not allowed to maintain the action, and the decision holds that such a temporary possession, obtained by a violation of the statute forbidding forcible entries, is not to be restored by the statute process, even though the person who has so obtained possession had the actual right of possession when he entered by force, and that the rights of such a plaintiff "must be determined by the rightfulness of that possession from which he was ousted." The case was one of the class in which Bracton says that the first and principal remedy is that he who has been disseised may eject the spoiler by his own strength, if he can, or by force called in or recalled, while yet no interval has elapsed, the disseisin and wrong

being flagrant. Bracton, De Ass. Nov. Diss. chap. 5, 162, b. That is to say, the attempted forcible entry and the recapture are but one transaction, and the recapture is not a forcible entry, but is a successful and proper resistance of a forcible entry; and so the wrongdoer who began the force cannot be heard to say that a forcible entry has been committed against himself, for all that has been done against him is to resist successfully his own wrongful act. Bracton says that forthwith to repel force by force is to do so as soon as the force is known, and before the party aggrieved has resorted to some other remedy; and that he can expel him immediately and on the same day, if he can, and, if he cannot expel him on that day, he may on the morrow, or on the third or fourth day, rallying his strength, collecting arms, and calling to his aid his friends. Bracton, f. 163. Nor can the true owner after being so entered by force, have an assise "*quia assisem demurit et gratiam juris, et quia frustra legis auxilium invocat qui in legem committit.*" Bracton f. 163, b. The same result reached in *Hodgkins v. Price*, would follow, whether, as intimated in the opinion, our process for forcible entry is "simply a quieting process," by which any party in possession of an estate shall not be dispossessed by force, but his possession shall be preserved to him, or whether it is a more restricted remedy, to be given only where the party who invokes it shows, not only that he has been put out by force, but that he is also entitled to possession. Under either construction, the plaintiff in *Hodgkins v. Price* could not have the statute process. As against him, the facts did not constitute a forcible entry, but merely a resistance and neutralization of his own attempted force. No discussion or determination of the general scope and effect of the statute was necessary to the decision, and therefore the observations in the opinion which seem to indicate that our statute remedy for forcible entry and detainer is open to any per-

son who has been forcibly put out, without regard to title or right of possession, do not constitute an authoritative construction of the statute. The opinion, while reviewing in part the course of legislation, makes no mention of the facts that the portion of Stat. 1851, chap. 238, which substituted for the forcible entry and detainer provisions of Rev. Stat. chap. 104, another system, in which, without regard to the state of the title or to the right of possession, a remedy was clearly given to restore any one put out by force, was quickly repealed by Stat. 1852, chap. 312, and that the former system, substantially identical with the present one, and giving the remedy only to those entitled to the premises, was permanently restored. Upon the whole, we think that the better view is that the legislature, after making a fresh trial of the ancient system under which a possession ended by force might be restored without regard to title or right of possession thought it better to provide that those only who had a right of possession should be put in by the courts, and to leave to the criminal law the acts of one who, being entitled to possession, takes it by prohibited force.

In the present case, the party guilty of the force asks no aid of the court, and we are not now concerned with his punishment, although from the time of the English settlement the use of force here by private individuals to obtain possession, even though they have title and right of possession, has been forbidden by the common or the statute law. We are of opinion that, by the true construction of Pub. Stat. chap. 175, the process is not given to one who is not entitled to the possession of the demanded premises as against the defendant; and that, if the present plaintiff was not entitled to possession as against the defendant when the latter put him out by force, the plaintiff cannot have the statute process.

Exceptions overruled.

TENNESSEE SUPREME COURT.

WIEHL, PROBASCO, & COMPANY,
App'ts.,
v.

C. P. ROBERTSON *et al.*

CLEVELAND NATIONAL BANK

v.
SAME.

(97 Tenn. 458.)

1. A deed to a fictitious grantee conveys no title.

NOTE.—Use of fictitious name as affecting validity of instrument.

- I. Of contractors, grantors, and mortgagors.
- II. Of grantees, patentees, mortgagees, and transferees.
- III. Of makers and drawers of negotiable paper.
- IV. Of payees.
 - a. In promissory notes.
 - b. In bills of exchange, checks, and drafts.
- I. Of contractors, grantors, and mortgagors.

A contract or obligation may be entered into by a person by any name he may choose to assume; the

2. A trust deed executed in a fictitious name by the real owner of the property, whose own Christian name was used as the name of a fictitious person, who had previously made a void deed of the property, using the same name as that of the grantee, is binding on the maker, when he intended it to take effect as security for bonds issued therewith and transferred by him as security for his own debt.

3. The admission of a note in evidence without proof of its execution, when it was admitted by the maker, who was a defendant, cannot be complained of on appeal by

law looks only to the identity of the individual, and when that is clearly established the act will be binding upon him. *Re Snook, 2 Hill, 566, dictum.*

One who contracts with another under a name he represents to be his name is estopped from denying or repudiating the same for the purpose of relieving himself from the obligations of the contract, and cannot avoid liability thereon where his identity is in question, by claiming that the name held out to be his name was not the name by which he was best known to the world. *Preiss v. Le Poidevin, 19 Abb. N. C. 123.*

And a conveyance by the true owner of property

another party as to whom the evidence was immaterial.

(October 19, 1896.)

APPEAL by complainants from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court for Hamilton County dismissing complainants' attachment suit against property of the defendant Robertson and directing foreclosure of the trust deed under a cross bill. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cooke, Swaney, & Cooke, for appellants:

Whether or not C. Phillips was Robertson's uncle, or a merely fictitious person, is immaterial.

Where the signature is a forgery no title passes, and notice of the forgery is not necessary to make the deed a nullity.

1 Devlin, Deeds, § 240; *Cole v. Levi*, 44 Ga. 579.

If an instrument which purports to convey

is good between grantor and grantee, and will transfer the title whatever name he may have adopted therein. *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347; *Wilson v. White*, 84 Cal. 239; *Wakefield v. Brown*, 38 Minn. 361.

Thus, a conveyance by a man by the name of Jeremiah Fallon, made in the name of Darby O'Fallon, which was only a nickname by which he was generally or often called and known, which was duly recorded as required by law and all the conditions duly performed as demanded by statute, conveys good title to the grantee as against another grantee to whom he subsequently conveyed the property under his right name. *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347.

So, a deed made by a person under a fictitious name, intending that it should be effectual to vest title in the grantee, will do so though he had previously in his right name made a conveyance of the property, inserting therein as grantee the fictitious name, which he subsequently used in conveying it. *David v. Williamsburgh City F. Ins. Co.* 83 N. Y. 265, 38 Am. Rep. 418.

This rule was applied to a trust deed in the principal case.

And one who executes a deed using the name of another who owned the property conveyed, which deed contained a covenant of warranty, may be held liable thereon, not as a breach of the covenant upon the ground that he was the agent of the owner, but on the ground that the covenant was his own, made under a name assumed by him for that purpose. *Preiss v. Le Poidevin*, 19 Abb. N. C. 123.

So, a chattel mortgage made by a person under an assumed name would be valid as between mortgagor and mortgagee for the reason that the mortgagor would be estopped from saying that a name assumed for a fraudulent purpose was not his true name. *Mackey v. Cole*, 79 Wis. 426.

And it has been held that one who sells personal property to a person who takes it under a fictitious name, and gives a chattel mortgage thereon for a part of the purchase price under such fictitious name, without knowledge that the name was fictitious, and records the mortgage in the proper county, takes title thereunder, and can recover the property from another person to whom the mortgagor afterwards sells it under his true name. *Alexander Bros. v. Graves*, 25 Neb. 453.

In *Mackey v. Cole*, 79 Wis. 426, however, the court refused to follow *Alexander Bros. v. Graves*, 25 Neb. 455, *supra*.

And the rule was laid down in that case that the

a legal estate or interest be a forged instrument no title can be acquired under it.

Kerr, Fraud & Mistake, 815; *Herman, Estoppel*, § 1006; *Whart. Am. Crim. L. ed.* 1846, 336; 2 *Bishop, Crim. L. ed.* 1868, §§ 510, 514; 2 *Russell, Crimes, ed.* 1850, 331.

The insistence by the Cleveland National Bank that a conveyance by a person under an assumed name passes the title is only supported by the authorities where the question is between the parties to the conveyance and in the absence of any fraud.

Wilson v. White, 84 Cal. 239; *David v. Williamsburgh City F. Ins. Co.* 83 N. Y. 270, 38 Am. Rep. 418.

It is immaterial that the person whose name is claimed to have been forged is a fictitious instead of a real person, the offense being completed if the instrument has the appearance of validity on its face.

People v. Munroe (Cal.) 24 L. R. A. 45, note, citing *State v. Hahn*, 38 La. Ann. 169; *State v. Givens*, 5 Ala. 747; *Thompson v. State*, 49 Ala.

filing of a chattel mortgage given by a person under an assumed name does not impute notice to, and will not affect, the title of a subsequent purchaser of the property from the mortgagor in his proper name, where he had possession and was the apparent owner.

And it was held that the rule that a chattel mortgage vests the title of the property mortgaged conditionally in the mortgagee, and that where the mortgaged property is retained by the mortgagor the statute makes the filing of the mortgage in the proper office equivalent to an actual change of possession, does not apply to a mortgage executed under an assumed and fictitious name so far as third persons are concerned. *Mackey v. Cole*, 79 Wis. 426.

II. Of grantees, patentees, mortgagees, and transferees.

The rule of the principal case that a conveyance to a fictitious grantee is a mere nullity, and does not transfer title, seems to be unquestioned, and is also laid down in terms in *Wilson v. White*, 84 Cal. 239; *Barr v. Schroeder*, 32 Cal. 600; and *David v. Williamsburgh City F. Ins. Co.* 83 N. Y. 265, 38 Am. Rep. 418.

As there is no such person to take title, title will remain in the grantor. *David v. Williamsburgh City F. Ins. Co.* 83 N. Y. 265, 38 Am. Rep. 418.

And such a deed cannot be confirmed by a subsequent deed given by an attorney in fact for that purpose. *Barr v. Schroeder*, 32 Cal. 600.

And a deed made by an agent for another to whom he had procured a conveyance of the property in question under a wrong name made to a third person, in the name used in the deed to his principal, transfers no title to the third person whether he acted in ignorance of the law or in good or in bad faith. *Staak v. Sigelkow*, 12 Wis. 235.

So, a conveyance to a supposed corporation which never had any existence under color of authority by the name used by it does not divest the grantor of his title. *Harriman v. Southam*, 16 Ind. 190; *Douthitt v. Stinson*, 63 Mo. 268.

And the grantor in a deed to a supposed corporation having no actual existence under color of authority is not estopped to deny its existence as the doctrine of estoppel applies only to cases in which there is an existing statute known to the courts authorizing such corporation. *Harriman v. Southam*, 16 Ind. 190.

But if the grantee is a person in existence and identified, and delivery is made, it makes no differ-

16; *Com. v. Chandler*, Thacher, Crim. Cas. 187; *Grant & Hopper's Cases*, 8 N. Y. City Hall Rec. 142; *United States v. Mitchell*, Baldw. 366; *King v. Sheppard*, 1 Leach, C. L. 226; *Gotobed's Case*, 6 N. Y. City Hall Rec. 25.

Before any person can execute a contract under an assumed name he must do so in the absence of fraud.

16 Am. & Eng. Enc. Law, p. 118.

A man can have but one Christian name—that is his first name—and one surname. The use of any middle name is mere surplusage and a description of the man.

Bratton v. Seymour, 4 Watts, 829; *Isaacs v. Wiley*, 12 Vt. 674; *Hart v. Lindsey*, 17 N. H. 235, 43 Am. Dec. 597; *Allen v. Taylor*, 26 Vt. 599; *Bletch v. Johnson*, 40 Ill. 116; *Thompson v. Lee*, 21 Ill. 242.

The omission or insertion of the middle name, or of the initial letter of that name, in a deed is immaterial.

Games v. Stiles, Dunn, 39 U. S. 14 Pet. 327, 10 L. ed. 478; *Pink v. Manhattan R. Co.* 15 Daly, 479; *Erskine v. Davis*, 25 Ill. 255.

ence by what name he is called. *Wilson v. White*, 84 Cal. 239.

And one who accepts a deed, and places it on record knowing that his name as grantee was erroneously written in it, is deemed to have adopted that name for the purpose of acquiring and holding the title to the land conveyed, and he has no reason to complain that he is so designated in legal proceedings calling in question the validity of the title so acquired and held. *Blinn v. Chessman*, 49 Minn. 140.

And a deed made in the name of Lewis Staak as grantee passes title to Arnold Staak where he furnished the purchase money and was the intended grantee, whether the name used was by mistake or by design, the disagreement or mistake in name being a latent ambiguity which is susceptible of explanation by parol. *Staak v. Sigelkow*, 12 Wis. 234.

So, patents for public lands issued to fictitious persons are invalid, there being in fact no grantees capable of taking title. *United States v. Southern Colorado Coal & T. Co.* 18 Fed. Rep. 273.

But while a patent issued to a person not in existence is void, if the patentee used a name different from his own to designate himself where he bought property, and made the entry in that name for himself, merely using it as he would the one by which he was usually known, and indorses the patent in that name with the same view, the title will inure to the transferee. *Thomas v. Wyatt*, 31 Mo. 188, 77 Am. Dec. 640.

So, an instrument in the form of a mortgage, which is filed for record, but which was payable to a fictitious person, and which secured no indebtedness and there was no delivery, is not such an encumbrance upon the property mortgaged as will invalidate an insurance policy thereon providing that if any encumbrance existed the policy should be void. *Fitchner v. Fidelity Mut. F. Asso.* (Iowa) 26 Ias. L. J. 326.

But a mortgagor who executes a mortgage to secure a promissory note which was given to secure advances to be made by the mortgagee, where the mortgagee after having made advances to an amount less than the face of the note assigned his interest in the mortgage and note to a fictitious person indorsing the note in blank without recourse, and then sold the note and mortgage for property, to a person acting in good faith without notice, delivering the note and mortgage with what purported to be an assignment to the fictitious person and from the fictitious person to the 39 L. R. A.

A man's name may be forged by a signature which leaves out the middle name.

Lafin & R. Powder Co. v. Seytler, 146 Pa. 434, 14 L. R. A. 690.

Mr. J. B. Frazier also for appellants.

Messrs. P. B. Mayfield & Son and *Eller & Milligan*, for appellees:

The persons who took the bonds as collateral took them on the security of the real estate alone. None of them knew anything about C. Phillips nor whether there was such a person in existence. In fact there was no such person though Wiehl has succeeded in finding a man named C. B. Phillips.

Consequently the holders of the bonds still have all the security they bargained for, and defendant Robertson is not resisting the enforcement of the deed of trust nor the personal judgment over against him on the notes. He simply wished the security to be shared by the holders in proportion to the bonds held by them as provided in the deed of trust.

There is no reason why one beneficiary under the trust should be allowed to absorb

purchaser, and after the purchaser had notice of the facts the mortgagee made a new assignment to him, cannot redeem as against such purchaser except on paying the full amount of the note. *Bassett v. Daniels*, 136 Mass. 547.

So, a bill of lading issued in the name of a fictitious or nonexistent firm imposes no liability upon the railroad company. *Bank of Tupelo v. Kansas City, M. & B. R. Co.* (Miss.) 16 So. 572; *Jasper Trust Co. v. Kansas City, M. & B. R. Co.* 99 Ala. 416.

And an assignment of stock by a subscriber in a turnpike company to a fictitious person is a mere nullity, and does not affect the title of the assignor. *Muskingum Valley Turnp. Co. v. Ward*, 13 Ohio, 120, 42 Am. Dec. 191.

§ III. Of makers and drawers of negotiable paper.

One who makes notes in a fictitious name which he had not used or held himself out as using in the transaction of other business, and by which he was not known, is not liable on contract thereon to one who buys them from the payees, though he was an innocent holder. His relation to such holder of the notes is not one of contract but of tort. *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

And where he had not by word or act asserted that they were his notes he is not estopped to deny them to be his as against a person who did not take them immediately from him or on his credit. *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

In that case *Gibson v. Minet*, 1 H. Bl. 506, 2 Bro. P. C. 43, 3 T. R. 481, and *Phillips v. Im Thurn*, L. R. 1 C. P. 463, 35 L. J. C. P. N. S. 220, 14 L. T. N. S. 406, 14 Week. Rep. 653 18 C. B. N. S. 694, 11 Jur. N. S. 439, 12 L. T. N. S. 457, 13 Week. Rep. 750, *infra*, IV. b. were distinguished upon the ground that those cases turn upon the rule that the defendant's own acceptance bound him so that he could not, even if he acted in good faith, dispute the genuineness of the prior signature.

There is no essential difference between a note purporting to be made by a person or corporation that has no capacity to make it and a note purporting to be made by one that in fact has no existence, or between a note on which the name of the person by whose hand it was written appears, and a note on which it does not. And there is no more reason for holding the maker liable to an action upon it as his own contract in the one case than in the other. *Bartlett v. Tucker*, 104 Mass. 336, *dictum*; *Pease v. Pease*, 35 Conn. 131, 36 Am. Dec. 225, *dictum*.

The only distinction is that in the latter case the proof ought to be very clear to show that the con-

all the security to the exclusion of the others.

The deed of conveyance from C. Phillips — Robertson and wife to C. Phillips (assumed name), and the deed of trust made by C. Phillips to D. L. Grayson, trustee, operated as a conveyance by C. P. Robertson and wife immediately, and immediately to D. L. Grayson, trustee.

Having accepted the trust, and having by agreement had a sale and purchase in the name of F. F. Wiehl, trustee, for the common benefit, the properties became charged and impressed with the trust, and no one of the beneficiaries could renounce the trust and acquire by attachment or otherwise priority over the co-beneficiaries as illegally attempted in this case.

Swanson v. Tarkington, 7 Heisk. 618.

A conveyance to and by a person under an assumed name passes title.

Wilson v. White, 84 Cal. 239.

One who falsely represents himself to be another person, and executes a deed in the name

of such person, may be sued under that name for breach of covenants in the deed.

Press v. Le Poidevin, 19 Abb. N. C. 128.

The assumption of a name where no person is injured thereby will not amount to forgery. 2 Dan. Neg. Inst. 818.

A note payable to a fictitious person, or to a person not *in esse*, and indorsed in blank under such name as against the real maker of the note in the hands of an innocent holder, will be held to be payable to bearer, or have legal operation as though so made.

Story, Prom. Notes, § 89; 1 Dan. Neg. Inst. 287; *David v. Williamsburgh City F. Ins. Co.* 88 N. Y. 270, 38 Am. Rep. 418.

Mr. D. L. Grayson, trustee, *in propria persona*.

Beard, J., delivered the opinion of the court:

The records in these consolidated causes present a series of transactions which are certainly unique in character. The defendant C.

tract was not designed to be a personal contract. *Pease v. Pease*, 35 Conn. 181, 95 Am. Dec. 225, *dictum*.

The fact that the drawer of a bill of exchange subscribed it in a name different from his own, however, does not make it a forgery so as to defeat a recovery thereon by an innocent indorsee, unless it is proved that the different name was used for purposes of fraud. *Schultz v. Astley*, 2 Bing. N. C. 544, 2 Scott, 815, 1 Hodges, 542, 7 Car. & P. 99.

And one who makes a promissory note in the name of another without authority, and which is delivered to the payee for a valuable consideration, will be presumed to have undertaken to bind himself, and he will be held liable thereon in an action against him in his true name upon a count alleging that he made the note by the name used. *Grafton Bank v. Flanders*, 4 N. H. 239.

And one of two partners, each of whom had authority to bind the other by drawing or indorsing bills of exchange, is liable to persons from whom money was obtained upon bills in fictitious names indorsed by the other partner in the name of the firm, where the money was afterwards applied to partnership purposes. *Thicknesse v. Bromilow*, 2 Crompt. & J. 425.

So, the payee and indorser of a promissory note is liable as maker where he knows the maker is a fictitious person, and if he were to be regarded as an indorser he would be liable on his indorsement without demand or notice. *Bundy v. Jackson*, 24 Fed. Rep. 629.

IV. Payees.

a. In promissory notes.

That a note was made payable to a fictitious person or bearer is no defense against a bona fide holder thereof receiving it without notice of that fact before it came due for value. *Lane v. Krekle*, 22 Iowa, 399.

And that the maker of a note did not know that the payee therein was fictitious is no defense against such a holder, as by making it payable to such person he avers his existence and is estopped as against an innocent holder to assert the fiction. *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501.

And that the holder of a note made payable to a fictitious payee or order received it from a person professing to be the agent of the fictitious payee, and who indorsed it as such to the holder, is not sufficient to charge him with notice of the fictitious character of the payee, or put him upon inquiry beyond the face of the note as to the existence of

such agent's principal. *Lane v. Krekle*, 22 Iowa, 399.

The general and common-law rule is that a note payable to a fictitious person may be recovered upon by any bona fide holder as upon a note payable to bearer. *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501; *Plets v. Johnson*, 3 Hill, 112.

And substantially the same rule has been adopted by statute in some of the states. See *Plets v. Johnson*, 3 Hill, 112, and cases set forth below.

But the rule that a negotiable instrument made payable to a fictitious person or order is in effect payable to bearer applies only where it is so made with the knowledge of the party making it, and does not apply where the maker supposed the payee to be a real person, and, intending payment to be made to such person or his order, is induced by the fraud of another to so draw it. *Armstrong v. National Bank*, 46 Ohio St. 512, 6 L. R. A. 625.

And a negotiable note made payable to a fictitious person and negotiated by the maker, which is given by N. Y. Rev. Stat. 765, § 5, the same validity as against the maker and all persons having knowledge of the facts as if payable to bearer, includes only paper made with knowledge that the payee is fictitious, and does not include paper made by one who supposes the payee to be a real person, and which is fraudulently negotiated by a third person without the maker's fault. *Shipman v. Bank of the State*, 126 N. Y. 318, 12 L. R. A. 791.

The maker of such a promissory note is not liable thereon to a person claiming as indorsee, unless proved to have had knowledge of the fact that the payee was fictitious at the time of the signing. *Maniort v. Roberts*, 4 E. D. Smith, 83.

But knowledge of the facts within the meaning of N. Y. Rev. Stat. 765, § 5, providing that promissory notes made payable to the order of the maker or a fictitious person if negotiated by him shall have the same validity as against him and all persons having knowledge of the facts as if payable to bearer, consists simply of knowledge that the note is payable to the order of the maker or of a fictitious person. *Irving Nat. Bank v. Alley*, 79 N. Y. 532.

And a note made payable to fictitious persons by inadvertence, which had been negotiated, may be recovered upon as payable to bearer under that statute. *Stevens v. Strang*, 2 Sandf. 138.

A note drawn payable to the order of a fictitious person should, under 2 N. Y. Rev. Stat. 54, § 5, be transferred by delivery only, or by the maker's own indorsement, and not by indorsing the name of the fictitious payee. *Maniort v. Roberts*, 4 E. D. Smith, 83.

P. Robertson seems at one time to have been a man of some mercantile reputation in the city of Chattanooga. Whether as the result of bad habits or not does not appear, but he finally passed out of business, and at the same time his condition was such that for a while he was under treatment in a sanitarium or asylum. On his release his need of money being great, a plan, according to his statement, was submitted to him for raising enough to relieve this need. The plan thus suggested was that Robertson, who was the owner of certain lots in Chattanooga, should bond these,—a method which he was made to understand was very prevalent, and which, if adopted in this case, could work no injury to anyone. This plan commended itself to Robertson as possessing superior advantages, and therefore he set about carrying it out. The details of the scheme were as follows: Robertson had prepared a deed, which was executed by himself and wife, conveying these lots to one C. Phillips for an expressed consideration of \$7,500, of

which \$1,500 was acknowledged to be paid and the balance evidenced by six bonds of \$1,000 of the grantee, payable in five years, with interest coupons payable semi-annually attached. At the same time he drafted a trust deed, by the terms of which C. Phillips conveyed this property to one Grayson as trustee to secure the payment of these bonds and coupons, with the usual power of foreclosure by a public sale in the event the grantee should fail to pay either the coupons or the principal of these bonds. When prepared, Robertson took possession of this instrument, and carried it with him to his home in Georgia, and very late in the evening of October 17, 1892, he went to the office of one Head, a notary public of that state, taking this trust deed with him, with a certificate attached and already filled out, and told the notary that he desired to acknowledge it. Knowing Robertson, and suspecting no foul play, the officer took his acknowledgment, and without any examination attached his official signature and seal to the

But the holder of a negotiable promissory note made to raise money, which is advanced by a third person instead of the payee, may declare upon such note as made payable to himself by the name of the payee, or as payable to bearer, regarding the name of the payee as fictitious. *Hunt v. Aldrich*, 27 N. H. 81; *Elliot v. Abbot*, 12 N. H. 549, 87 Am. Dec. 227.

And a recovery may be had on a promissory note made payable to a fictitious person where money had passed between the parties, on the money counts, and when it did not pass between them a recovery can be had on a count alleging the note to have been made payable to bearer. *Foster v. Shattuck*, 2 N. H. 446.

But to warrant a recovery by a holder of a note against the maker, which had not been indorsed, he must prove affirmatively that the payee is a fictitious person. *Maniort v. Roberts*, 4 E. D. Smith, 83.

Where a note is given to a person by a name other than his real name, he may aver in a declaration thereon that the note was given to him by the name specified in the note, but it will then be necessary to prove to the satisfaction of the jury that he was the person intended as the payee. *Chenot v. Lefevre*, 8 Ill. 637.

So, a party may become an indorser of a bill or note by any mark or designation he chooses to adopt, provided it be used as a substitute for his name and he intends to be bound by it. *Brown v. Butchers' & D. Bank*, 6 Hill, 443, 41 Am. Dec. 755.

And a person to whom a note is given which is drawn payable to a firm when no such firm exists may assume such firm name and indorse the note in that name, and it will be a good indorsement in the hands of an innocent holder, who may collect the same of the maker under a count for money had and received. *Blodgett v. Jackson*, 40 N. H. 21.

And a promissory note payable to a fictitious copartnership, which is indorsed by a person in the fictitious firm's name, is valid in the hands of innocent third parties purchasing for value and before maturity, both as against the maker and the person thus indorsing it. *Bull's Head Bank v. McFeeters*, 9 Jones & S. 215.

And N. Y. Laws 1833, chap. 281, prohibiting the transaction of business by any person in the name of a firm that does not represent any real partnership, does not affect the liability of a person who indorses a note in the name of a fictitious copartnership to which it purported to have been given. *Bull's Head Bank v. McFeeters*, 9 Jones & S. 215.

Where a note is made payable to a person by 89 L. R. A.

name or order, when no particular person of that name was intended to be the payee or had any interest in the note, the name of the payee is to be regarded as fictitious. *Foster v. Shattuck*, 2 N. H. 446.

And a note made payable to a corporation which never had even a *de facto* existence is in effect payable to a fictitious payee, and any bona fide holder may sue upon it, and need not aver that he is a bona fide holder. *Farnsworth v. Drake*, 11 Ind. 101.

b. In bills of exchange, checks, and drafts.

A bill of exchange running to a fictitious payee is the same as if drawn payable to the bearer. *Kohn v. Watkins*, 28 Kan. 601, 40 Am. Rep. 336; *Rogers v. Ware*, 2 Neb. 29; *Willets v. Phoenix Bank*, 2 Duer, 130.

And indorsement thereof is not necessary to its validity or negotiability. *Rogers v. Ware*, 2 Neb. 29.

And the same rule applies to the case of a bank check. *Willets v. Phoenix Bank*, 2 Duer, 130, *dictum*.

And a draft issued to a person who directs an assumed name to be inserted and thereafter indorses that name upon it becomes, when so indorsed, negotiable, and will pass by mere delivery to an innocent holder for value. *Anderson v. Dundee State Bank*, 66 Hun, 613.

In *Rogers v. Ware*, 2 Neb. 29, *supra*, *Gibson v. Minet*, 1 H. Bl. 569, 3 T. R. 481, 2 Bro. P. C. 48, *infra*, was distinguished upon the ground that the drawer there indorsed the name of the fictitious payee on the bill himself.

So, a bona fide holder for a valuable consideration, of a bill of exchange which was signed in blank and delivered to another for the purpose of filling up, which he did by inserting the name of a fictitious payee or order, and indorsed it in that name, and transferred it to such holder, may maintain an action against the signer as a drawer of a bill payable to bearer on a count to that effect, or on a count stating the special circumstances of the case. *Collis v. Emett*, 1 H. Bl. 513.

And a plea that the drawer of a bill of exchange did not know the payee to be fictitious is no defense against a bona fide holder thereof where the drawer was induced to so make it by the false representations of a correspondent to whom he transferred it with instructions for its disposition. *Kohn v. Watkins*, 20 Kan. 601, 40 Am. Rep. 386.

And one who purchases goods of another, which prove to be stolen property, and gives a check therefor, payable in a name given him by the seller

certificate. It proved, however, in the end, that Robertson had affixed the name of C. Phillips, the assumed grantor, to the trust deed, and the notary had appended his name and seal of office to a certificate which recited that "personally appeared C. Phillips, the within-named bargainer, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained." Thus certified, and without anything to induce suspicion of the gross fraud perpetrated on him, this officer redelivered the instrument to Robertson, who on the next day caused it to be noted for registration in Hamilton county, where his deed to Phillips had already been registered. There was no such man as C. Phillips, this name being selected by the parties to this scheme because this was the baptismal or Christian name of Robertson. Within a very short time thereafter, using these bonds as collateral se-

curity, Robertson obtained advances of money from various parties. From the complainants Wiehl, Probasco, & Co. he obtained a loan of \$1,000, and gave one of these bonds with coupon attached as security; four he gave to the complainant the Cleveland National Bank to secure a debt of \$2,400; and one to C. L. Hardwick & Co., of Dalton, Georgia, as security for \$1,000. Robertson defaulted on the interest coupons, and the beneficiaries, seeing that it was best to foreclose the trust deed, thereupon directed that this be done. Accordingly Mr. Grayson (entirely ignorant of the method adopted in the execution of these papers), as trustee, advertised the property for sale in accordance with the terms of the trust deed, and at the sale made by him a third party, acting under the agreement already reached by the beneficiaries, bought the property in the name of Wiehl, Probasco, & Co., who were to hold it in trust for the various

which proves to be fictitious, which check is indorsed by such seller in such fictitious name to another in payment of a board bill, who takes it without knowledge of the facts, is liable thereon for the amount thereof to such innocent holder. *Robertson v. Coleman*, 141 Mass. 231, 55 Am. Rep. 471.

And one who makes a draft to a real person in actual existence but designated by a false or assumed name, of which fact he is ignorant, in payment of property received from him, cannot defend as against bona fide holders for value and set up fraud practised by the payee upon the maker, whether he was induced to adopt the name used in the draft through fraud or by mistake. *Forbes v. Eapy*, 21 Ohio St. 474.

So, an indorser of a bill of exchange is bound by his indorsement though the bill is made to a fictitious payee. *Ex parte Clarke*, 3 Bro. Ch. 238.

But the indorsement of a bill of exchange by a person into whose hands it comes by mistake, though his name is the same as that of the payee, with knowledge that he is not the person to whom the bill was made payable, is a forgery, and will not pass title to the bill. *Mead v. Young*, 4 T. R. 28.

And the acceptance of a bill without knowledge on the part of the acceptor that the payee therein named was fictitious is completely void, and imposes no liability upon the acceptor. *McCall v. Corning*, 3 La. Ann. 409, 48 Am. Dec. 454.

And a person discounting a bill payable to a fictitious payee for the benefit of the drawers and with knowledge of the transaction cannot recover of the acceptor. *Hunter v. Jeffery, Peake*, Add. Cas. 148.

But an acceptor of a bill who knew that the payee was a fictitious person is liable to a bona fide holder thereof who did not know of such fiction. *McCall v. Corning*, 3 La. Ann. 409, 48 Am. Dec. 454.

And an innocent indorsee for a valuable consideration, of a bill of exchange drawn in favor of a fictitious payee, which was known to the acceptor as well as to the drawer and the name of such payee was indorsed on the bill, may recover against the acceptor as on a bill payable to bearer. *Hunter v. Blodget*, 2 Yeates, 480; *Minet v. Gibson*, 3 T. R. 482; and see *Gibson v. Minet*, 1 H. Bl. 509.

And the acceptor *supra* protest of a bill of exchange for the honor of the drawer is, like the drawer himself, estopped to deny that the bill was valid, and not competent to set up as a defense to an action against him by the indorsee that the payee is a fictitious person, and that he was ignorant of that fact when he accepted the bill. *Phillips* 39 L. R. A.

v. Im Thurn, 18 C. B. N. S. 694, 11 Jur. N. S. 489, 12 L. T. N. S. 457, 18 Week. Rep. 750.

The acceptor of a bill of exchange made to enable the drawer to raise money, which is made payable by such drawer to a fictitious payee and indorsed by him in such fictitious name, which bill is put in circulation, is estopped to object that the payee therein named was fictitious, and to claim that he had nothing to do with it, as by lending his acceptance he had enabled the drawer to make the bill in that form. *Stone v. Freeland*, 1 H. Bl. 316, note.

One of the parties to a mercantile transaction in which by express agreement a bill was drawn and indorsed by procuration in the name of a fictitious or dead person, and the position of one of the parties has been altered by giving up certain goods to the other, is not at liberty afterwards to say that the fact which was assumed as the basis of the contract or arrangement, and upon which the other party acted and thereby altered his position, was really untrue, and that the bill was void. *Ashpital v. Bryan*, 3 Best & S. 474, 3 Fost. & F. 153, 33 L. J. Q. B. N. S. 323, 9 Jur. N. S. 791, 11 L. T. N. S. 221, 12 Week. Rep. 1082.

And a bona fide purchaser for a valuable consideration of a bill of exchange drawn by a person and others upon himself in favor of a fictitious person, which fact was known to all the parties concerned in drawing it, and who received the value from a second indorser, may recover the amount in an action against the acceptor for money paid or money had and received. *Tatlock v. Harris*, 3 T. R. 174; *Vere v. Lewis*, 3 T. R. 182.

And where a bill of exchange is drawn in favor of a fictitious payee with the knowledge of both the acceptor and drawer, and the name of such payee is indorsed on it by the drawer with the knowledge of the acceptor, which fictitious indorsement purports to be to the drawer himself or his order and then the drawer indorses the bill to an innocent indorsee for value and it is afterwards accepted, and no intent to defraud anyone appears, the innocent indorsee may recover against the acceptor, as on a bill payable to bearer. *Gibson v. Minet*, 1 H. Bl. 509.

So, the acceptor of a bill of exchange drawn in the name of a fictitious person, payable to the order of the drawer, is considered as undertaking to pay to the order of the person who signed as drawer, and an indorsee may bring evidence to show that the signature of the supposed drawer to the bill and to the first indorsement are in the same handwriting. *Cooper v. Meyer*, 10 Barn. & C. 468.

And evidence is admissible in an action by an in-

bondholders. This sale, however, was not consummated. Soon afterwards Wiehl, Probasco, & Co., being informed that the deed of trust and bonds were executed as has been before detailed, filed their bill in one of these consolidated causes, in which they charge that the deed from Robertson to Phillips was ineffectual to convey title, as there was no such grantee, and that the deed of trust was equally ineffectual in conveying title to Grayson, trustee, because the name of C. Phillips was forged to that instrument by Robertson. They allege that, as the owner of Robertson's note, and by reason of his nonresidence, they have a right to treat these conveyances as of no force and value, and attach the lots in question and appropriate them, as far as might be necessary to the payment of their debt. They especially repudiate the trust deed, and decline to take any benefit from it, or the sale made under it, by Grayson as trustee. Subsequently the Cleveland National Bank filed its

bill in the other of said causes, setting up its ownership of the \$2,400 note of Robertson and its possession of four of these coupon bonds, and charging bad faith upon the part of Wiehl, Probasco, & Co. in repudiating the sale made in the interest of all the beneficiaries of the trust deed, and insisting that the legal effect of the execution of this deed of trust to Grayson was that the title to this property passed out of Robertson to said trustee, although the maker used in its execution the false name of C. Phillips, and that this trustee held it for the security of all the holders of said bonds and coupons, save alone the bond of Wiehl, Probasco, & Co., which it was insisted could not participate because of the renunciation of all interest in the trust deed by its owner. Among other things, this bill prayed that the attachment issued at the instance of Wiehl, Probasco, & Co. be vacated, and that said deed of trust be set up and established, and that the lots covered by it be sold

inocent indorsee for value against the acceptor of a bill drawn by the maker to a fictitious payee or order and indorsed by him in that name, of irregular and suspicious transactions and circumstances relating to other bills drawn by the one upon the other payable to fictitious payees and accepted by such acceptor, in order to raise an inference that the acceptor knew the name of the payee to be fictitious, or that he had given authority to draw the bill in question payable to a fictitious person, though none of such transactions or circumstances had any apparent relation to the bill in question, and though none of them proved that he accepted any of such other bills with knowledge that the payees mentioned in them were fictitious. *Gibson v. Hunter*, 2 H. Bl. 288, 6 Bro. P. C. 255.

In *Bennett v. Farnell*, 1 Campb. 180, however, it was held that a bill of exchange made payable to a fictitious person or his order is neither in effect payable to the order of the drawer nor to bearer, but is completely void, but that if money paid by the holder of such a bill as the consideration for its indorsement to him gets into the hands of the acceptor it may be recovered back as money had and received.

So, a bank which certifies a check purporting to have been drawn upon it payable to order is liable to a bona fide holder in the ordinary course of business thereon, whether the indorsement of the check is that of the payee named or whether a fictitious person is named as payee and the check is indorsed in such fictitious name. *Hagen v. Bowery Nat. Bank*, 6 Lans. 490.

And a bank which issues and puts in circulation a draft payable to order inserting the name given by the person requiring it, relying simply upon the word of an entire stranger that it is his name, under circumstances somewhat calculated to excite suspicion, is liable thereon where such name was indorsed upon it when presented for discount to an innocent holder for value. *Anderson v. Dundee State Bank*, 66 Hun. 613.

And where by the fraud of a third person a depositor of a bank is induced to draw his check payable to a nonexisting person or order, the drawer being in ignorance of the fact and intending no fraud, the bank on which it is drawn is not authorized to pay it and charge the amount to the account of the depositor on the indorsement of the party presenting it, although it appears to have been previously indorsed by the party named as payee, and as such indorsement is in effect a forgery, payment thereof by the bank confers no right on it as against the drawer of the check. *Armstrong v. National Bank*, 46 Ohio St. 512, 6 L. R. A. 625.

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In that case *Lane v. Krekle*, 22 Iowa, 399, *supra*, was distinguished upon the ground that the note there in question was made payable to a fictitious person or bearer, and passed by delivery without indorsement, and *Phillips v. Im Thurn*, 18 C. B. N. S. 694, 11 Jur. N. S. 469, 12 L. T. N. S. 457, 18 Week. Rep. 750, *supra*, was distinguished upon the ground that in that case the signature of the drawer, as well as the indorsement, was a forgery, but the acceptor was held liable because the paper was discounted relying in good faith upon the acceptance; and *Ort v. Fowler*, 31 Kan. 473, 47 Am. Rep. 501, *supra*, IV. a, was criticised as not supported by authority so far as it holds that a note made payable to a fictitious person or order is in effect payable to bearer irrespective of the knowledge of the maker.

An instrument, though not in reality a bill of exchange, is within the meaning of the bills of exchange act of 1882 (45 & 46 Vict. chap. 61), providing that a bill of exchange made payable to a fictitious person should be treated as payable to bearer, where it is in the form of a bill manufactured by a person who forges the signature of the named drawer and obtains by fraud the signature of the acceptor, and forges the signature of the named payee and presents the document for payment, although the drawer and named payee were ignorant of all the circumstances. *Bank of England v. Vagliano Bros.* [1891] A. C. 107.

And the person named as the payee in a bill of exchange is not prevented from being a fictitious or nonexisting person within the meaning of the bills of exchange act of 1882, § 7, subs. 3, so as to prevent the bill from being considered as payable to bearer, by the fact that at the time of drawing the instrument the drawee supposed him to be a real person, and checks are equally within the meaning of the act with bills of exchange. *Clutton v. Attenborough* [1895] 2 Q. B. 306; *Clutton v. Attenborough* [1897] A. C. 90, 66 L. J. Q. B. N. S. 221, 75 L. T. N. S. 556.

And a bill may be pleaded as payable to bearer within the meaning of the bills of exchange act of 1882 (45 & 46 Vict. chap. 61) where the person named as payee, and to whose order the bill is made payable on the face of it, is a real person, but has not, and never was intended by the drawer to have, any right upon it or arising out of it. *Bank of England v. Vagliano Bros.* [1891] A. C. 107.

See also generally, as to use of fictitious names in negotiable paper, note to *Armstrong v. Pomeroy Nat. Bank* (Ohio) 6 L. R. A. 625. F. H. B.

under proper decree in the interest of such bondholders as had not renounced this trust. All necessary parties were made defendants to these respective bills. The chancellor, on the hearing of these causes, dismissed the bill of Wiehl, Probasco, & Co., and decreed that the effect of the deed of trust to Grayson, trustee, was to vest the title to this property for the benefit of all the bondholders, directed a foreclosure sale for their benefit, and in effect declined to exclude Wiehl, Probasco, & Co. from a participation in the proceeds of the trust property. From this decree Wiehl, Probasco, & Co. alone appealed. The court of chancery appeals have affirmed the chancellor's decree, and the case is now before us by appeal from this decree of affirmance.

The theory of the bill of Wiehl, Probasco, & Co., as has been stated, is that the grant from Robertson and wife to C. Phillips, there being no such grantee, was waste paper, leaving the title in the grantor, and that the trust deed from C. Phillips to Grayson, trustee, being a forgery, communicated no title. There can be no doubt but that this contention is sound, so far as the effect of the deed from Robertson and wife to the fictitious grantee, Phillips, is concerned. The definition of a deed that it "is a writing sealed and delivered by the parties" (Co. Litt. 171; 2 Bl. Com. 295) makes it essential, for an instrument to operate as such, that there should be both a grantor and a grantee; so that a conveyance uncertain as to the person intended as grantee, as, for instance, where a grant is made to a "neighborhood" (*Thomas v. Marshfield*, 10 Pick. 864), or to one who is dead at the time of its execution (*Hunter v. Watson*, 12 Cal. 863, 78 Am. Dec. 548), or to a person purely fictitious (*David v. Williamsburgh City F. Ins. Co.* 83 N. Y. 265, 88 Am. Rep. 418), is inoperative and void. But we do not agree with appellants' counsel in their insistence that the deed of trust which Robertson executed in the name of C. Phillips was a nullity. On the contrary, we are satisfied, on reason and authority, that it as effectually conveyed the title to this property to Grayson, trustee, as if Robertson had used his own name in the conveyance. We think there can be no doubt but that, if the grantor had used in the execution of this deed his surname simply, his identity being established, it would have been operative to carry title; and we think it equally free from doubt that, using his Christian name, as the grantor did, and intending it to take effect as a perfect deed, and delivering it as such, it will be taken as conclusively binding upon him. The question in a case like this is, Did the grantor intend to bind himself by the instrument, and is his identity free from uncertainty? 1 Devlin, Deeds, §§ 154, 185. Mr. Devlin in his work on Deeds (vol. 1, § 191) states the law to be that "a patent issued to a person under an assumed name is not void, and a conveyance by such person under his assumed name will transfer title." And again, in § 188, the same author says: "Between the parties, a conveyance of property by the owner by any name will transfer the title. And when executed in a different name from that in which he acquired title, it will, when recorded, operate as constructive notice of the transfer of title, and

will be entitled to precedence over a deed to the same land executed in the name by which title to it was acquired, but subsequently recorded,"—citing to this proposition *Fallon v. Kehoe*, 38 Cal. 44. This exact question has been carefully and on authority considered by the supreme court of New York in *David v. Williamsburgh City F. Ins. Co.* 83 N. Y. 265, 88 Am. Rep. 418, and the same conclusion was reached there as is announced by Mr. Devlin. In that case Henry J. David conveyed real and personal property to Marx David, a fictitious person, and then in the name of this fictitious grantee, conveyed the same property to the plaintiff in the action, who undertook in her own name to protect it with insurance policies. It was subsequently burned, and the insurance company, discovering the character of these conveyances, declined to pay the loss upon the ground that the mythical character of "Marx David" had prevented title from passing into plaintiff. The court said: "The conveyances to Marx David were undoubtedly wholly invalid and inoperative, as there was no such person to take title; and if nothing more had been done, the title to the property would have remained in Henry J. David. But the title still remaining in him, he executed the bills of sale and the deed to the plaintiff, using or adopting, for that purpose, the name of Marx David. The papers thus executed were undoubtedly valid against him. . . . *Pro hac vice* it is his name." But appellants earnestly insist that, however this may be where a party, without fraud or wrongdoing, assumes a name other than his own in making a contract, yet that in this case Robertson, in using the name of C. Phillips, was guilty of the crime of forgery; that no contract can spring from a felony. Forgery at common law and under our statute is the fraudulent making or alteration of any writing to the prejudice of another's rights. 1 Whart. Crim. L. § 658; Mill. & V. Code, § 5492. While this transaction was highly discreditable, yet we do not think it falls within this definition. Whose rights were prejudiced by the assumption of this name? Not those of C. Phillips, because he was a mythical personage; nor were those of Mr. Grayson, the trustee, for he had none in the property, until this instrument was executed, and then there occurred by the use of this assumed name exactly what would have happened if the grantor had used his true name,—that is, he acquired title to the property; nor were the holders of these bonds prejudiced, because they had no interest either in the property or in these bonds at the time the trust deed was executed, and it was then the crime of forgery was committed, if at all. Whatever may have been the offense, if any, committed by Robertson in afterwards obtaining money on those bonds as executed by Phillips, at any rate it could not make that forgery which was not so at the time the trust deed was made. We do not think, under the facts disclosed, that this act was felonious. As Mr. Wharton, in volume 1, § 660, of his work on Criminal Law, says, it is not "forgery when the offense is not the assumption of the name of a supposed third person, but the adoption of an alias or alternative name of the party charged." But it is insisted

that this case must at all events be reversed, as the court below permitted on the trial the Cleveland National Bank, without proof of its execution, to read the note of Robertson held by it, over the objection of appellants. We do not think this objection was well taken. It is true that the bill of complainant bank alleged that it was the owner of a note of Robertson's for \$2,500, and that this averment was denied by the defendants Wiehl, Probasco, & Co., but it was admitted to be true by Robertson, the maker, against whom they sought a personal decree. Appellants were in nowise interested in this. As no relief was asked against them on the note it was immaterial to them whether complainant did or did not have

this note, or whether it was duly executed, as they had no controversy with the bank over it. The question that appellants were interested in was whether the complainant bank had the four bonds claimed by it, and as such holder could insist upon treating the property as a trust fund for their security. If it held these it was unimportant to appellants whether they were held as collateral to a note or as absolute owner. The Cleveland National Bank did not appeal, and we therefore cannot consider the question whether, having repudiated this trust deed, the chancellor was in error in letting Wiehl, Probasco, & Co. in to participate in the trust fund.

Affirmed.

NEW HAMPSHIRE SUPREME COURT.

Henry I. FAUCHER

v.

John W. WILSON.

(.....N. H.)

1. A person trucking goods for particular customers at prices fixed in each case by special contract is not a common carrier so as to be liable as an insurer of the goods.
2. A carrier is not liable for the loss due to the bursting of a hogshead of molasses by reason of fermentation, as this results from the operation of natural laws, which a common carrier does not insure against.

(July 28, 1895.)

ACTION to recover the value of a hogshead of molasses which burst while being moved by defendant from the railroad station to plaintiff's store. *Judgment for defendant.*

Defendant, a truckman, on one of the warmest days in the summer of 1891, undertook to transport a hogshead of molasses from the railway station to plaintiff's store. On arrival at the store the hogshead was found to be leaking from fermentation. Taps had been provided for gauging the hogshead, which might have been used for venting it. If they had been removed and the gas caused by fermentation allowed to escape before unloading the bursting might have been prevented. The negligence alleged was in failing to make the attempt to prevent the bursting.

Further facts appear in the opinion.

Messrs. Burnham, Brown, & Warren, for plaintiff:

The molasses was lost while in the possession and keeping of the defendant, a common carrier.

Under the common law the defendant became an insurer of the property while in his

possession, and liable for any loss unless occasioned by act of God or public enemy.

Coggs v. Bernard, 2 Ld. Raym. 909; *Moses v. Boston & M. R. Co.* 24 N. H. 71, 55 Am. Dec. 222; *Hall v. Cheney*, 86 N. H. 26; *Rixford v. Smith*, 52 N. H. 865, 18 Am. Rep. 42; *Ewart v. Street*, 2 Bail. L. 157, 28 Am. Dec. 181; *Gilmore v. Carman*, 1 Smedes & M. 279, 40 Am. Dec. 96; *Fish v. Chapman*, 2 Ga. 849, 46 Am. Dec. 398; *Leonard v. Hendrickson*, 18 Pa. 40, 55 Am. Dec. 587; *New Brunswick S. B. & C. Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 398; *Cooper v. Berry*, 21 Ga. 526; *Fergusson v. Brent*, 12 Md. 9, 71 Am. Dec. 582; *Arnold v. Jones*, 26 Tex. 835, 83 Am. Dec. 617; *Hooper v. Wells, F. & Co.* 27 Cal. 11, 85 Am. Dec. 211; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415; *Wolf v. American Exp. Co.* 43 Mo. 421, 97 Am. Dec. 406.

The defendant, in order to avoid his liability for the loss of the molasses, must satisfy the court that the loss was occasioned by the act of God.

Loss by act of God is such an "irresistible disaster as results immediately from natural causes, and is in no sense attributable to human agency."

Schouler, Bailments & Carriers, p. 391.

The act of God seems to involve some notion of an accident from natural causes, impossible to be foreseen, and therefore impossible to be guarded against.

Ewart v. Street, 2 Bail. L. 157, 28 Am. Dec. 181.

The criterion, it seems, is, that if it be such an accident as no human foresight or sagacity could have prevented, then the loss will be excused.

Gilmore v. Carman, 1 Smedes & M. 279, 40 Am. Dec. 96; *Fish v. Chapman*, 2 Ga. 849, 46 Am. Dec. 398.

NOTE.—As to liability of carriers as affected by act of God, see *Blythe v. Denver & R. G. R. Co.* (Colo.) 11 L. R. A. 615, and note; also *Long v. Pennsylvania R. Co.* (Pa.) 14 L. R. A. 741; *Lang v. Pennsylvania R. Co.* (Pa.) 20 L. R. A. 380; *Libby* 39 L. R. A.

v. Maine C. R. Co. (Me.) 20 L. R. A. 812; and *Wald v. Pittsburg, C. C. & St. L. R. Co.* (Ill.) 36 L. R. A. 356. As to transportation of dangerous articles by carrier, see note to *California Powder Works v. Atlantic & P. R. Co.* (Cal.) 36 L. R. A. 648.

If divers causes concur in the loss, the act of God being one, but not the immediate or proximate cause, such act of God does not discharge the carrier. To have this effect, it must be one exclusive of human agency.

New Brunswick S. B. & C. Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

To relieve him the act of God must be the immediate cause of the loss.

Fergusson v. Brent, 12 Md. 9, 71 Am. Dec. 582.

If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God.

Michaels v. New York C. R. Co. 30 N. Y. 564, 86 Am. Dec. 415.

The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause.

Wolf v. American Exp. Co. 48 Mo. 421, 97 Am. Dec. 406.

The defendant well knew that molasses fermented in warm weather. He knew that the day that he undertook to transport it was a warm day—"one of the warmest of the season." He knew and had every opportunity to know whether the cask was full or not. If the defendant had been asked by the plaintiff to bring from the freight station instead of a hogshead of molasses a certain box which bore his name, with no other mark upon it, and was not informed of its contents and had no reason to believe it contained anything dangerous to handle or expose to the sun when in fact it contained nitro-glycerine, then in case of accident and loss by explosion the carrier might not be liable for the loss.

Parrott v. Wells ("The Nitro-Glycerine Case"), 82 U. S. 15 Wall. 524, 21 L. ed. 206.

But the defendant here was negligent in undertaking to transport the molasses at the time of day that it was transported, and during a day which was one of the warmest of the season when he knew the contents of the hogshead and that molasses ferments in warm weather.

Rixford v. Smith, 52 N. H. 361, 18 Am. Rep. 42; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415; *Schouler, Bailments & Carriers*, p. 399.

The burden of proof is on the defendant to show that the loss occurred from some cause that would furnish him with a defense.

Hall v. Cheney, 36 N. H. 32.

Mr. Joseph W. Fellows for defendant.

Chase, J., delivered the opinion of the court:

It is not found that the defendant was a common carrier. The finding that he was engaged in the business of trucking goods for hire from the railway freight station to different

stores in the city lacks the distinguishing characteristics of a common carrier, namely, the holding of oneself out as ready "to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow." *Shelden v. Robinson*, 7 N. H. 157, 163, 26 Am. Dec. 726; *Elkins v. Boston & M. R. Co.* 23 N. H. 275; *Moses v. Boston & M. R. Co.* 24 N. H. 71, 80, 88, 89, 55 Am. Dec. 222; *McDuffee v. Portland & R. R. Co.* 52 N. H. 480, 448, 18 Am. Rep. 72; *State v. United States & C. Exp. Co.* 60 N. H. 219, 261; 2 Kent, Com. 597, 598; *Story, Bailm.* §§ 495, 508; *Brind v. Dale*, 8 Car. & P. 207; *Liver Alkali Co. v. Johnson*, L. R. 9 Exch. 388, 343; *Seafie v. Farrant*, L. R. 10 Exch. 358, 365; *Nugent v. Smith*, L. R. 1 C. P. Div. 423; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Allen v. Sackrider*, 87 N. Y. 341; *Lough v. Outerbridge*, 148 N. Y. 271, 278, 25 L. R. A. 674.

The inference from this finding is as strong, to say the least, that the defendant's business was limited to trucking for particular customers at prices fixed in each case by special contract, as it is that he held himself out as ready to truck for the public indiscriminately, at reasonable prices. If such was the character of his business, he was not an insurer of the plaintiff's goods (there being no special contract of insurance), and was only bound to exercise ordinary care in respect to them.

If the defendant was a common carrier, he is not liable for the plaintiff's loss, since it happened from the operation of natural laws which a common carrier does not insure against. *Hudson v. Baxendale*, 2 Hurlst. & N. 574; *Great Western R. Co. v. Flower*, 20 Week. Rep. 776; *Nugent v. Smith*, L. R. 1 C. P. Div. 423; *Nelson v. Woodruff*, 66 U. S. 1 Black, 156, 17 L. ed. 97; *Smith v. New Haven & N. E. Co.* 12 Allen, 581, 533, 90 Am. Dec. 166; *Swelland v. Boston & A. R. Co.* 102 Mass. 276, 282; *Dow v. Portland Steam Packet Co.* 84 Me. 490; *Coupland v. Housatonic R. Co.* 61 Conn. 581, 15 L. R. A. 584; *Rixford v. Smith*, 52 N. H. 365, 18 Am. Rep. 42.

In *Farrar v. Adams*, 1 Bull. N. P. 69c, it is said that "if an action were brought against a carrier for negligently driving his cart, so that a pipe of wine was burst, and was lost, it would be good evidence for the defendant that the wine was upon the ferment, and, when the pipe burst, he was driving gently."

It being found that the plaintiff's loss was not due to any want of ordinary care on the part of the defendant, there must be judgment for the defendant.

Smith, J., did not sit. The others concurred.

NEW YORK COURT OF APPEALS.

William MATTHEWS, Exr., etc., of Caro-
line Silvernail, Deceased, *Appt.*,

AMERICAN CENTRAL INSURANCE
COMPANY, *Respt.*,

(154 N. Y. 449.)

1. A standard insurance policy being prepared by insurers should be construed, when the meaning is doubtful, most favorable to the insured.
2. A liberal construction of an insurance policy, if it is a reasonable one and will prevent injustice, should be adopted when a literal construction would lead to manifest injustice.
3. In case of a loss by fire after the death of the original insured and before the appointment of a legal representative those interested in the policy must make reasonable efforts to see that the covenants as to notice and proofs of loss are kept, and within a reasonable time must use such agencies as the law provides to secure that result.
4. The appointment of a temporary representative who may take the necessary steps to prosecute a cause of action on an insurance policy within the periods limited may be necessary in case of a loss occurring after the death of the insured, if the appointment of an executor or administrator cannot for any reason be secured with ordinary promptness.
5. A dismissal of the complaint on the merits cannot be made by the appellate division on hearing exceptions upon a motion for a new trial under Code Civ. Proc. § 1000, but if the exceptions are well taken the motion should be granted and the case sent back for a new trial; if they are not well taken, the motion should be denied and judgment entered on the verdict or order of nonsuit, as the case may be.

(*Martin and O'Brien, JJ., dissent.*)

(December 7, 1897.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of the Circuit Court for Steuben County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Modified and affirmed.*

Statement by Vann, J.:

On the 1st of August, 1889, the defendant issued its policy of insurance, of the standard form, to Mrs. Caroline Silvernail, whereby it insured her dwelling house, barn, and the produce therein, against loss or damage by fire, to an amount not exceeding \$1,050, for the term of three years from that day. On the 2d of December, 1891, Mrs. Silvernail died, leaving a will, in which the plaintiff was nominated as sole executor. The probate of her will was opposed by some of her heirs, and on the 20th

of April, 1892, when the contest was still in progress before the surrogate, a fire occurred, which destroyed a portion of the property insured, both real and personal. On the 15th of May, 1894, the contest over the will resulted in its admission to probate, and the appointment of the plaintiff as executor. July 11, 1894, proofs of loss were sworn to by the plaintiff, and shortly thereafter mailed to the defendant, which received them at the home office, in St. Louis, July 23, 1894, and retained them, without objection. The loss not having been paid, on the 29th of October following this suit was commenced upon the policy. The defendant pleaded as defenses that the action was not begun within twelve months next after the fire, although there was a limitation by contract to that period, that written notice of the loss was not immediately given, and that proofs of loss were not furnished within sixty days after the fire, as required by the policy. Upon the trial, after the defendant's counsel had expressly stated that he did not ask to have any question submitted to the jury, the court, upon motion of the plaintiff, directed a verdict in his favor for the sum of \$612, the admitted value of the property destroyed, with interest from the 23d of September, 1894, and ordered that the defendant's exceptions should be heard by the appellate division in the first instance, and that entry of judgment should in the meantime be suspended. The appellate division having, by a divided vote, sustained the exceptions and dismissed the complaint, the plaintiff appealed to this court.

Mr. John F. Parkhurst, for appellant:

The one-year limitation in the policy did not commence to run until the appointment of plaintiff as executor.

Wenman v. Mohawk Ins. Co. 13 Wend. 268, 28 Am. Dec. 464; *Bucklin v. Ford*, 5 Barb. 393; *Sanford v. Sanford*, 62 N. Y. 553; *Richards v. Maryland Ins. Co.* 12 U. S. 8 Cranch, 84, 3 L. ed. 496; *Dunning v. Ocean Nat. Bank*, 6 Lans. 296; *Pendleton v. Pendleton*, 6 Bush, 469; *Word v. West*, 38 Ark. 243; *Benjamin v. DeGroot*, 1 Denio, 156; Code Civ. Proc. § 415; *Angell, Limitations of Actions*, §§ 54-68, 144; *New York v. Hamilton F. Ins. Co.* 39 N. Y. 46; *Murray v. East India Co.* 5 Barn. & Ald. 204; *Braun v. Sauerwein*, 77 U. S. 10 Wall. 218, 19 L. ed. 895; *Hobart v. Connecticut Turnp. Co.* 15 Conn. 145; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 323, 43 Am. Rep. 297; *Hay v. Star F. Ins. Co.* 77 N. Y. 285; *Wood, Fire Ins.* p. 145; *Longhurst v. Star Ins. Co.* 19 Iowa, 864; *Stout v. City F. Ins. Co.* 12 Iowa, 371, 79 Am. Dec. 539.

The legal representative was the only person who could sue upon the policy. It was a personal contract to which the creditors and heirs were not parties.

Wyman v. Prosser, 86 Barb. 371; *Wyman v. Wyman*, 26 N. Y. 255; *Lawrence v. Niagara F. Ins. Co.* 2 App. Div. 268.

The cause of action, which must exist before the statute can run, is not complete until there exists a party to sue and be sued.

NOTE.—As to the effect of insanity of insured person on obligation to give notice, see *Buchanan v. Supreme Conclave I. O. of H. (Pa.)* 34 L. R. A. 436, 39 L. R. A.

Wenman v. Mohawk Ins. Co. 13 Wend. 268, 28 Am. Dec. 464; *Bucklin v. Ford*, 5 Barb. 398; *Richards v. Maryland Ins. Co.* 12 U. S. 8 Cranch, 84, 3 L. ed. 496; *Braun v. Sauerwein*, 77 U. S. 10 Wall. 218, 19 L. ed. 895; *Hay v. Star F. Ins. Co.* 77 N. Y. 285; *Cooper v. United States Mut. Acci. Asso.* 57 Hun, 410; *Semmes v. City F. Ins. Co.* 80 U. S. 18 Wall. 158, 20 L. ed. 490; *Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 628, 10 Am. Rep. 522; *Sands v. New York L. Ins. Co.* 50 N. Y. 687, 10 Am. Rep. 585; *Mutual Ben. L. Ins. Co. v. Atwood*, 24 Gratt. 497, 18 Am. Rep. 652; *Mutual Ben. L. Ins. Co. v. Hillyard*, 87 N. J. L. 444, 18 Am. Rep. 741; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 815, 42 Am. Rep. 297; *Trippe v. Provident Fund Soc.* 140 N. Y. 26, 22 L. R. A. 482; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385; *Stout v. City F. Ins. Co.* 12 Iowa, 871, 79 Am. Dec. 539; *Barber v. Fire & Marine Ins. Co.* 16 W. Va. 658, 37 Am. Rep. 800; *Clark v. Lehman*, 65 Ill. App. 238.

Conditions of the policy as to proof and procedure after loss are entitled to a liberal and reasonable construction in favor of the insured.

McNally v. Phenix Ins. Co. 187 N. Y. 898; *Trippe v. Provident Fund Soc.* 140 N. Y. 26, 22 L. R. A. 482; *Germania Ins. Co. v. Boykin*, 79 U. S. 12 Wall. 433, 20 L. ed. 442; *Paltrovitch v. Phenix Ins. Co.* 143 N. Y. 75, 25 L. R. A. 198; *Bumstead v. Dividend Mut. Ins. Co.* 12 N. Y. 92.

In enforcing conditions as to proofs of loss, the court will require "no more information of the party than what appeared to be within his contract."

Trippe v. Provident Fund Soc. 140 N. Y. 26, 22 L. R. A. 482; *McNally v. Phenix Ins. Co.* 187 N. Y. 898; *Paltrovitch v. Phenix Ins. Co.* 143 N. Y. 75, 25 L. R. A. 198; *McLaughlin v. Washington County Mut. Ins. Co.* 23 Wend. 525; *Hoffman v. Aetna Ins. Co.* 1 Robt. 501; *Norton v. Rensselaer & S. Ins. Co.* 7 Cow. 649; *Germania Ins. Co. v. Boykin*, 19 U. S. 12 Wall. 433, 20 L. ed. 442.

Where the performance of a contract depends upon the continued existence of a party, there is always an implied condition that the death of the party contracting shall excuse nonperformance.

Dexter v. Norton, 47 N. Y. 65; *Taylor v. Caldwell*, 8 Best & S. 826; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594; *McNally v. Phenix Ins. Co.* 187 N. Y. 898; *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625.

Where an instrument emanates from the obligor, and the obligee has no voice in its preparation, its terms are to be construed most strongly against the obligor, and all doubts are to be construed in favor of the promisee and against the promisor.

New York v. Hamilton F. Ins. Co. 89 N. Y. 45; *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607; *Hoffman v. Aetna F. Ins. Co.* 82 N. Y. 405, 38 Am. Dec. 337; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 815, 42 Am. Rep. 297; *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443; *Kratzenstein v. Western Assur. Co.* 116 N. Y. 54, 5 L. R. A. 799; *Reynolds v. Commerce F. Ins. Co.* 47 N. Y. 89 L. R. A.

597; *Cooper v. United States Mut. Acci. Asso.* 57 Hun, 410; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385.

The plaintiff was not bound to apply for the appointment of a temporary administrator to bring this action.

Hall v. Brennan, 64 Hun, 397, Affirmed in 140 N. Y. 409; *Hayden v. Pierce*, 144 N. Y. 519; *McGregor v. Buel*, 24 N. Y. 166; *Redfield, Law & Practice of Surrogates' Courts*, p. 334; *Re Chase*, 82 Hun, 320; *Code Civ. Proc.* §§ 2670 et seq.

There can be no aches when there is no person to sue.

Sanford v. Sanford, 63 N. Y. 554; *Richards v. Maryland Ins. Co.* 12 U. S. 8 Cranch, 84, 3 L. ed. 496; *Bucklin v. Ford*, 5 Barb. 393; *Angell, Limitations of Actions*, p. 61; *Sheldon v. Heaton*, 88 Hun, 538.

Laches is a neglect to do something which by law a man is obliged to do.

Sebag v. Abitbol, 4 Maule & S. 462; *Luz v. Haggin*, 69 Cal. 255; *Smith v. Duncan*, 16 N. J. Eq. 240; *Lindley, Partn.* 902; 2 Bouvier, *Law Dict.* 2; *Sheldon v. Heaton*, 88 Hun, 538.

The two years' contest was an insuperable impediment arising without his fault.

Riley v. Riley, 141 N. Y. 409.

Whether the present limitation be regarded as one by contract, or special provision, of law, it is equally within this rule.

Hayden v. Pierce, 144 N. Y. 512.

It would have been absurd to hold that there was a statute of limitations within which a claim must be sued, when there had been neither a person to be sued, nor any court or tribunal before which the state could be summoned to answer the suit.

Parmenter v. State, 135 N. Y. 163.

The general provisions of the Code governing the statutes of limitations apply also to limitations by contract.

Hayden v. Pierce, 144 N. Y. 512; *Titus v. Poole*, 145 N. Y. 425; *Hay v. Star F. Ins. Co.* 77 N. Y. 235 33 Am. Rep. 607; *Hoffman v. Aetna F. Ins. Co.* 82 N. Y. 415, 38 Am. Dec. 337.

Mr. I. N. Ames, for respondent:

If the plaintiff as the legal representative of the assured has not performed all the terms and conditions of the policy respecting the time when said proofs of loss should have been rendered and when this action should have been commenced, and there is no waiver or estoppel, the cause of action is lost to him and his estate.

Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 38 L. ed. 231; *Riddlesbarger v. Hartford F. Ins. Co.* 74 U. S. 7 Wall. 386, 19 L. ed. 237; *Wilkinson v. First Nat. Fire Ins. Co.* 72 N. Y. 499, 28 Am. Rep. 166; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594; *Wilson v. Aetna Ins. Co.* 27 Vt. 99; *Waynesboro Mut. F. Ins. Co. v. Conover*, 98 Pa. 384, 42 Am. Rep. 618.

Under the policy it is provided where the word "insured" occurs, it shall be held to include the legal representative of the insured.

The condition that no action can be sustained by the insured or her legal representative unless commenced within twelve months next

after the fire is a condition precedent which has not been performed or waived in the case at bar, hence there can be no recovery.

King v. Watertown F. Ins. Co. 47 Hun, 1; *People v. American Steam Boiler Ins. Co.* 96 Hun, 456; *Ripley v. Aetna Ins. Co.* 30 N. Y. 163, 86 Am. Dec. 362; *Wilkinson v. First Nat. Fire Ins. Co.* 72 N. Y. 499, 28 Am. Rep. 166; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594; *Tasker v. Kenton Ins. Co.* 58 N. H. 469; *Riddlesbarger v. Hartford F. Ins. Co.* 74 U. S. 7 Wall. 386, 19 L. ed. 257; *Quinn v. Royal Ins. Co.* 81 Hun, 207; *Better v. Prudential Ins. Co.* 16 Daly, 344; *Chambers v. Atlas Ins. Co.* 51 Conn. 17, 50 Am. Rep. 1; *Bradley v. Phoenix Ins. Co.* 28 Mo. App. 7; *Johnson v. Humboldt Ins. Co.* 91 Ill. 92, 33 Am. Rep. 47; *Merchants' Mut. Ins. Co. v. Lacroix*, 85 Tex. 249; *Virginia Fire & M. Ins. Co. v. Wells*, 83 Va. 736; *Brown v. Roger Williams Ins. Co.* 7 R. I. 301; *Wilson v. Aetna Ins. Co.* 27 Vt. 99; May, Ins. 3d ed. §§ 478, 483.

Under the wording of the New York standard policy the short contractual twelve months limitation commences to run from the day of the fire, not from the time the loss matures or becomes due and payable.

King v. Watertown F. Ins. Co. 47 Hun, 1; *Quinn v. Royal Ins. Co.* 81 Hun, 207; *People v. American Steam Boiler Ins. Co.* 96 Hun, 456; *Chambers v. Atlas Ins. Co.* 51 Conn. 17, 50 Am. Rep. 1; *Bradley v. Phoenix Ins. Co.* 28 Mo. App. 7; *Johnson v. Humboldt Ins. Co.* 91 Ill. 92, 33 Am. Rep. 47; *Carraway v. Merchants' Mut. Ins. Co.* 26 La. Ann. 298; *Proska v. McCormick*, 56 Iowa, 318.

The fact that there was a contest over the probate of the will which lasted two or three years is no excuse.

Bliss's Code, § 2688, and cases there cited; *Redfield, Law & Practice of Surrogate's Courts*, 2d ed. p. 345; *Wilkinson v. First Nat. Fire Ins. Co.* 72 N. Y. 499, 28 Am. Rep. 166; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594; *Riddlesbarger v. Hartford F. Ins. Co.* 74 U. S. 7 Wall. 386, 19 L. ed. 257; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Wilson v. Aetna Ins. Co.* 27 Vt. 99.

The general statute of limitations prescribed by law or the Code has no application to a limitation stipulated by contract.

Wilkinson v. First Nat. Fire Ins. Co. 72 N. Y. 499, 28 Am. Rep. 166; *Riddlesbarger v. Hartford F. Ins. Co.* 74 U. S. 7 Wall. 386, 19 L. ed. 257; *Better v. Prudential Ins. Co.* 16 Daly, 344; *Quinn v. Royal Ins. Co.* 81 Hun, 207; *People v. American Steam Boiler Ins. Co.* 96 Hun, 456; *Tasker v. Kenton Ins. Co.* 58 N. H. 469; *Proska v. McCormick*, 56 Iowa, 318.

When a person by express contract engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident, nor other unforeseen contingency not within his control, will excuse him, for the reason that he might have provided against them by his contract.

Wheeler v. Connecticut Mut. L. Ins. Co. 82 N. Y. 543, 37 Am. Rep. 594; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; 39 L. R. A.

Ward v. Hudson River Bldg. Co. 125 N. Y. 280; *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487; *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371.

The doctrine by which the performance of a contract is excused when rendered impossible by the act of God is confined exclusively to those examples where the act to be done is personal, and can be performed only by the party so disqualified, as in contracts of personal service.

Wolfe v. Houses, 20 N. Y. 197, 75 Am. Dec. 388; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594.

The nonperformance of a contract is not excused by the act of God, when it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible.

Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 338; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Blacksmith v. Fellows*, 7 N. Y. 401; *Norton v. Woodruff*, 2 N. Y. 153; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 37 Am. Rep. 594.

No waiver is "proved by any evidence that has any probative force. If there had been, being oral, under the policy it would have no force or effect.

Walsh v. Hartford F. Ins. Co. 73 N. Y. 5; *Marcin v. Unicereal L. Ins. Co.* 85 N. Y. 278; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356; *Allen v. German American Ins. Co.* 123 N. Y. 6; *Messelback v. Sun Fire Office*, 122 N. Y. 578; *Baumgartel v. Providence Washington Ins. Co.* 136 N. Y. 547; *Hill v. London Assur. Corp.* 16 Daly, 120; *Walton v. Agricultural Ins. Co.* 116 N. Y. 317, 5 L. R. A. 877; *Walker v. Phoenix Ins. Co.* 89 Hun, 333; *Kyle v. Commercial Union Assur. Co.* 144 Mass. 43; *Waynesboro Mut. F. Ins. Co. v. Conover*, 98 Pa. 384, 43 Am. Rep. 618; *Moore v. Hanover F. Ins. Co.* 141 N. Y. 219.

The general statute of limitations would not apply.

Quinn v. Royal Ins. Co. 81 Hun, 207; *Hill v. Rensselaer County Supers.* 119 N. Y. 344; *Dunham v. Sage*, 7 Lans. 419.

Vann, J., delivered the opinion of the court:

The policy in question provided that, if a fire should occur, "the insured" should "give immediate notice of any loss thereby, in writing, to" the company, and "within sixty days after the fire" should furnish proofs of loss, "signed and sworn to by said insured." It further provided that the loss should not become payable until sixty days after the receipt by the company of the proofs of loss, and that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." By a subsequent clause it was stipulated that, whenever the word "insured" occurred in the policy, it should "be held to include the legal represen-

tatives of the insured," and, by a preceding clause, that any change in interest, title, or possession, "other than by death of the insured," should avoid the policy. As the fire occurred after the death of Mrs. Silvernail, "the insured" at the date of the loss was either the person who in the course of time should be appointed by the surrogate to administer upon her estate, or the persons interested in her estate, who expected to share therein. 13 Am. & Eng. Enc. Law, p. 221; 21 Am. & Eng. Enc. Law, p. 18; *Greenwood v. Holbrook*, 111 N. Y. 465. As "legal representatives" are equivalent to "executors and administrators," where the subject-matter or context does not control the meaning, we will first proceed upon the assumption that on the death of the testatrix the words "the insured," as used in the policy, referred to the legal representative to be appointed by the surrogate. That person could not, in the nature of things, be known until the appointment was actually made, as in the case of testacy the executor nominated might die or decline, and in case of intestacy none of the persons entitled to the right of administration might accept the trust. The policy, although of the standard form, was prepared by insurers, who are presumed to have had their own interests primarily in view; and hence, when the meaning is doubtful, it should be construed most favorably to the insured, who had nothing to do with the preparation thereof. *Rickerson v. Hartford F. Ins. Co.* 149 N. Y. 307, 313; Laws 1886, chap. 488; Laws 1892, chap. 690, § 121. Moreover, when a literal construction would lead to manifest injustice to the insured, and a liberal, but still reasonable, construction would prevent injustice, by not requiring an impossibility, the latter should be adopted, because the parties are presumed, when the language used by them permits, to have intended a reasonable, and not an unreasonable, result. *Trippe v. Provident Fund Soc.* 140 N. Y. 28, 26, 22 L. R. A. 432; *McNally v. Phoenix Ins. Co.* 137 N. Y. 389. Hence, it cannot be held that the policy became of no value upon the death of Mrs. Silvernail, because at that moment she had, and of necessity could have, no legal representative to give immediate notice of a fire if one had occurred. So, when the fire actually occurred there was still no legal representative to give the notice specified, yet the liberal construction that always obtains with reference to the procedure after a loss does not permit us to hold that the policy became void because, under the circumstances then existing, the notice was not given at once. *Paltronitch v. Phoenix Ins. Co.* 143 N. Y. 73, 76, 25 L. R. A. 198. As the policy provides for the effect of death, and includes under the head of "the insured" the legal representative of the insured, the parties necessarily contemplated a period longer or shorter in duration, depending upon circumstances, when there could be no one authorized to act for the estate. Hence the covenants that "the insured" should give written notice immediately after the fire, and that within sixty days "the insured" should sign, swear to, and deliver proofs of loss, are to be considered in the light of what may reasonably be presumed to have been within the contemplation of the parties, when they entered

89 L. R. A.

into those covenants, as to the possibility of literal performance in case of a fire after the death of the original "insured," and before any opportunity to have a legal representative appointed by the surrogate. The words "immediately after the fire," as used with reference to the preliminary notice, and "sixty days after the fire," as used with reference to the proofs of loss, are to be construed, not literally, in all cases, but in the light of what was reasonable and possible in the case in hand. *Bennett v. Lycoming County Mut. Ins. Co.* 67 N. Y. 274; *Richards, Ins.* § 160. The law does not require impossibilities. The disability to sue, caused by war, has been held to relieve a policy holder from the consequences of failing to bring suit within twelve months after a loss, as required by the policy, because compliance was impossible under the circumstances. *Sennnes v. City F. Ins. Co.* 80 U. S. 13 Wall. 158, 20 L. ed. 490. The same cause was held for the same reason to legally excuse the nonpayment of premiums upon a policy of life insurance as required by its terms. *Cohen v. New York L. Ins. Co.* 50 N. Y. 610, 10 Am. Rep. 522. Still, as the covenants in question are essential to the safe conduct of the insurance business, in order to enable the insurer to promptly investigate the facts connected with a fire and to provide for paying or defending, or for rebuilding, if it so elected, it is incumbent upon those interested in the policy to make reasonable efforts to see that the covenants are kept, and, within a reasonable time, to use such agencies as the law provides, in order that they may be kept if possible. As was said by this court in *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543, 550, 37 Am. Rep. 594, with reference to the failure to pay premiums of life insurance, owing to the insanity of the insured and the infancy of the assignees of the policy: "After Vose became insane, he was not really the party in interest. He had assigned the policies to his children, and they were the parties interested therein and to be affected by a failure to perform the condition of the contract. Although Vose was their guardian, if incapacitated by his insanity a competent person could have been appointed in his place; and hence his insanity was not necessarily an insuperable obstacle to their performance of the condition of the policy, and they were not relieved thereby." Those who expect to share in the proceeds of the policy when paid cannot trifle with the subject, nor delay action that would naturally result in compliance with the requirements of the contract. If the appointment of an executor or administrator cannot, for any reason, be secured with ordinary promptness, it would not be a reasonable construction of the policy to cast all the risk and inconvenience of the delay upon the insurer, provided those interested in the estate could procure the appointment of a temporary representative, who, by taking the necessary steps, could keep the covenants entered into by the insured.

It is provided by § 2670 of the Code of Civil Procedure that on the application of a creditor, or a person interested in the estate, the surrogate may, in his discretion, issue to one

or more suitable persons letters of temporary administration, where delay necessarily occurs in the granting of letters testamentary or of administration owing to a contest before the surrogate, arising on an application therefor, or for probate of a will, or for any other cause. At least ten days' notice must be given to each party to the proceeding who has appeared, but the period may be shortened to not less than two days by the surrogate, upon proof that the safety of the estate requires it. A temporary administrator, thus appointed, "has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and, for either of those purposes, he may maintain any action or special proceeding." *Id.* § 2672. It is further provided that "where a temporary administrator is appointed, in consequence of a contest respecting a will of real property, the order appointing him may confer upon him authority to take possession of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof. The surrogate may, by an order, confer upon him authority to lease any or all of the real property, for a term not exceeding one year; or to do any other act with respect thereto, except to sell it, which is, in the surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property. For either of these purposes, he may maintain or defend any action or special proceeding." *Id.* § 2675. While other powers are conferred by statute, or may be conferred by the surrogate, under its authority, upon a temporary administrator, these are sufficient for the purpose of discussing the question now before us. The will of Mrs. Silvernail embraced both real and personal property, including by specific mention the farm upon which the burned buildings stood, and indirectly the produce destroyed, through the power to sell the same in order to pay pecuniary legacies. The executor was given the power to sell the farm after five years, with power to lease the same in the meantime. The income, after deducting interest and taxes, was to be applied upon the encumbrances; and the proceeds of the sale, after payment of all the debts of the testatrix, were to be divided among her children. A fire insurance policy, after a loss has occurred, is a chose in action; and a temporary administrator could collect the same, and if necessary, commence an action for that purpose. Whether the proceeds, when collected, would be real or personal property, or both, is unimportant in this case, as the power to collect is the vital fact. That power necessarily implies the further power to do whatever is requisite in order to perfect the chose in action so that collection can be enforced, for the power to do an act includes the power to do all that is reasonably necessary to do it effectively. *Hall v. Lauderdale*, 46 N. Y. 70, 78; *Parker v. Saratoga County Supers.* 106 N. Y. 892. Independent, therefore, of the provisions of the statute empowering the surrogate to confer authority upon the temporary administrator in regard to real estate, when there is a contest respecting a will of realty, we think that the right to collect the policy

carried with it the right to serve all such notices as the policy required, in order to make it collectible. Hence, it was within the power of the persons expecting to share in the property of the testatrix to do something toward keeping her covenants with the defendant. While it is true that their application, if made to the surrogate, was subject to his discretion, it cannot be presumed that he would have hesitated to appoint a temporary administrator if the facts bearing upon the subject were spread before him, that appear in the record now before us. *McGregor v. Buel*, 24 N. Y. 166, 169. Moreover, even if the application, although made in due time and form, had failed, it would have relieved the beneficiaries under the will from the accusation of negligence that is now brought against them; for they could say in answer thereto, "we have done all that we could." No excuse, sufficient or otherwise, for nonaction, was shown, such as absence, insanity, infancy, or want of knowledge that the fire had taken place. The subject of applying for a temporary administrator was under discussion among the heirs while the contest over the will was in progress. Not long after Mrs. Silvernail died, the plaintiff deposited the will with the surrogate, and informed him that he did not want to have anything to do with it; but after the lapse of several months, upon the request of certain creditors of the testatrix, he consented to act, and thereupon proceedings were begun to prove the will. Mrs. Silvernail left three children, each of whom was a devisee or legatee under the will, and all were of full age and competent to act, except one, who was an infant of thirteen when her mother died. Two of them, at least, lived within sight of the building in question at the time of the fire. So far as appears, therefore, there was no reason why a temporary administrator should not have been applied for and appointed. The contingency of death was foreseen, and provided against by provisions in the policy which kept it alive notwithstanding that event. *Dolan v. Rodgers*, 149 N. Y. 489; *Dexter v. Norton*, 47 N. Y. 62, 7 Am. Rep. 415. The legal representative was by the contract substituted as "the insured," upon whom rested the burden of performing those covenants which Mrs. Silvernail had entered into. The insurance company was under no obligation to procure the appointment of an administrator, temporary or permanent, even if it had been in a position to, because its promise to pay was dependent on prior action by the insured; but those entitled to the proceeds of the policy when paid were bound to do so, if they could by reasonable effort, so that the agreement could be performed on the part of "the insured." If the executor could have acted by virtue of the power conferred by the will without probate or other action by the surrogate, his default is too apparent to require discussion.

Upon the assumption that the legal representatives of the insured, referred to in the policy, included the heirs at law, next of kin, legatees, or devisees, as the case may be, the situation of the plaintiff is not improved, because, according to that theory, there was no time when competent persons, sustaining one

or more of those relations to the decedent, with full knowledge of all the facts, could not have given the preliminary notice, and furnished the proofs of loss. *Wyman v. Wyman*, 26 N. Y. 253; *O'Brien v. Phoenix Ins. Co.* 76 N. Y. 459; *Greenwood v. Holbrook*, 111 N. Y. 465. The delay in serving notices and in bringing the action was in no respect owing to the defendant, which, so far as appears, did nothing to mislead anyone, or to waive the defenses it now insists upon. Some evidence was given tending to show that a son of the testatrix, about ten days after the fire, signed and swore to a statement of the loss and delivered it to an aunt, but he could not tell what she did with it. She died before the trial, and there was no satisfactory evidence to show that the statement sworn to by the son ever reached the defendant. One witness testified that he saw a lady, who, as he thought, was a "Silvernail," deliver a paper to a man who claimed to be an adjuster, and that they talked about the loss. The nature or contents of the paper was not shown, and it did not appear that the man was an adjuster for the defendant, except by the verification of the answer, which was not put in evidence. But, even assuming that there was evidence to sustain a finding that both the preliminary and final notice of loss was given to the defendant as required by the policy, the fact remains that this action was not begun until long after the time limited for that purpose had elapsed, and yet no lawful reason is given for not procuring temporary administration in time to have sued within the stipulated period. Therefore, whether the policy means by legal "representative" the appointee of the surrogate, or some person directly interested in the estate, or both, there was a failure to comply with its provisions, with no excuse for noncompliance. The insured was bound by contract to do certain acts, as conditions precedent to the right to recover, and was under a legal obligation, if there were obstacles in the way, of making a reasonable effort to remove them. *Howland v. Edmonds*, 24 N. Y. 807, 808; *Porter v. Kingsbury*, 71 N. Y. 588; *Reinting v. Buffalo*, 102 N. Y. 308. If, after due diligence, they had proved insurmountable for a time, the delay would have been excusable, and performance at the earliest practicable moment thereafter would have been sufficient; but, to excuse nonperformance, it must appear that the act to be done could not, by any reasonable means, have been accomplished. Mere difficulty of performance is not enough. *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 548, 551, 87 Am. Rep. 594. In *Sanford v. Sanford*, 62 N. Y. 558, it appeared that the defendant's intestate was adjudged an idiot in 1847, and that the committee then appointed died in 1854. The intestate died December 9, 1864, and during the ten years preceding his death he had boarded with the plaintiff, and was clothed and cared for by her, and she paid his necessary funeral expenses; yet it was held that the statute of limitations applied to the whole claim accruing before the death of the intestate. Judge Allen said: "There was no legal impediment to an action against the intestate. Had there

been a committee in office, the creditor could have petitioned the court either for a summary adjustment and payment of her claim, or for leave to sue. As there was no committee, although it seems the judgment of the court, determining that the debtor was *non compos mentis*, was in force, the plaintiff might have applied to the court for leave to sue, or, perhaps, have brought an action without such leave. One or the other of these courses was open to the plaintiff, and which would have been the proper practice it is not necessary to determine." The failure to apply for a temporary administrator, and to endeavor through him to give the notices required by the policy, and essential to perfect the cause of action, and then to have suit brought therefor within the period stipulated, was absolute and without excuse; and hence the plaintiff, upon the facts now presented, was not entitled to recover. The motion for a nonsuit, which raised generally or specifically all of the defenses discussed, should have been granted, because it affirmatively appeared that the conditions of the policy had not been complied with by "the insured."

The judgment of the appellate division not only sustained the exceptions taken by the defendant upon the trial, but also dismissed the complaint on the merits. This it had no power to do. The Code of Civil Procedure provides two methods of review by the appellate division before the entry of judgment, when the trial was before a jury. The first is authorized by § 1000, which permits the presiding judge, in his discretion, to order that the exceptions taken during the trial be heard in the first instance by the appellate division, and that judgment be suspended in the meantime. In such a case, as the section further provides, "the exceptions must be heard upon a motion for a new trial, which must be decided by the appellate division." The decision should either grant or deny the motion. If the exceptions were well taken, the motion should be granted, and the case sent back for a new trial. If the exceptions were not well taken, the motion should be denied, and judgment entered on the verdict or the order of nonsuit, as the case may be. *Huda v. American Glucose Co.* 151 N. Y. 549. The only function of the appellate division is to grant or deny the motion, and order judgment accordingly. It cannot go further, and dismiss the complaint on the merits, because the Code does not authorize it. The verdict or order is the authority for the entry of a final judgment, and, if the exceptions are not sustained, the judgment must be in favor of the party for whom the verdict was rendered, while, if the exceptions are sustained, there can be no final judgment, but simply the award of a new trial. The second method of reviewing before judgment is when a verdict is taken subject to the opinion of the court, as authorized by § 1185 of the Code. In such a case the motion is not for a new trial, but for judgment; and it may be made by either party before the appellate division, under § 1234. The decision of a motion of that kind necessarily involves a direction for judgment. As the case now before

us arose under § 1000, the action of the learned appellate division in dismissing the complaint was inadvertent, and without authority.

The judgment appealed from should therefore be so modified as to sustain the defendant's exceptions, and order a new trial, and as so modified affirmed, with costs to abide event.

Andrews, Ch. J., and Gray, Bartlett, and Haight, JJ., concur.

Martin, J., dissenting:

In this case the cause of action did not accrue until after the death of the testatrix. At that time there was no person who was authorized to enforce or comply with the provisions and requirements of the policy. Until a representative of the estate of the testatrix

was appointed, who was authorized to commence an action and perform the conditions of the policy, neither the contractual limitation commenced to run, nor was the previous non-performance of its condition a bar to the action. The fact that the appointment of a temporary administrator might have been applied for does not change the situation. Whether an administrator would be appointed rested wholly in the discretion of the surrogate, and no certainty that it would have been done existed at any time. The creditors and other persons interested in the estate were not required to make that experiment to protect their rights under the policy. I think the judgment should be reversed.

O'Brien, J., concurs.

NORTH CAROLINA SUPREME COURT.

COMMISSIONERS OF STANLY COUNTY *et al.* *v.*

I. W. SNUGGS, Appt.

(121 N. C. 304.)

- 1. Legislative journals are competent evidence** to show that a bill was not passed in accordance with mandatory provisions of the Constitution.
- 2. The failure to enter on a legislative journal** the yeas and nays on the second and third readings of a bill authorizing a tax is absolutely fatal to the validity of the act under Const. art. 2, § 14, which expressly requires such entry.
- 3. "The completion" of a railroad,** within the meaning of Code, § 1906, authorizing counties to subscribe to stock to "aid in the completion" of a railroad, applies only to roads the building of which has begun.

(*Faircloth, Ch. J., dissents.*)

(December 21, 1897.)

APPEAL by defendant from a judgment of the Superior Court for Stanly County enjoining him from paying coupons upon certain railroad aid bonds. *Affirmed.*

The facts are stated in the opinions.

Messrs. B. F. Long and Frank Long, for appellant:

When the commissioners ascertained and declared that an election was properly held, and that a majority favored the bonds, etc., it was conclusive, and irregularities in detail will not be permitted to prevent a tax levy.

Simpson v. Mecklenburg Comrs. 84 N. C. 158; *Normont v. Charlotte*, 85 N. C. 387. See *Simpson's Case* approved in *Cain v. Davie County Comrs.* 86 N. C. 8, citing *Manly v. Raleigh*, 4 Jones, Eq. 370; *Caldwell v. Burke*

County Justices, 4 Jones, Eq. 323; *Young v. Henderson*, 76 N. C. 420; *Brodnaz v. Groom*, 64 N. C. 244.

The board is the tribunal that has the sole power to determine the fact whether the conditions have been performed or not.

The recitals in the bond are conclusive and constitute an estoppel *in pais*.

Belo v. Forsythe County Comrs. 76 N. C. 489.

These bonds are not due, and purchasers looking at the face of the bonds need not have looked further.

Mercy v. Oswego Twp. 92 U. S. 637, 23 L. ed. 748; *Deming v. Houlton*, 64 Me. 254, 18 Am. Rep. 253; *Belo v. Forsythe County Comrs.* 76 N. C. 494.

The taxpayer must enjoin before issue; he cannot do so after the bond passes into circulation with the "insignia of validity."

Chester & L. Narrow Gauge R. Co. v. Caldwell County Comrs. 72 N. C. 486.

An act of the general assembly authorizing counties to take stock in railroads and determine the same by vote, and tax themselves to pay for the stock, has been settled to be constitutional.

Hill v. Forsythe County Comrs. 67 N. C. 367, citing *Taylor v. Newberne Comrs.* 2 Jones, Eq. 141, 64 Am. Dec. 566.

The court should review the decision in—*Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487; *Charlotte v. Shepard*, 120 N. C. 411; *Rafferty v. Huffman*, 99 Ky. 80, 32 L. R. A. 203; *Street v. Craven County Comrs.* 70 N. C. 644; *Field v. Clark*, 148 U. S. 649, 36 L. ed. 294; *Lyons v. Woods*, 153 U. S. 649, 38 L. ed. 854.

Messrs. Battle & Mordecai also for appellant.

Messrs. David Schenck, Jr., James E. Shepherd, and A. C. Avery, for appellee: The acts of assembly under which the

NOTE—As to evidence of legislative journals concerning statutes, see *note* to *State, Reed, v. Jones* (Wash.) 23 L. R. A. 340; *Lafferty v. Huffman* 89 L. R. A.

(Ky.) 32 L. R. A. 203; *Union Bank v. Oxford Comrs.* (N. C.) 34 L. R. A. 487; *Cohn v. Kingsley* (Id.) 38 L. R. A. 74; and *State, Cheyenne, v. Swan* (Wyo.) *post*, —.

commissioners attempted to act were not passed as required for all acts empowering counties to issue bonds and levy taxes for their payment.

Const. art. 2, § 14.

The journals offered in evidence show affirmatively that the yeas and nays on the second and third readings of the bills were not entered on the journal of the house; and the Constitution—the supreme law—says that unless so entered no law authorizing states, counties, cities, or towns to pledge the faith of the state or to impose any tax upon the people, etc., shall be valid.

Union Bank v. Oxford Comrs. 119 N. C. 214, 84 L. R. A. 487.

An unfinished road is one that has been begun and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road.

Galloway v. Jenkins, 68 N. C. 155.

Even if all the acts were valid and applicable, the bonds would be void because the question of whether taxes should be levied to pay them, etc., was not submitted to the people.

Charlotte v. Shepard, 120 N. C. 411.

Montgomery, J., delivered the opinion of the court:

On the 15th of August, 1889, at an election held in Stanly county, a majority of the voters of the county cast their ballots in favor of subscription to the capital stock of the Yadkin Railroad Company to the amount of \$100,000. Bonds of the county to that amount were issued in payment of the subscription, and delivered to the president of the company. The annual interest has been paid regularly, except that accruing on the 1st of July, 1897, which has been collected and is now in the hands of the defendant, who is the treasurer of the county, and who is about to pay it to the holders of the coupons. The plaintiffs, taxpayers of the county, and the board of commissioners, bring this action, alleging that the Acts of 1870-71, chap. 236, and the Acts of 1887, chap. 188, under which the commissioners attempted to act, and under which the election was held, were void, for the reason that they were not passed as required by § 14 of article 2 of the Constitution, and that the bonds were therefore illegally issued; and they pray that the treasurer of the county, the defendant, be perpetually enjoined from paying the sum now in his hands, or any other sums which may hereafter come into his hands, to the holders of the coupons. The matter was heard before Coble, J., and the restraining order therefore granted was continued, and the defendant enjoined from paying out the money in his hands until the final hearing of the case. The act of incorporation of the Yadkin Railroad Company (chapter 236 of the laws enacted by the general assembly of North Carolina at its session of 1870-71), in its 4th section, made provision for subscriptions to be made to the capital stock of the company by any county along the line of the road to such amount as a majority of the county commissioners might determine, subject to the approval of the quali-

fied voters of the county; the commissioners, in order to pay the subscriptions, being empowered to issue bonds for that purpose, and to levy taxes to pay the bonds and interest upon them. Section 4 of the act of incorporation was amended by chapter 188 of the Laws of 1887, the amendment extending the privilege of subscribing for stock of the company to the towns and cities and townships along the line of the road, and requiring the subscriptions to be approved by a majority of the qualified voters of such cities, towns, and townships; and providing, further, that bonds should be issued in payment of said subscription and taxes levied to pay the same, principal and interest, according to the terms and conditions of said bonds, and that the board of commissioners of the county should issue the bonds, and levy the taxes to pay the township subscriptions. Section 14 of article 2 of the Constitution ordains that "no law shall be passed to raise money on the credit of the state or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the state, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal." The plaintiffs were allowed to produce copies of the house journal, certified to by the secretary of state, to show that the above-mentioned acts were not passed by the general assembly in accordance with the requirements of the Constitution. That journal showed that the bill which became chapter 236 of the Laws of 1870-71, was introduced on the 31st of March, 1871, and referred to the committee on internal improvements; that it was reported favorably on the next day; and that on the 8d of April, two days after its introduction, it passed its second and third readings; and that there was no entry of the yeas and nays on either of its readings. From that journal it appears that the bill which was enacted into chapter 188 of the Laws of 1887 passed its second reading on February 26, and that the yeas and nays were called on that reading and entered on the journal; that the bill passed its third reading on the 28th of February, but the yeas and nays were not entered on the journal on that reading. We are of the opinion that it was competent to introduce the house journal as proof that the acts referred to were not passed according to the requirements of the Constitution and they establish that fact. That provision of the Constitution (§ 14 of art. 2) is mandatory as we have decided in *Union Bank v. Oxford Comrs.* 119 N. C. 214, 84 L. R. A. 487. It is the protection which the people in convention have thrown around themselves for the benefit of the minority as well as the majority. The object of the provision was to prevent hasty and ill-advised legislation by means of which the people might be deprived of their property, not for the ordinary expenses of government, but by special taxation, for enterprises ostensibly in the name of the public good, but which

might prove sources of individual injustice and injury. When indebtedness of the kind mentioned in the provision is sought to be incurred, the people have said in that provision that their legislative body, whenever considering the propriety of authorizing it, shall be not only careful, but deliberate; that the bill shall be read three several times, and pass three several readings, and that no two readings of the bill shall be had on the same day, and that the names of the legislators who vote on the question shall be known to the people in the enrolment of their names on the journal. It is a reasonable requirement, too, especially serviceable to those who are property holders and taxpayers, and the information is easy to be had, by all who may be interested, for § 16 of the same article of the Constitution ordains that each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the general assembly. Therefore it is clear that in legislation in reference to raising money on the credit of the state, or pledging its faith to the payment of debt, or imposing any tax on the people of the state, or allowing the counties, cities, or towns to do so, the Constitution itself ordains that such legislation is void, unless the bills have passed three separate readings, on three different days, and unless the yeas and nays on the second and third readings shall have been entered on the journal. The bill may, in point of fact, have been read three several times, and on three different days, and the yeas and nays may have been actually called on the second and third readings, and the presiding officers may have certified thereto, and yet, if the entry of the yeas and nays is not actually made on the journal, the Constitution, speaking with absolute clearness, says that the failure of such entry is absolutely fatal to the validity of the act. The entry showing who voted on the bill, and how they voted, must be made before the bill can ever become a law. The Constitution does not allow the certificate of the presiding officers, or any other power, to cure such an omission. The certificate of these officers will be taken as conclusive of the several readings in ordinary legislation, even if it could be made to appear that the journals were silent in reference thereto, because, in ordinary legislation, the directions of the Constitution are not a condition precedent to the validity of the act. But in that class of legislation, the purpose of which is to legislate under § 14 of article 2 of the Constitution, a literal compliance with the language of that section is a condition precedent, and one which must be performed in its entirety before the bill can ever become a law. This point, however, has been so recently and so thoroughly discussed in the case of *Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487, that it will be unprofitable to enter into another protracted discussion of it here. The authorities there cited are numerous, and most of them directly in point.

This case is clearly to be distinguished from that of *Carr v. Coke*, 116 N. C. 228, 28 L. R. A. 737, and the difference cannot be pointed out more clearly than was done by Clark, J., who delivered the opinion in *Union* 89 L. R. A.

Bank v. Oxford Comrs. 119 N. C. 214, 34 L. R. A. 487, in the following language: "This case has no analogy to *Carr v. Coke*, 116 N. C. 228, 28 L. R. A. 737. That merely holds that, when an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house, and ratified. Const. art. 2, § 28. And so it is here; the certificate of the speakers is conclusive that this act passed three several readings in each house, and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each house, and that the yeas and nays were entered on the journals. The journals were in evidence, and showed affirmatively the contrary. The people had the power to protect themselves by requiring in the organic law something further, as to acts authorizing the creation of bonded indebtedness by the state and its counties, cities, and towns, than the fact certified to by the speakers of three readings in each house, and ratification. This organic provision plainly requires, for the validity of this class of legislation, in addition to the certificates of the speakers, which are sufficient for ordinary legislation, the entry of the yeas and nays on the journals on the second and third reading in each house. It is provided that such laws are 'no laws,' i. e. are void, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house, respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal." But the defendant, for his protection, presents the view that, even if it be conceded that the acts above referred to were not passed according to the requirements of the Constitution, and for that reason might be held void by this court, yet the commissioners of the county had the right to submit the question of subscription, embracing the question of issue of bonds and the levy of taxes to pay the same, principal and interest, to the voters of the county, and upon approval by a majority of the qualified voters to issue the bonds under §§ 1996-2000 of the Code. All the sections of the Code were enacted by having been read three several times in each house of the general assembly, having passed three several readings on three different days in either house, the yeas and nays on the second and third reading having been entered on the journals of the senate and house of representatives, respectively.

But did the sections above mentioned give additional and complete authority to order the election, issue the bonds, and levy the taxes to pay them, principal and interest? Section 1996 is in these words: "The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." It will be necessary, in order that that section may be construed to give authority to the commissioners to issue the bonds, that the language should include a railroad not begun to be built before the subscription was made;

that the word "completion" should be construed "building" or "construction," extending even to the building of a new road; for in the case before us it appears that the road had not begun to be built. We cannot see why the word "completion" should be thought to have been used by the legislators in any other sense than the one most usual and natural. Ordinarily, the words "to complete" are understood to mean "to finish," "to fulfil," and the word "completion" to mean the "finishing" or "accomplishing in full" of something which has already been commenced; as, for instance, it is most frequent to hear the word "completion" used in connection with the finishing years and months of the education of the young. It is said of the young man or the young woman that he or she has gone for this year or this session to a certain university for the completion of his or her education; the training or educational process having been going on for years. If there is uncertainty as to the meaning of the word "completion," as used in § 1996 of the Code, we might invoke the aid of § 4 (formerly 5) of article 5 of the Constitution, in its analogy to the Code section, to clear it up. The part of that section of the Constitution pertinent to this matter reads as follows: "And the general assembly shall have no power to give or lend the power of the state in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the state has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the state, and be approved by a majority of those who shall vote thereon." Thus it appears that all gifts or loans by the state in aid of the completion of such railroads as had been begun, but which were unfinished, at the time of the adoption of the Constitution, or in which the state has a direct pecuniary interest, could be made valid by simple act of legislation. The act of 1868-69, chap. 171 (now §§ 1996-2000 of the Code), was enacted a few days more than a year after the ratification of the Constitution of 1868. It is most reasonable to conclude that the policy and purpose of both the constitutional provision and the statute were the same, the only difference being that, in case of state aid, no approval by a vote of the people was required, while a majority vote of the people was required in cases of county aid. The object of the statute must have been to provide by a general act means by which the counties, without special legislation for each county by separate bills, might be enabled to complete unfinished railroads in which the counties had a pecuniary interest. At the time of the enactment of the statute of 1868-69, and always since that time, any county of the state, duly observing the limitations of § 7 of article 7 of the Constitution, and under an act passed according to the requirements of § 14, article 2, of the Constitution, could and can subscribe to the capital stock of the railroad company, whether unfinished or to be begun. The act of 1868-69, however, considering the condition of affairs then existing,—that is, that there were counties which had a pecuniary interest in railroads that had

been begun, but were unfinished,—enabled such counties to make subscriptions of bonds to complete such unfinished roads at the earliest moment, and with the least cost, by a general law passed according to § 14, article 2, of the Constitution. This reasoning leads us to the still further conclusion that at the time when the act of 1868-69 was brought forward in the Code, § 1996, and the four succeeding sections, it could have had reference to no cases except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the Constitution of 1868, and that, therefore, the Code sections could not apply to the present case, because the Yadkin Railroad was not begun to be constructed until about 1889. We have given to the matters embraced in this case a patient and thorough consideration. We are aware of the hardships and losses that may follow from our decision, and we are also aware of the probable complaints likely to be made by persons interested. But the constitutional requirement which we have discussed is clear in its meaning and in its language, and it is also mandatory. We must obey it in our interpretation of its meaning. Investors in such securities, who may meet with losses, have no one to blame but themselves, for the journals of the general assembly are open to public inspection, and the Constitution of the state is a part of the public literature. The purchaser of real estate with us must look to the depository of his title for the security of his purchase, and so must the investors in our state and county and municipal bonds look to the Constitution and the laws for the safety of their investments. We find no error in the ruling of the court below.

No error.

Furches, J., concurring:

As I concurred in the opinion of the court in *Carr v. Coke*, 116 N. C. 223, 28 L. R. A. 787, and also in the opinion of the court in *Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487; and as it was claimed on the argument in this case that the two opinions were in conflict and could not stand together, I propose, in addition to the well-considered opinion of Justice Montgomery, to say briefly what seems to me to constitute the distinction between the two cases.

The power to legislate is not conferred on the general assembly by the Constitution. This it has without an express delegation of power. There are instances where the legislature is commanded to legislate; but these are the exception to the general rule, and have nothing to do with the act we are considering. The most of the provisions of the Constitution with regard to legislation are restraints upon its power. The act considered in the case of *Carr v. Coke* was passed under the general and inherent right to legislate. This being so, it fell under the general parliamentary law of authentication, and the signature of the presiding officers was final. But the act now under consideration was passed under one of the restrictions or prohibitions placed upon the legislature by the Constitution (art. 2, § 14), which provides "that no law shall be passed to raise money on the credit of the state, etc., unless it be read on three

several days in each house, and on the two last readings the yeas and nays are taken and recorded; and this rule applies to counties, town, cities, etc. It must be admitted that the Constitution might have prohibited the legislature from passing any act to lend its credit, or to authorize any county or town to do so. Suppose, then, that the Constitution had prohibited the enactment of any such law, but, notwithstanding this inhibition, the legislature had passed such an act, and the presiding officers had signed and ratified it, should the courts have gone on, and enforced this act, because it had passed, and been ratified by the presiding officers of the two houses? And, if not, why should this act be enforced, passed in a way in which the Constitution says it shall not be passed, so as to authorize a county to raise money upon its credit? Suppose the legislature should pass an act providing for the payment of the special tax bonds, or the interest thereon, and the bill should be signed and ratified by the presiding officers of each body of the general assembly, should this court enforce this act? I must suppose that the answer to this proposition would be "No;" that the Constitution prohibits the legislature from passing such an act. And, if such an act as this could not be enforced because the Constitution prohibits its enactment, it would be difficult to draw the distinction, and to see how we could enforce this act, passed in a way the Constitution says it should not be passed. I have had trouble in coming to the conclusion that we, as a co-ordinate department of the government, could look to the manner of its passage. But, upon further consideration of the matter, I have come to the conclusion that these rules, preventing us from looking behind the ratification, are only applicable to acts passed under the general power of legislation. The precedents I have examined grew out of legislation under the general unrestricted power as to legislation. To adopt this rule with regard to restricted or prohibited powers, would be, in effect, to destroy these restrictions, these wise and beneficial provisions of the Constitution. In this, it seems to me, lies the distinction between *Carr v. Coke* and *Union Bank v. Oxford Comrs.* and this case falls under the rule governing in *Union Bank v. Oxford Comrs.*

It is claimed that this is an act of repudiation on the part of plaintiffs and repudiation is not more distasteful to anyone than it is to me. And it may be, in a moral sense, repudiation, but it cannot be in law, as the plaintiffs were never legally bound for these bonds.

Clark, J., concurring:

So far from the decision in *Carr v. Coke*, 116 N. C. 223, 28 L. R. A. 787, conflicting with the decision of this case, it is the strongest vindication of the wisdom and necessity of placing article 2, § 14, in the Constitution. In *Carr v. Coke* the majority of the court felt constrained to hold that a bill of a general legislative nature, and not imposing a tax, when authenticated by the certificate and signatures of the speakers, could not be impeached, though it was averred in the complaint, and shown by the journals, that such bill had in fact been tabled on the second

reading in the house in which it had been introduced, and consequently had not reached the other house at all. This being so, if the people should desire by constitutional amendment, or by a provision inserted by a constitutional convention, to require other safeguards of the actual passage of laws than the signatures of the speakers, can there be any doubt that they have the power to do so? Now, as to the passage of the class of bills specified in § 14, article 2, they had the foresight to do this very thing, and to require additional guaranties by providing that such bills should not become laws unless read on three different days in each house, and unless "the yeas and nays on the second and third readings shall have been entered on the journal," which journal § 16 of the same article requires to be "printed and made public immediately after the adjournment of the general assembly." As to such matters, in which great amounts of money are at stake, the public were not willing to run the risk of bills being palmed off as statutes through the inadvertence of the speakers or the venality of clerks of the general assembly, without having in fact been enacted. These additional requirements are not mere technicalities, but indispensable safeguards, which experience has caused to be inserted in the Constitutions of many of the states to protect the public against the grossest abuses in the creation of indebtedness or authorizing taxation by the state, counties, and towns. *Carr v. Coke* holds that, as to bills not embraced in 12, article 2, the certificate of the speakers is conclusive evidence of passage, and the courts are powerless to go behind their signatures. The decision in this case holds that, as to the class of bills referred to in § 14, such certificate is expressly made not sufficient, and the bills are not laws unless the additional requirements of that section appear by the journal to have been complied with. There is no conflict between the two decisions, and this has heretofore been pointed out in *Union Bank v. Oxford Comrs.* 119 N. C. 214, 34 L. R. A. 487.

Fairecloth, Ch. J., dissenting:

The facts are stated in the opinion of the majority of the court and I will simply state my position briefly. My reasoning is stated in *Carr v. Coke*, 116 N. C. 223, 28 L. R. A. 787. In that case it was held that, where a bill had been duly signed by the presiding officers of the assembly, the court cannot go behind such ratification to inquire how the bill was passed. The ratification is a record, and concludes the matter. It does not certify that the bill was read three times or a less number of times. *Omnia præsumuntur*, etc. It is argued, however, that the case above stated applies when the assembly is legislating under its inherent power, unrestricted by the Constitution, and that that principle does not apply when legislating under restricted clauses of the Constitution, as in this case, under article 2, § 14; i. e. that in one instance the ratification is a record, and conclusive, and in the other instance the ratification means nothing, because one section of the Constitution is restrictive, and the other is not. I cannot reach that conclusion. Article 2, § 14, saying that no law

shall be passed to allow counties, etc., to raise money on their credit, etc., unless the bill shall have been read three times, etc., is a restriction directed to the legislature, and no such indebtedness can be imposed except by a majority vote of the taxpayers at the ballot box. That article and section do not declare that any legislative act under it is void, but leaves much to the judgment and discretion of the legislature. But is the distinction well taken? Article 2, § 12, declares that "the general assembly shall not pass any private law unless it shall be made to appear that thirty days' notice of the application to pass such a law shall have been given, under such direction and in such manner as shall be provided by law." This is a restrictive clause, and yet in *Brodnax v. Groom*, 64 N. C. 244, it was held by this court that, if a private act for the purpose of levying a special tax for the county be certified by the presiding officers of the two branches of the legislature as duly ratified, it is not competent for the judiciary to go behind such record, and inquire collaterally whether the thirty days' notice of an application therefor, required by the Constitution, had been given. Pearson, Ch. J., said: "We do not think it necessary to enter into the question, whether this is a public local act, or a mere private act, in regard to which thirty days' notice of the application must be given; for taking it to be a mere private act, we are of opinion that the ratification certified by the lieutenant governor, and speaker of the house of representatives, makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way, Lord Coke says, 'A record, until reversed, importeth verity.' There can be no doubt that acts of the legislature, like judgments of courts, are matters of record, and the idea that the 'verity of the record' can be averred against in a collateral proceeding, is opposed to all of the authorities." The courts must act on the maxim, *Omnia præsumuntur*, etc. And so, if the distinction is sought to be applied to the many sections of the Constitution on various subjects, whether restrictive or general, the law might change as each case was presented. The legislature has a general power to levy

and raise taxes. Const. art. 5, § 1. When the power of taxation is conferred, it is difficult for the courts to enforce restraints imposed by the Constitution upon the procedure of the legislature in passing the necessary laws for the exercise of the power. That is saying to a co-ordinate branch of the government, "You have not done your work or duty with a proper degree of precision, and we will declare it void." When the prohibition is absolute, then the courts may declare the result void, not on the ground of irregularity in the legislative proceedings, but because the power does not exist, whether the proceedings were regular or irregular. For instance, article 1, § 6, declares that "the state shall never assume or pay or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States," unless the proposition to pay such debt shall be submitted to the people, and ratified by them by the vote of a majority of all the qualified voters of the state, at a regular election held for that purpose. Here we find a restriction, not on the procedure of a co-ordinate branch, but an absolute prohibition and denial of power, which the courts can see on the face of the Constitution, without looking at the journals of the assembly, and without impeaching the record of ratification. It is argued that the legislative journals are public documents, and open to the inspection of the purchasers of the bonds in question. That is true, and it is equally true that they were open to the plaintiffs and the taxpayers of Stanly county when they held forth these bonds to the public, and received the money for them, and invested the same for the permanent improvement and benefit of their county. They have recognized and paid the annual interest on their bonds for several years without objection, and it is possible that they never discovered the absence of the words "yea" and "nay" on the journals until since the decision of this court in *Union Bank v. Oxford Comrs.* 119 N. C. 214, 84 L. R. A. 487. I think the true principle is found in the first two cases cited *supra*.

CALIFORNIA SUPREME COURT.

P. W. MURPHY, *Appt.*,

v.

City of SAN LUIS GBISPO *et al.*, *Respts.*

(.....Cal.....)

1. Bonds may be made payable in gold coin only, under the act of March 19, 1889, as amended in 1898, giving power to issue municipal bonds "payable in gold coin or lawful money," as this, to have any effect, must be construed—especially in view of other provisions of the statute—to give the city the option to make them payable in gold coin alone or in lawful money.

2. A requirement of an ordinance that a

vote for or against a bond proposition shall be indicated by writing or causing to be written or printed the word "Yes" or "No" on the right-hand margin of the ticket opposite the proposition, is mandatory, when the ordinance is authorized by and has the force of a statute, and therefore it is insufficient to mark a cross after the word "Yes" or "No" when both those words are printed opposite the proposition.

3. The alternative of making interest payable annually or semiannually need not be submitted to the voters on an election respecting the issue of municipal bonds under the act of March 19, 1889, § 3, requiring a notice of the election, the purpose and charac-

NOTE.—As to contracts of municipalities as well as other parties calling specifically for payment in gold coin, see note to *Skinner v. Santa Rosa* (Cal.) 29 89 L. R. A.

L. R. A. 512; also *Burnett v. Maloney* (Tenn.) 84 L. R. A. 541; and *Packwood v. Kittitas County* (Wash.) 83 L. R. A. 678.

ter of the bonds, and the rate of interest, without requiring any notice as to the time of paying interest.

(January 18, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for San Luis Obispo County in favor of defendants in a suit brought to enjoin the negotiation of certain bonds. *Reversed.*

The facts are stated in the opinion.

Messrs. Graves & Graves for appellant.

Mr. W. H. Spencer, for respondents:

The adoption of one or the other kind of currency involves the exercise of business judgment and sagacity, which may vary with time and circumstances. It is wiser, therefore, to leave to the local communities whose interests are most deeply concerned, the privilege of taking advantage of opportunities, and of legislating for themselves on this subject.

Fareon v. Louisville Sinking Fund Comrs. 97 Ky. 119.

Effect is to be given to every phrase and every word in the statute, if it be possible, and no clause or word is to be treated as redundant.

Souter v. The Sea Witch, 1 Cal. 162; *San Francisco v. Hazen*, 5 Cal. 169; *Langenour v. French*, 34 Cal. 92; *Houghton's Appeal*, 42 Cal. 35; *Read v. Rahm*, 65 Cal. 843; *Hyatt v. Allen*, 64 Cal. 853.

It was certainly competent for the board to prescribe that the method of voting should be according to the general election law of the state, without reciting its provisions. The voters being familiar with this mode of voting, there can be no question they understood the significance of the stamp, and intended to cast their votes exactly as they did.

Clearly the ordinance contemplated that the tickets should be printed and furnished to the voter, and that he should indicate his wish by depositing the ballots so printed in the ballot box. And the form of the ticket required that he should declare his vote on the propositions submitted by adopting in some appropriate manner the "Yes" or "No" already printed on the tickets. By placing or stamping an X, in conformity with the manner of voting under the general election law, he followed strictly the ordinance.

Pennington v. Bahr, 48 Cal. 565; *Williams v. McDonald*, 58 Cal. 527; *Ligure v. California Southern R. Co.* 76 Cal. 610; *Rock Creek Twp. v. Strong*, 96 U. S. 271, 24 L. ed. 815; *Chicago, D. & V. R. Co. v. Coyer*, 79 Ill. 373; *Clark v. Montgomery County Comrs.* 33 Kan. 202.

Harrison, J., delivered the opinion of the court:

The board of trustees of the city of San Luis Obispo, having advertised for the sale of certain bonds of the city for the purpose of paying the cost of certain municipal improvements authorized by the voters under the provisions of act March 19, 1889 (Stat. 1889, p. 399), the plaintiff, a taxpayer of the city, brought the present action to enjoin the sale of the bonds, and the levy and collection of any taxes for their payment, upon the ground that their issuance was illegal. The superior court rendered judgment in favor of the defendants, and the plaintiff has appealed therefrom. The

notice of appeal states that an appeal is also taken from an order denying a new trial, but the record does not contain such order, nor does it appear therefrom that a new trial was ever asked for or denied.

The appellant presents three grounds upon which he contends that the issuance of the bonds is illegal, *viz.*: First, that the bonds are made payable in gold coin of the United States, instead of being made "payable in gold coin or lawful money of the United States;" second, that at the election upon the question of their issuance the votes were not cast in accordance with the terms of the ordinance by which the question was submitted; third, that the question whether the interest on the bonds should be paid annually or semiannually was not submitted to the voters.

1. Section 6, act March 19, 1889 (Stat. 1889, p. 401), provides: "All municipal bonds for public improvements issued under the provisions of this act shall be of a character of bonds known as serials, and shall be payable in the manner following: [Providing for the denominations of the bonds, and that one twentieth of the issue must be paid in each year, but making no provision in reference to the times for the payment of interest.] Such bonds may be issued and sold by the legislative branch of the city, town, or municipal corporation as they may determine, at not less than their face value, in gold coin of the United States," etc. This section was amended in 1893 (Stat. 1893, p. 61), making the first sentence to read as follows: "All municipal bonds for public improvements issued under the provisions of this act shall be of the character of bonds known as serials, and shall be payable in gold coin or lawful money of the United States in the manner following;" and also directing that one fortieth of the issue must be paid in each year, and also that the interest "may be payable annually or semiannually."

The notice under the ordinance calling the special election for the purpose of authorizing the issuance of the bonds in question stated: "The character of said bonds will be what is known as 'serial,' and will be payable in gold coin of the United States, in the manner following: [Providing for distributing their payment over a period of forty years.] The rate of interest to be paid on said bonds will be 5 per cent per annum." The ordinance creating the indebtedness and providing for the issuance and sale of the bonds, which was passed subsequent to the election, provided: "The character of said bonds shall be what is known as 'serial,' and the same shall be payable in gold coin of the United States, in the manner following;" and further provided: "Each of said bonds shall be dated the 6th day of January, 1896, shall bear interest at the rate of 5 per cent per annum from said date, and to each of said bonds shall be attached as many interest coupons as it may have years to mature, each coupon to be for one year's interest on the bond to which it is attached, one of which coupons on each and every of said bonds shall be payable on the 6th day of January, 1897, and one on the same day of said month of each succeeding year until all are paid."

Under the terms of the original act the municipality was not required to designate any

kind of money in which the bonds should be payable, and, in the absence of such designation in the bonds, could at their maturity elect to pay them in any medium that might then be lawful money or legal tender. Whether the municipality had the power to designate in the bonds any specific kind of money in which they should be payable was an unsettled question. It had been held in *Judson v. Bessemer*, 87 Ala. 240, 4 L. R. A. 742, that the municipality possessed such power, while in *Woodruff v. State*, 66 Miss. 298, it had been held that such act was *ultra vires*, and that the bonds were void. The reversal of this case by the Supreme Court of the United States (162 U. S. 299, 40 L. ed. 975), was upon a point which left the question undetermined by that tribunal. It has since been held by the supreme court of Kentucky in *Farson v. Louisville Sinking Fund Comrs.* 97 Ky. 119, that under a statute authorizing a municipality to issue a bonded indebtedness, which is silent as to the kind of currency or money in which it is to be payable, the municipality may make the bonds payable in gold coin. Experience had shown that if bonds are made payable in a currency of fluctuating value they are less readily negotiated than if the lender or investor knows in advance the precise kind of money in which they will be paid. Under this condition of the law as it had then been expounded, and with the universal experience in financial transactions, and doubtless in consequence thereof, the legislature in 1898 amended the statute by giving to the municipality the right to designate at the issuance of the bonds the specific kind of money in which they should be paid. It is to be assumed that the amendment was for the purpose of remedying some defect in the original act, but if the defect in the original act was a want of power in the municipality to issue its bonds payable in any specific kind of money, as had been held by the supreme court of Mississippi, this defect would not be obviated if the statute required them to be "payable in gold coin or lawful money of the United States." In the absence of any limitation upon the mode of payment, they would be payable in any lawful money of the United States, and, as a provision in the bonds giving to the municipality the alternative of paying them in gold coin or in lawful money of the United States would create no obligation upon it to make the payment in gold coin, it follows that the "lawful money" in which they would be paid would be that kind which the municipality would elect at their maturity, and, consequently, the kind which at that date would have the least value. It cannot be held that the words, "shall be payable in gold coin or lawful money of the United States," were inserted in the statute merely for the purpose of declaring that the municipality should have the option, at the maturity of the bonds, to pay them in gold coin, or in lawful money, since it needed no legislative declaration to give it that option. The fact that they were payable in money would itself confer upon it that privilege; and, as such a construction of the statute would destroy any efficacy in the amendment, it ought not to be given unless required by its terms. It is not so indicated in specific lan-

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guage, and, as its language will permit a construction by which the municipality may determine in advance whether the bonds shall be payable specifically in gold coin, or generally in lawful money of the United States, a consideration of the purposes of the statute and the objects to be effected by it justifies us in giving it this construction.

The purpose of the legislature in enacting the statute in question was to enable the municipalities of the state to acquire or construct certain municipal improvements which the public interest or necessity might demand, the cost of which would be too great to be paid out of the ordinary annual income. Unless the bonds that are to be issued under the proceedings thus authorized can be negotiated, the municipality will be unable to acquire or construct the improvements, and the very purpose of the legislature will be defeated. The legislature must be assumed to have been familiar with the laws of trade and finance,—to have known that bonds payable in a fluctuating currency are less salable than if payable in gold coin. Guided by experience and the history of the last forty years, they were aware that obligations which were to run forty years in the future would be subject to the contingencies of a depreciated currency, and that in the light of this experience, capitalists and investors would decline to invest their money unless they could be assured that they would receive the value which they should give for the bonds. The bonds authorized by this act, when issued, become negotiable securities, and the subject of daily traffic in the commercial world, and any provision in them that impedes their free negotiability destroys their value, and prevents the municipality from effecting a sale in accordance with the terms of the act. The requirement in the statute that the bonds shall be sold "at not less than their face value in gold coin of the United States," would prevent the sale of a single bond whose payment at maturity could be made, at the option of the maker, in such currency as it might then elect, and thus the very object of the statute would be destroyed. The recognized standard of value in this state is gold coin, and as this is the only kind of money which the legislature has authorized to be received upon a sale of the bonds, and has required them to be sold for not less than their face value, it must be held that it was the intention of the legislature that they might be made payable in gold coin.

There is an additional consideration which lends weight to this construction of the intention of the legislature by this amendment. By an act passed March 15, 1888 (Stat. 1888, p. 370), certain incorporated cities were authorized to refund their indebtedness by issuing new bonds therefor. The form of the bond was prescribed by the statute, and made payable in "dollars," without designating any kind of money. On the same day that the aforesaid amendment to the act of March 19, 1889, was passed the legislature amended the act of March 15, 1888 (Stat. 1888, p. 59), by giving authority to those cities to refund their indebtedness and issue serial bonds therefor, to run for forty years, "principal and interest being payable in gold coin or lawful money of the United States;" and also providing that the bonds should be

sold for not less than their face value, "in the same character of money in which they were payable." The provision in this statute that the bonds shall be payable in gold coin or in lawful money of the United States, as in the statute under consideration, and the further provision in that statute that they should be sold for their face value "in the same character of money in which they were payable," clearly indicate that the municipality should exercise its option for the mode of their payment at the issuance of the bonds, and not at their maturity, and that the bonds themselves should be payable in the kind of money for which they were to be sold. The same provision in § 6 of the act under consideration, coupled with the provision that the bonds are to be sold for gold coin at not less than their face value, carries with it the same intention of the legislature that the bond may be made payable in gold coin. See *Sutherland*, Stat. Constr. §§ 284, 288. In the case of *Skinner v. Santa Rosa*, 107 Cal. 465, 29 L. R. A. 512, cited by appellant, the ordinance calling the election as well as the notice of election, described the bonds as "payable in gold coin or lawful money of the United States," with interest payable "annually" at a place to be fixed by the city council, while the bonds which the council proposed to sell were made payable "in gold coin," with interest payable "semiannually" in the city of New York, and it was held that the bonds in this form, not having been authorized by the voters of the city, would be invalid. Whether, if the ordinance had provided that the bonds should be issued "payable in gold coin," its approval by the voters would have authorized the issuance of such bonds, was not before the court for decision or discussed in its opinion. The only bonds which the voters had approved were to be "payable in gold coin or lawful money of the United States,"—that is, as we have seen above, payable in such money as the city might elect at their maturity, and it was held that the city could not be made liable for bonds payable in gold coin, as that would impose upon it a burden which the voters had never authorized.

2. Section 2 of the act of March 19, 1889, provides that the ordinance calling a special election "shall fix the day on which such special election shall be held, the manner of holding such election, and the voting for or against incurring such indebtedness; such election shall be held as provided by law for holding such election in such city, town, or municipal corporation." The ordinance in the present case stated (§ 6): "The manner of holding said election shall be as follows: (1) As provided by law for holding elections in said city; (2) as provided by the general election laws of this state, except where such general laws may conflict with the state law for elections of the kind hereby called, or with this or any ordinance; and, (3) as provided for in this ordinance." It was further provided in this section of the ordinance: "Tickets must be of ordinary election ticket paper, 6×12 inches; the heading of such ticket must be: 'Bond Election, City of San Luis Obispo.' Each proposition set forth in § 2 of this ordinance shall be voted on separately, and must be printed on such tickets as follows: 1. Bond-

ing for city waterworks, \$90,000.00. 2. Bonding for sewer improvements, \$34,500.00. Each voter shall indicate his wish by writing or causing to be written or printed, 'Yes' or 'No' on the right-hand margin on his ticket, opposite the proposition on which he may desire to vote." At the election which was held under this notice more than two thirds of the voters that voted indicated their wishes by voting a ticket in the following form:

MUNICIPAL TICKET.

BOND ELECTION.

City of San Luis Obispo.

To vote for or against a proposition, stamp a cross (X) in the square at the right.

1	Bonding for City Water Works, \$90,000.00.	YES.	X
2	Bonding for City Water Works, \$90,000.00.	NO.	
3	Bonding for Sewer Improvements, \$34,500.00.	YES.	X
4	Bonding for Sewer Improvements, \$34,500.00.	NO.	

—And indicated their wishes in no other way than by stamping a cross opposite the propositions on said ticket. Whether the proposition to issue the bonds was legally adopted depends upon whether the ballots thus cast should have counted in its favor.

The provisions of the Political Code which are applicable to elections of officers are not by any statute made applicable to elections of the character under consideration, and we have not been cited to any special statute on the subject governing elections in the city of San Luis Obispo. It will be observed that by the terms of the ordinance the general election law of the state is applicable only where it is not in conflict with the mode pointed out in the ordinance, and that the provisions of the ordinance control unless they are in conflict with some of the provisions of the general law. It follows that the statutory provisions requiring the city to fix by its ordinance the manner of holding the election, and the voting for and against it, is the rule by which the voters are to act in voting upon the question. This ordinance, having been passed by virtue of the statute authorizing it, has the force of a statute, and is to be construed with the same effect as if its terms had been prescribed by an act of the legislature.

It is urged by the appellant that the manner of voting which was prescribed in the ordinance calling the election was mandatory upon the voters, and that, as this manner was not observed, the election was invalid. Whether the forms prescribed for holding an election are mandatory or directory, and whether their observance is essential to the validity of the election, depend upon the character of the acts prescribed. In *Tebbe v. Smith*, 108 Cal. 101, 29 L. R. A. 673, Mr. Justice Henshaw stated the rule as follows: "It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while the departure from the terms of a directory provision will not render it void in the absence of a further showing that the result of the election has been changed or the rights of

the voters injuriously affected thereby. . . . But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed." In *Kirk v. Rhoads*, 46 Cal. 898, it was held that, if the requirements of the statute which it is within the power of the elector to control are wilfully disregarded, his vote should be rejected; and in *Lay v. Parsons*, 104 Cal. 661, it was held that the specific directions to the voter as to the mode in which he shall mark his ballot are mandatory, and cannot be disregarded. In the absence of any direction, the manner in which the voter is to indicate his wish may be immaterial, so long as his wish can be ascertained; but when the mode of its indication has been prescribed by authority of law, the form becomes a matter of substance, and courts are not authorized to say that it may be disregarded, and that the wish of the voter may be determined by conjecture. Whatever the statute requires the form to be is mandatory. In the present case it may be a reasonable conjecture that the votes cast in the above form were intended to be in favor of the issuance of the bonds, but it is still only a matter of conjecture. If the voters had drawn a line through the "Yes" it might be supposed that they intended to vote against their issuance, but, if instead of drawing a line through the "Yes" they had stamped an "X" directly upon it, it would be uncertain whether they intended in this mode to indicate an affirmative vote, or to have it counted as a negative. It is equally a matter of conjecture, though perhaps with less uncertainty, where the "X" has been placed at the side of the "Yes" rather than upon it. Let it be supposed that, with the direction which was given in the ordinance for the mode of voting, 500 ballots had been cast, of which 100 were marked in this mode, 100 with a line drawn through the "Yes," 100 with a line drawn through the "No," 100 with the "X" stamped upon the "Yes," and 100 with the words "For the bonds" written upon the ticket; could it be said that the board would be authorized to declare that the election had resulted in favor of the issuance of the bonds, or that there was anything more than conjecture as to the wishes of the voters? The only safe rule is to hold the specific directions to be mandatory, and that the manifest disregard of them by the voter renders his vote nugatory. The notice which was printed upon the tickets that were used by the voters, "To vote for or against a proposition, stamp an 'X' in the square at the right," was unauthorized, and gave to the voters no right to disregard the manner of voting which was directed by the ordinance calling the election. That direction in the ordinance was clear and unambiguous, and it must be held that, as it was disregarded, the election was invalid.

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8. It was not necessary that the alternative of making the interest payable annually or semiannually should be submitted to the voters. Section 3 of the act requires the legislative body, after the ordinance has been published two weeks, to publish a "notice of such special election, the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of the tax levy to be made for the payment thereof;" but makes no requirement with reference to the publication of the times at which the interest is payable. The indebtedness cannot be incurred without the assent of two thirds of the qualified electors of the city voting at an election for that purpose (Const. art. 11, § 15); but it is not requisite under this provision, or the aforesaid statute, that the voters shall determine in the first instance whether the interest shall be paid annually or semiannually. The amount of the bonds and the rate of interest constitute the indebtedness proposed to be incurred, and upon which the voters are to exercise their wishes; but, as the city council is to determine in the first instance the rate of interest which the bonds are to bear, it may also in the first instance determine whether the interest shall be payable annually or semiannually. Its determination upon this point may be stated in the proposition to the voters as readily as the rate of interest. The ordinance herein stated in sufficient terms that the interest was to be paid annually.

The judgment is reversed.

✓ We concur: **Henshaw, J.; Temple, J.; Garoutte, J.; McFarland, J.; Van Fleet, J.**

Beatty, Ch. J., concurring:

I concur. This case certainly reverses one point decided in *Skinner v. Santa Rosa*. But although the point was involved in that case it was not essential to the conclusion reached, which was fully sustained upon other grounds. And since the decision of that point cannot have given rise to any claim of vested right it ought to be set aside if erroneous. A comparison of the act of March 1, 1893 (Stat. 1893, p. 59), amending the act of March 15, 1883, with the act here in question which was passed on the same day, is conclusive as to the sense in which that legislature used the expression, "payable in gold coin or lawful money of the United States." The same phrase must mean the same thing in both acts, and the former act shows clearly that the bonds were to be made payable specifically in gold coin or specifically in lawful money, and not in either at the option of the municipality. This construction also accords with the object of the amendment, which, as shown by Justice Harrison, would have been defeated by any other construction.

NEW YORK COURT OF APPEALS.

Charles E. HOVEY, Survivor, etc., *Appt.*,
v.

George ELLIOTT *et al.*, Exrs., etc., of John
Elliott, Deceased, *Resp't.*

(145 N. Y. 126.)

1. **Striking out a defendant's answer** to punish him for contempt is not authorized by U. S. Rev. Stat. § 725, which restricts such punishment to fine or imprisonment.
2. **A judgment pro confesso after striking out defendant's answer** to punish him for contempt, rendered by the supreme court of the District of Columbia, which has, under U. S. Rev. Stat. § 725, no power to impose such punishment for contempt, is void on collateral attack.

NOTE.—Decision against constitutional right as a nullity subject to collateral attack.—

- I. *Denial of due process of law or other constitutional right of procedure.*
 - a. *In general.*
 - b. *Habeas corpus cases.*
- II. *Conviction for violating unconstitutional statute or ordinance.*
- III. *Judgment on unconstitutional contract.*
- IV. *Other cases.*
- I. *Denial of due process of law or other constitutional right of procedure.*
 - a. *In general.*

In considering the principle on which the above decision of HOVEY v. ELLIOTT should be based, the first inquiry is whether a lack of jurisdiction is or is not the only ground on which a judgment can be held void upon collateral attack. Another ground is at least hinted at in some cases, and is the necessary logical basis for some decisions which are professedly based on a lack of jurisdiction, when in fact jurisdiction existed. By such decisions judgments denying a constitutional right have been held void on collateral attack when the courts rendering them really had jurisdiction. These cases are further discussed in the subsequent divisions of this note.

If the denial of a constitutional right was in itself a sufficient ground of collateral attack, this would be sufficient to sustain the case of HOVEY v. ELLIOTT and the other similar cases cited in this division. But these cases may quite fairly be based on the general doctrine as to the nullity of decisions when there was lack of jurisdiction to render them. It may be reasonably said that jurisdiction is abdicated or lost when the court strikes out a defendant's appearance and answer. This substantially says that to turn a defendant out of court after he has been duly brought in leaves the court without any more jurisdiction than it had before he was brought in.

Jurisdiction is the right to hear and determine, not to determine without hearing, and where no appearance is allowed there can be no hearing or opportunity of being heard, and therefore no exercise of jurisdiction. Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

A judgment rendered without due process of law is held void on collateral attack by the Supreme Court of the United States in Hovey v. Elliott, 187 U. S. 409, 42 L. ed. 215, affirming the main case. It is impliedly held that there was a lack of jurisdiction.

"A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding

3. **Civil as well as criminal contempts** are within the provisions of U. S. Rev. Stat. § 725, authorizing fine or imprisonment only, as a punishment therefor, and this is applicable to the District of Columbia.

(February 26, 1895.)

A PPEAL by plaintiff from a judgment of the General Term of the Superior Court for the City of New York affirming a judgment entered upon the report of a referee dismissing the complaint in an action brought to charge defendants as trustees of certain bonds which it was alleged their testator had purchased *pendente lite*. *Affirmed.*

The facts are stated in the opinion.

had better be omitted altogether. It would be like saying to a party, 'Appear, and you shall be heard,' and, when he has appeared, saying, 'Your appearance shall not be recognized, and you shall not be heard.'" Where the court in effect said this and immediately added a decree of condemnation reciting that the default of all persons had been duly entered, it was in fact a mere arbitrary edict clothed in the form of a judicial sentence. Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.

"Of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was ineffectual, and that the defendant had no right either to appear or be heard in his defense?" Hovey v. Elliott, 187 U. S. 409, 42 L. ed. 215.

The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. Hovey v. Elliott, 187 U. S. 409, 42 L. ed. 215.

The denial to a party of the right to appear is in legal effect the recall of the citation to him. Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Hovey v. Elliott, 187 U. S. 409, 42 L. ed. 215.

A forfeiture or confiscation of the property of a person in rebellion, made by sentence of the court in a judicial proceeding to which the owner appeared by counsel and answered, was held void on collateral attack where his answer was stricken from the files on the ground that he was an enemy and within the Confederate lines. Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914. This decision was collaterally attacked in an action of ejectment.

A sentence of condemnation and sale was also held, in Underwood v. McVeigh, 23 Gratt. 409, to be void for refusal to permit the defendant to be heard. The court says it was "a nullity—void *in toto*. It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way. It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact and upon the matters of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defense."

**Mr. Herbert B. Titus, with Mr. Fred-
erick S. Duncan, for appellant:**

A judgment can be attacked collaterally in another state only on the ground of want of jurisdiction over the parties, or over the subject-matter, or that it is not responsive to the issues tendered by the pleadings.

Thompson v. Whitman, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464.

If the decree in *Hovey v. McDonald* was assailable, the remedy of the defendants was by direct review in the Supreme Court of the United States. Having failed to pursue that remedy, they and their privies are now estopped from collateral attack upon the decree.

Dowell v. Applegate, 152 U. S. 827, 38 L. ed. 468; *Pepke v. Cronan*, 155 U. S. 100, 39 L. ed. 84; *New York v. Eno*, 155 U. S. 89, 39 L. ed. 80; *Re Fonda*, 117 U. S. 516, 29 L. ed.

994; *Cooper v. Reynolds*, 77 U. S. 10 Wall. 808, 19 L. ed. 981; *Voorhees v. Jackson, Bank of United States*, 85 U. S. 10 Pet. 449, 9 L. ed. 490; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 559, 31 L. ed. 205; *Gray v. Brignardello*, 68 U. S. 1 Wall. 634, 17 L. ed. 697; *Comstock v. Crawford*, 70 U. S. 3 Wall. 404, 18 L. ed. 87; *Thompson v. Tolmie*, 27 U. S. 2 Pet. 168, 7 L. ed. 388; *Ex parte Watkins*, 28 U. S. 3 Pet. 193, 7 L. ed. 650; *McCormick v. Sullivan*, 23 U. S. 10 Wheat. 192, 6 L. ed. 800; *Nash v. Williams*, 87 U. S. 20 Wall. 226, 22 L. ed. 254; *Kempe v. Kennedy*, 9 U. S. 5 Cranch, 173, 8 L. ed. 70; *Skullern v. May*, 10 U. S. 6 Cranch, 267, 8 L. ed. 220; *Nougué v. Clapp*, 101 U. S. 551, 25 L. ed. 1026; *Huling v. Kaw Valley R. & Improv. Co.* 180 U. S. 559, 32 L. ed. 1045; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 30 L. ed. 196; *Ex parte Bigelow*, 118 U. S. 828, 28 L. ed. 1005.

So, in *Henry v. Carson*, 96 Ind. 412, it was held that even if the court acquires jurisdiction, its judgment was unauthorized by law where, after defendant had appeared and filed an answer, his appearance and answer were stricken out and judgment rendered against him by default, on the ground that there was no affidavit of his loyalty. The court says: "The effect of the ruling was that although an alleged traitor, when prosecuted, was entitled to a notice requiring him to appear, yet if he should appear he could not be heard in defense."

"The doctrine that when a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and that its judgment, however erroneous, cannot be collaterally assailed 'is only correct where the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it.'" *Henry v. Carson*, 96 Ind. 412. Citing *Windsor v. McVeigh*, 98 U. S. 274, 23 L. ed. 914.

But a judgment of a justice of the peace rendered with the statement that "the court being of the opinion that the defendant could not tender an issue until his answer was verified, refused to hear evidence in support thereof; and being well and sufficiently advised in the premises" proceeded to render judgment," was held valid on collateral attack, in *Carolan v. Carolan*, 47 Ark. 511, as the court says the record does not show an absolute refusal to permit the defendant to appear and defend. It adds: "The justice was in error in striking out the defendant's answer and in refusing to hear his defense without a written or verified answer; but a justice of the peace has the right to determine every question that arises in a cause pending in his court that a superior court has under like circumstances; and when he errs in his conclusions upon the law, the judgments of his court are no more open to attack than those of the circuit court."

In discussing the void character of a judgment rendered without due process of law, the court, in *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, says: "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitu-
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tion? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

b. Habeas corpus cases.

A writ of habeas corpus to release a prisoner held under a sentence is unquestionably a collateral attack upon the judgment against him. Yet it has been sustained in numerous cases to release from imprisonment under a conviction by a court which had jurisdiction of the case but which attempted to enforce an unconstitutional statute or ordinance, or denied some constitutional right. These decisions generally follow the case of *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717, as a leading case, although it was not in fact the first to that effect.

Most of them seem to regard the question as one to be determined by the ordinary rule which allows collateral attack only for want of jurisdiction, and do not seem to lay any stress on the fact that the Federal courts under U. S. Rev. Stat. § 753, are authorized to issue such writs by language broad enough to overthrow that rule entirely so far as Federal courts are concerned. The Federal courts themselves have said very little about the effect of this section to take their habeas corpus cases out of the usual rule. Even in very late cases the Supreme Court of the United States has declared that it can by writ of habeas corpus attack a judgment only for lack of jurisdiction, although in other cases it uses less explicit language, saying it can attack only such judgments as are "nullities," or judgments which are void for lack of jurisdiction, "or for other reasons."

These varying expressions, which are somewhat confusing when we try to get an exact statement of the doctrine of that court, are illustrated by the following quotations: "Judgments of courts of that character [superior jurisdiction] cannot be assailed collaterally, except upon grounds that impeach their jurisdiction." *Re Cuddy*, 181 U. S. 280, 33 L. ed. 154.

"The proposition is so clear, that in a writ of habeas corpus nothing can be inquired into but the jurisdiction of the court, that it is unnecessary to pursue the entire line of argument of counsel for appellant." *Wight v. Nicholson*, 134 U. S. 136, 33 L. ed. 866.

"It is only upon the theory that the proceedings and judgment of the court were nullities that we

The supreme court of the District of Columbia made the regularity of its procedure in rendering this decree the subject of judicial determination; it could be questioned, therefore, only in that court, or by appeal.

Ex parte Bigelow, 118 U. S. 881, 28 L. ed. 1006; *Ex parte Watkins*, 28 U. S. 3 Pet. 203, 7 L. ed. 653; Black, Judgm. § 274; *Cooper v. Reynolds*, 77 U. S. 10 Wall. 808, 19 L. ed. 931; *Voorhees v. Jackson*, *Bank of United States*, 35 U. S. 10 Pet. 449, 9 L. ed. 490; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 180, 35 L. ed. 660; *Bryan v. Kennett*, 113 U. S. 180, 28 L. ed. 909; *Holdane v. Sumner*, 82 U. S. 15 Wall. 608, 21 L. ed. 259.

If the supreme court of the District of Columbia exceeded its authority in ordering the answer of McDonald and White to be removed from the files, that does not affect the validity of the final decree.

are authorized to reverse its action." *Ex parte Lennon*, 168 U. S. 548, 41 L. ed. 1110.

But "want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void," is the language in which some of the cases define the ground on which habeas corpus can be granted to release a prisoner. *Re Frederick*, 149 U. S. 70, 37 L. ed. 653.

Thus, in some cases, the court explicitly declares that want of jurisdiction is the only ground of attack upon a judgment by habeas corpus; in other cases it says only judgments which are "nullities" can be thus attacked; while in still other cases it qualifies the statement by saying that a judgment can be questioned collaterally if, for lack of jurisdiction "or for any other reason," the judgment is void. Cases of the last-mentioned class clearly imply that a judgment may be void for "other reasons" than want of jurisdiction, but they do not make it clear what such other reason or reasons may be.

The fact is the Federal courts do issue writs of habeas corpus to release persons held under judgment of a court, not only when the judgment was without jurisdiction, but when it denies a right conferred by the Federal Constitution, even if the court had jurisdiction to decide the case. This fact clearly appears from the decisions below cited, in the division next following as well as in this.

In numerous cases in which the jurisdiction of the court to try the case was unquestionable, its decision has been held void on habeas corpus because the court erred in its decisions by denying some constitutional right.

Thus, the right of a Federal court to release by habeas corpus a person imprisoned under judgment of a state court without due process of law is declared and exercised in numerous cases. *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223; *Re Lee Tong*, 9 Sawy. 363; *Re Ah Lee*, 6 Sawy. 410; *Re Parrott*, 6 Sawy. 349; *Re Wan Yin*, 10 Sawy. 532; *Re Quong Woo*, 7 Sawy. 526; *Ex parte Ah Lit*, 11 Sawy. 447; *Re Ah Jow*, 12 Sawy. 88; *Re Sam Kee*, 12 Sawy. 379; *Re Tie Loy*, 11 Sawy. 472; *Re Wong Yung Quy*, 2 Fed. Rep. 624; *Ex parte Farley*, 40 Fed. Rep. 66; *Ex parte McClusky*, 40 Fed. Rep. 71.

These are followed by some state decisions to the same effect. *State, Larkin v. Ryan*, 70 Wis. 676; *Re Doyle*, 16 R. I. 537, 5 L. R. A. 359; *Re Roberts*, 4 Kan. App. 232; *Re Durbin*, 10 Mont. 147.

In several of these cases another ground of relief was the denial of the equal protection of the laws. *State, Larkin v. Ryan*, 70 Wis. 676; *Re Tie Loy*, 11 Sawy. 472; *Re Sam Kee*, 12 Sawy. 379.

But in *Re Frederick*, 149 U. S. 70, 37 L. ed. 653, where a sentence authorized by a state statute was

Collateral inquiry into the validity of a judgment must be confined to the judgment and the pleadings. Preliminary or interlocutory proceedings cannot be brought in question.

Gray v. Brignardello, 68 U. S. 1 Wall. 684, 17 L. ed. 697; *Comstock v. Crawford*, 70 U. S. 8 Wall. 404, 18 L. ed. 37; *Huling v. Kass Valley R. & Improv. Co.* 190 U. S. 559, 32 L. ed. 1045; *Mellen v. Moline Malleable Iron Works*, 181 U. S. 870, 33 L. ed. 184; *Ex parte Bigelow*, 118 U. S. 828, 28 L. ed. 1005.

Even if the preliminary steps could be reviewed collaterally, and the interlocutory order striking out defendants' answer were held to have been made in excess of the statutory authority of the court, this defect does not invalidate the final decree, or subject it to collateral attack.

Grignon v. Astor, 48 U. S. 2 How. 840, 11 L. ed. 291; *Thompson v. Tolmie*, 27 U. S. 2 Pet.

alleged to have been void because the statute was in violation of the provision of the Constitution as to due process of law, the writ was denied because the court thought it the better practice to put the prisoner to his remedy by writ of error. See similar cases, *Ex parte Belt*, *infra*, and *Andrews v. Swartz*, *infra*.

The alleged unconstitutionality of a statute allowing indeterminate sentence was held insufficient ground for habeas corpus to release a person thus sentenced, in *Re Pikulik*, 81 Wis. 158; *Re Schuster*, 82 Wis. 610.

Trial without a jury in violation of the constitutional right of the accused entitles him to discharge from the conviction by habeas corpus. *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223.

Release on habeas corpus because of the alleged denial of trial by jury was denied on the ground that the constitutional right had not been violated, but without questioning the remedy in *Re Staff*, 68 Wis. 255, 52 Am. Rep. 285; *Re Marron*, 60 Vt. 199; *Re Clayton*, 59 Conn. 510, 13 L. R. A. 66.

But in *Ex parte Belt*, 159 U. S. 95, 40 L. ed. 88, where the prisoner contended that his constitutional right to trial by jury had not been granted him, and that his attempted waiver thereof in pursuance of an act of Congress for the District of Columbia was void because the statute was unconstitutional, the court said: "We are clearly of opinion that the supreme court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury," and therefore denied the writ.

So, in *Andrews v. Swartz*, 156 U. S. 272, 39 L. ed. 422, where a convict sought release on habeas corpus on the ground that he had been deprived of his rights under the United States Constitution by the arbitrary exclusion from the panel of jurors of all persons of his race, the Supreme Court of the United States held that the writ would not lie, and that his proper remedy, if such right was in fact denied, was to carry the case to the highest court of the state and thence upon writ of error to the United States Supreme Court.

In Indiana the writ of habeas corpus based on the refusal of a constitutional right to a jury to assess punishment on a plea of guilty in a homicide case, was denied on the ground that the court had jurisdiction. *Lowery v. Howard*, 103 Ind. 440.

So, in Arkansas the denial of a jury trial is held not to be a jurisdictional matter, and not to constitute ground for habeas corpus. *Ex parte Brandon*, 49 Ark. 143.

A witness who has a constitutional right under the 6th Amendment to the Federal Constitution to decline to answer questions because the answers may tend to criminate him is entitled to discharge

168, 7 L. ed. 385; *Ex parte Watkins*, 28 U. S. 8 Pet. 208, 7 L. ed. 653; *Voorhees v. Jackson*, *Bank of United States*, 35 U. S. 10 Pet. 472, 9 L. ed. 499; *Grignon v. Astor*, 43 U. S. 2 How. 385, 11 L. ed. 289; *Florentine v. Barton*, 69 U. S. 2 Wall. 215, 17 L. ed. 785; *Harvey v. Tyler*, 69 U. S. 2 Wall. 346, 17 L. ed. 875; *Comstock v. Crawford*, 70 U. S. 8 Wall. 404, 18 L. ed. 87; *Cooper v. Reynolds*, 77 U. S. 10 Wall. 308, 19 L. ed. 931; *Nash v. Williams*, 87 U. S. 20 Wall. 249, 22 L. ed. 258; *Maxwell v. Stewart*, 88 U. S. 21 Wall. 78, 22 L. ed. 565; *Ex parte Bigelow*, 113 U. S. 328, 28 L. ed. 1005; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 370, 83 L. ed. 184; *Huling v. Kaw Valley R. & Improv. Co.* 130 U. S. 565, 32 L. ed. 1048; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 130, 35 L. ed. 660.

The supreme court of the District of Columbia is a court of general jurisdiction in law

and equity, and, as such, has the recognized power of a court of chancery to strike out the answer of a defendant for contempt, and render a decree *pro confesso*.

McKenna v. Fisk, 42 U. S. 1 How. 245, 11 L. ed. 118; *Walker v. Walker*, 82 N. Y. 260; *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105.

Section 725 of the Revised Statutes of the United States does not apply to the supreme court of the District of Columbia.

Territory v. Murray, 7 Mont. 251; *Hornbuckle v. Toombs*, 85 U. S. 18 Wall. 654, 21 L. ed. 967; *Clinton v. Englebrecht*, 80 U. S. 18 Wall. 447, 20 L. ed. 662; *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693.

Section 725 of the Revised Statutes of the United States applies only to criminal, not to civil, contempt.

Hendryx v. Fitzpatrick, 19 Fed. Rep. 810;

by habeas corpus if imprisoned for contempt in refusing to answer. *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816. No question was made in this case as to the remedy, but only as to the constitutional right.

So, a person imprisoned for contempt in refusing to answer questions as to which he claimed a constitutional privilege under the state Constitution attempted to get his discharge by habeas corpus in *People, Hackley, v. Kelly*, 12 Abb. Pr. 150, but while the remedy was unquestioned, it was held that his constitutional rights had not been infringed.

A person sentenced to imprisonment for an infamous crime without having been presented or indicted by a grand jury as required by the 5th Amendment to the Constitution of the United States is entitled to be discharged on habeas corpus. *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89; *United States v. DeWalt*, 128 U. S. 393, 32 L. ed. 435; *Re Bain*, 121 U. S. 1, 30 L. ed. 849; *Ex parte McClusky*, 40 Fed. Rep. 71; *Ex parte Van Vranken*, 47 Fed. Rep. 883.

This constitutional requirement is declared to be jurisdictional. *Re Bain*, 121 U. S. 1, 30 L. ed. 849; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89.

And it is applied to an indictment amended under order of court by striking out some words. *Re Bain*, 121 U. S. 1, 30 L. ed. 849.

Likewise in Texas one indicted by a grand jury composed of fourteen instead of twelve as the Constitution required was released on habeas corpus. *Ex parte Reynolds*, 35 Tex. Crim. Rep. 437, overruling *Ex parte Fuller*, 19 Tex. App. 241.

In Montana the want of an indictment by a grand jury was held to be a want of due process of law sufficient to make a conviction void when attacked by habeas corpus. *Re Durbon*, 10 Mont. 147.

Though this is denied in other cases which do not question the right to the remedy by habeas corpus if the constitutional provision had been in fact violated. *Re Dolph*, 17 Colo. 35; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232.

The unconstitutionality of a statute which violated a bill of rights providing for plain description of the crime and for protection against furnishing evidence to criminate one's self and for the right to face witnesses and be heard personally by counsel, was held, in *State, Cunningham, v. Ray*, 63 N. H. 406, 56 Am. Rep. 523, a good ground of habeas corpus.

Whether imprisonment in violation of the constitutional provision that no man shall be twice placed in jeopardy entitles the prisoner to release on habeas corpus, although his imprisonment is under a 89 L. R. A.

sentence of a court, is a question on which the decisions have not been quite agreed.

In *Ex parte Lange*, 85 U. S. 18 Wall. 163, 21 L. ed. 872, a person sentenced to fine and imprisonment both, when the court could rightly sentence him to one of them only, paid the fine and then sought release by habeas corpus from the same court. This was denied and he was resentenced. But the Supreme Court of the United States granted the relief on the ground that he had fully satisfied the judgment so that the second sentence was void because made after the authority of the court was ended.

But this case was distinguished in the later case of *Re Bigelow*, 113 U. S. 328, 28 L. ed. 1006, where the infringement of the constitutional exemption against second jeopardy was held insufficient to make a sentence void when collaterally attacked by writ of habeas corpus. In this case the alleged former jeopardy was created by the swearing of a jury and presentment of the case by the district attorney under an order for consolidation of indictments, but the order was rescinded and there was a subsequent trial. It is held that the case "remained with the trial court to decide whether the acts on which he relied were a defense to any trial at all." This is said to be within the jurisdiction of the court. It is asked if articles 5, 6, and 7 of the Amendments to the United States Constitution all go to the jurisdiction of courts, and if all judgments are void where these constitutional provisions have been disregarded.

That question is substantially answered in the negative by the decision in *Ex parte Bigelow*. But the other decisions of the same court above cited as to necessity of indictment and trial by jury and exemption from self-crimination seem to answer it in the affirmative.

In *Ex parte Ulrich*, 43 Fed. Rep. 661, reversing 42 Fed. Rep. 587, habeas corpus to release a prisoner held under judgment of a state court because his plea of former jeopardy had been overruled, was denied on the ground that his remedy was by writ of error, since the case was not within the special grounds on which a Federal court could discharge prisoners from a state court, as the 5th Amendment of the United States Constitution did not apply to the proceedings in a state court.

In *Re Snow*, 120 U. S. 274, 30 L. ed. 653, it was held that a person sentenced on each of three convictions on separate indictments for a single offense could be released from punishment on more than one of them by writ of habeas corpus because the lack of jurisdiction was shown on the face of the judgment.

In respect to the power of a chancellor to release a prisoner on writ of habeas corpus, it is said, in

Re Graves, 29 Fed. Rep. 60; *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105; *Fuller v. Cluffin*, 98 U. S. 14, 23 L. ed. 785.

Mr. Everett P. Wheeler, also for appellant:

Since the English court of chancery began to exercise its powers, there never was a time when a defendant in the circumstances of the defendants in the original action had the right to be heard upon the merits of his alleged defense.

Walker v. Walker, 82 N. Y. 260, Affirming 20 Hun, 400; *Quigley v. Quigley*, 45 Hun, 23; *Wartman v. Wartman*, Taney, 362; *Stubbs v. Ripley*, 39 Hun, 626; *Comstock v. Crawford*, 70 U. S. 3 Wall. 896, 18 L. ed. 34; *Simmons v. Saul*, 188 U. S. 439, 34 L. ed. 1054; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123; *Thaw v. Falls* (*Thaw v. Ritchie*), 186 U. S. 319, 54 L. ed. 531; *Grignon v. Astor*, 43 U. S. 2 How. 319, 11 L. ed. 283.

Ex parte Jackson, 45 Ark. 158: "He has nothing to do with the administration of the criminal laws, nor right to interfere with them. He is simply empowered to hold the keys of the Constitution over those whose liberty is infringed by void process of law, or, what is the same thing, no process at all." On the ground that the warrant did not set forth any offense as the ground of commitment it was held in this case that the prisoner should be discharged on habeas corpus.

If the defect in the warrant prevented the court from getting jurisdiction of the case, the "seign of the Constitution" was not needed to protect the prisoner, as the judgment would be void without reference to any constitutional provision.

A prisoner who is held in violation of the constitutional provision against imprisonment for debt can be released on habeas corpus. It is immaterial that this is done under a statute authorizing the imprisonment as a contempt of court for refusal to pay the debt. *Ex parte Hardy*, 68 Ala. 303.

Habeas corpus was also granted to release a prisoner on the ground that his imprisonment was in violation of the constitutional provision against imprisonment for debt, but without any discussion of the remedy in *Ex parte Clark*, 20 N. J. L. 648, 45 Am. Dec. 264, *Re Blair*, 4 Wis. 522. The same remedy was sought for the same reason in *People, Latorre, v. O'Brien*, 6 Abb. Pr. N. S. 63, and in a large number of other cases in which the discharge was denied without any question as to the propriety of the remedy. Among these cases are *Ex parte Perkins*, 18 Cal. 60; *Ex parte Grace*, 12 Iowa, 208, 79 Am. Dec. 529; *Re Wheeler*, 84 Kan. 96; *Re Boyd*, 34 Kan. 570; *Re Sheahan*, 25 Mich. 145; *Ex parte Cottrell*, 18 Neb. 193; *Ex parte Donahoe*, 24 Neb. 66; *Ex parte Bergman*, 18 Nev. 331; *Re Beall*, 26 Ohio St. 195; *Com. v. Bowman*, 3 Pa. Dist. R. 74; *Re Mowry*, 12 Wis. 58; *Re Milburn*, 59 Wis. 24; *Re Macdonald* (Wyo.), 15 Crim. L. Mag. 673.

But habeas corpus to test the constitutionality of a statute under which a city or township was organized is denied to a person held under judgment of a justice of the peace of that *de facto* city or township. *Re Rabbitt*, 47 Kan. 382.

The disqualification of a judge under the 14th Amendment because of his having engaged in rebellion after taking his oath of office was held, in *Re Griffin*, 25 Tex. Supp. 623, insufficient basis for habeas corpus to release a person sentenced by the judge.

In numerous other cases writs of habeas corpus sought because of the alleged violation of a constitutional right have been denied merely because it was held that such right had not been violated and without any question that such writ was the proper 39 L. R. A.

The rights of defendant are not ignored when a bill is taken *pro confesso*.

Thomson v. Wooster, 114 U. S. 104, 29 L. ed. 105; *Ogilvie v. Herne*, 13 Ves. Jr. 568.

The refusal to comply with the order of the court, and the remaining out of its jurisdiction, waived any constitutional guaranty.

Eureka Lake & Y. Canal Co. v. Yuba County Super. Ct. 116 U. S. 410, 29 L. ed. 671; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Sentenis v. Ladeco*, 140 N. Y. 463; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325.

However irregular or erroneous a judgment may be, it is not open to collateral attack if the court have jurisdiction of the person and of the cause.

Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461; *Rocco v. Hackett*, 2 Bosw. 579; *Wineman v. Gastrell*, 2 U. S. App. 449, 53 Fed. Rep. 697, 3 C. C. A.

remedy if the constitutional right had been denied.

For further consideration of the use of habeas corpus, see next division, respecting release from conviction for violation of unconstitutional statute or ordinance.

In respect to the above cases, as well as those discussed in the next division of this note, it seems clear that the judgments held void were rendered by courts which had jurisdiction to try the issues involved, and that their alleged want of jurisdiction was, at most, a want of authority to decide wrong on a constitutional question which they have jurisdiction to decide right.

This is the strange position into which a court is inevitably placed when it decides that a judgment is void for lack of jurisdiction because it denies a constitutional right, although it was rendered by a court of general jurisdiction whose judgment would have been valid if the court had decided the question the other way.

But while the Federal courts have in most habeas corpus cases decided the question as if it must be decided by the general rule as to collateral attack it will be seen, as above stated, that some cases speak of "other reason" besides want of jurisdiction for holding a decision void. In several cases also there is language implying that the Federal statute had materially changed the rule of such procedure in Federal courts.

Thus, it was said by Mr. Justice Bradley: "In view of our late civil strife, and the necessity of protecting those who claim the benefit of the national laws, Congress, by the act of February 5, 1867, extended the writ to 'all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States,' and made it issuable by 'the several courts of the United States and the several justices and judges of said courts within their respective jurisdictions.'" *Ex parte Bridges*, 2 Woods, C. C. 429.

Judge Dady also says: "If the jurisdiction to discharge a person from imprisonment, who is deprived of his liberty without due process of law by a state, was not conferred upon the district and circuit judges, this provision of the 14th Amendment, that was plainly intended as a bulwark against local oppression and tyranny, as well 'up North' as 'down South,' would be a dead letter. The Supreme Court is too far away, and the way there is too expensive, to furnish relief in the great majority of cases, either upon a direct application or on an appeal from the state court." *Re Wan Yin*, 10 Sawy. 532. This clearly implies that habeas corpus is to some extent at least a substitute for a

621; *Bigelow v. Chatterton*, 10 U. S. App. 267, 51 Fed. Rep. 614, 2 C. C. A. 402; *Haskell County Bank v. Bank of Santa Fe*, 151 Kan. 39; *Paterson v. Baker*, 51 N. J. Eq. 49; *First Nat. Bank v. Genesee Town Co.* 51 Kan. 215; *State, Morrison, v. Morris*, 108 Ind. 161; *Marion County Bd. of Children's Guardians v. Shutter*, 189 Ind. 268, 81 L. R. A. 740.

It is immaterial whether the judgment was by default or confession. It is final and not open to collateral attack.

Gates v. Preston, 41 N. Y. 118; *Nemetty v. Naylor*, 100 N. Y. 562; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 182; *Ferris v. Fisher*, 67 Hun. 185; *Austin v. Austin*, 43 Ill. App. 488; *Gibbs v. Southern*, 116 Mo. 204; *Tracey v. Shumate*, 22 W. Va. 475.

Jurisdiction is sometimes used to mean power to render a particular judgment. Again it is used with reference to the regular method of obtaining particular relief.

writ of error when a state court had denied the constitutional right to due process of law.

Again, in speaking of the rule that habeas corpus will be granted only for lack of jurisdiction, it is said in *Kingen v. Kelley*, 8 Wyo. 566, 15 L. R. A. 177: "There is an apparent exception to this rule in some special cases, provided for by § 753 of the Revised Statutes of the United States."

The authority given by U. S. Rev. Stat. § 753, is not in its terms limited to cases in which persons are held without jurisdiction. The question of collateral attack is not mentioned therein, and possibly the Federal courts might hold the statute broad enough to permit the issuance of the writ to a state court even when the latter had conceded jurisdiction. The fact seems to be that the Federal courts have in fact done so without discussing the matter in this light, or expressly claiming to do so.

Some of the state courts also, as in several decisions above mentioned, have used the writ of habeas corpus to release a person sentenced in violation of his constitutional rights. In many other state cases the writ has been assumed to be proper without questioning the remedy, where the court has proceeded to discuss the existence of alleged violation of the constitutional right.

II. Conviction for violating unconstitutional statute or ordinance.

It has been repeatedly declared that an unconstitutional statute is a nullity, and that a decision attempting to enforce it is therefore void for lack of jurisdiction. Just what is meant by such a declaration is not quite clear. It surely does not mean that the court in such case cannot have jurisdiction to decide the question of constitutionality of a statute, because that is a judicial question of the highest class which the courts are expressly created to decide. Moreover a decision against the validity of a statute seems never to have been held or claimed to be void on the ground that the statute was a nullity. Therefore, unless we adopt the peculiar theory that the court has jurisdiction to decide right, but none to decide wrong, we are driven to the conclusion that a decision is not void for lack of jurisdiction merely because it decides that an unconstitutional statute is valid. If such a decision is void on collateral attack, it must be for some other reason than a lack of jurisdiction of the court to decide the question. If the courts should say that constitutional rights are too important to be cut off by wrong decisions, and that decisions which deny such rights will therefore be held void, even on collateral attack, because of the serious consequences involved, it would merely express the actual attitude of the courts; but they do 89 L. R. A.

In the first sense only, the word is used when it is said that a particular judgment is void for want of jurisdiction, and is therefore open to collateral attack.

Mentz v. Cook, 108 N. Y. 504; *Reynes v. Du-mont*, 180 U. S. 354, 82 L. ed. 984; *Brown v. Lake Superior Iron Co.* 184 U. S. 580, 83 L. ed. 1021; 1 Dan. Ch. Pr. 4th Am. ed. 555; *Sentenis v. Ladew*, 140 N. Y. 468; *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 75, 86 L. ed. 352; *Whyte v. Gibbs*, 61 U. S. 20 How. 541, 15 L. ed. 1016; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 468; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 128 U. S. 552, 81 L. ed. 202; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 182.

Defendants are bound by judgment in District of Columbia because purchasers *pendente lite*.

Leitch v. Wells, 48 N. Y. 601; *Tilton v. Co-field*, 98 U. S. 168, 28 L. ed. 859; *Wright v.*

not say this. They usually attempt to justify their repudiation of such decisions by what seems to be a demonstrably untenable argument against the jurisdiction of the courts which rendered the decisions. Either the rulings which hold such decisions void on collateral attack are wrong *in toto*, or else they are based on wrong reasons so far as they declare the decisions void for lack of jurisdiction.

To say that state courts have no jurisdiction to decide the question of the constitutionality of a state statute under the Federal Constitution would be absurd. That proposition is contradicted in all possible ways. The jurisdiction is assumed or implied in the provisions of U. S. Rev. Stat. § 709, providing for a writ of error from the Supreme Court of the United States to review decisions of this kind. So in a great number of cases the Supreme Court of the United States has reviewed such judgments of state courts on writs of error without intimating that the state courts did not have jurisdiction to decide the questions involved, and on such writs of error have proceeded to determine the constitutional questions on the merits. If the state court in such a case was without jurisdiction, it would seem to be the business of the Supreme Court of the United States to reverse the decision because of the want of jurisdiction of the lower court, without going into the merits of the case further than that. In *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, the court quotes from and follows the decision in *Jackson v. Ashton*, 33 U. S. 8 Pet. 148, 8 L. ed. 898, to the effect that on appeal from a decision of the circuit court when it had no jurisdiction the Supreme Court "had no jurisdiction except for the purpose of reversing the decree appealed from on that ground."

But the Supreme Court of the United States has declared in the most express language that state courts have jurisdiction to decide as to the constitutionality of state statutes when they are claimed to violate the Federal Constitution. It says: "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." *Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542.

This is plainly decided also by holding that while the Federal courts have the power and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the Federal Constitution or laws, they are not bound to exercise such power, but may in their discretion require the accused to sue out his writ of error from the

Tebbitts, 91 U. S. 252, 23 L. ed. 820; *Child v. Trist*, 1 MacArth. 1; *Hovey v. Elliott*, 118 N. Y. 124; *Union Stock Yards Nat. Bank v. Gillespie*, 187 U. S. 411, 34 L. ed. 724; *National Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 698; *Importers' & T. Nat. Bank v. Peters*, 128 N. Y. 272; *Holden v. New York & E. Bank*, 72 N. Y. 286; *Dobold v. Oppermann*, 111 N. Y. 581, 2 L. R. A. 644; *Moore v. Williams*, 62 Hun. 55.

Messrs. William G. Choate and John Selden, with *Mr. E. D. Harris*, for respondent:

The court had no power to inflict any punishment for contempt except fine or imprisonment.

U. S. Rev. Stat. § 725.

The supreme court of the District of Columbia is a court of the United States and within this section of the Revised Statutes.

United States v. Emerson, 4 Cranch, C. C.

highest court of the state, or even from the Supreme Court of the United States. *Ex parte Royall*, 117 U. S. 271, 29 L. ed. 868; *Ex parte Fonda*, 117 U. S. 516, 29 L. ed. 994; *Duncan v. McCall*, 139 U. S. 449, 35 L. ed. 219; *Wood v. Brush*, 140 U. S. 278, 35 L. ed. 505; *Cook v. Hart*, 146 U. S. 133, 36 L. ed. 984; *Whitten v. Tomlinson*, 160 U. S. 281, 40 L. ed. 406; *New York v. Eno*, 155 U. S. 89, 39 L. ed. 80.

Even after a final judgment based on a state statute alleged to be unconstitutional, the Federal courts in some cases have refused the prisoner relief on habeas corpus and compelled him to resort to his remedy by writ of error. *Pepke v. Cronan*, 155 U. S. 100, 39 L. ed. 84; *Re Frederick*, 149 U. S. 70, 37 L. ed. 658; *Ex parte Belt*, 159 U. S. 95, 40 L. ed. 88; *Re Spickler*, 43 Fed. Rep. 658, 10 L. R. A. 445.

In *Pepke v. Cronan*, 155 U. S. 100, 39 L. ed. 84, although the petitioner expressly claimed that a state law was void because in contravention of the Federal Constitution, the court denied the writ, refusing to consider the merits, because, as it said, "the validity of the law and of the sentence could be tested by the supreme court of the state on certiorari or habeas corpus, and no reason was suggested why, if the judgment of the district court was the final judgment of the highest court of the state in which a decision in the matter could be had, a writ of error from this court might not be applied for."

We have then the repeated recognition by the Supreme Court of the United States of the right of other courts to proceed and determine the constitutionality of statutes, and even its express declaration that it is their province to do so. Therefore the denial of jurisdiction for judgments based on unconstitutional statutes or ordinances is uncontestedly shown to be, not a denial of their jurisdiction to determine the case, but a denial of their jurisdiction to render a wrong judgment. This is a strange doctrine of jurisdiction, but this is what the courts have quite generally brought themselves to.

In fact the issue of a writ of habeas corpus to release a prisoner convicted under an unconstitutional statute or ordinance has become an established practice in the Federal courts and in most of the state courts; and most of the decisions proceed on the theory that such an unconstitutional statute or ordinance is insufficient to give jurisdiction to the court. *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 230; *Re Medley*, 124 U. S. 100, 32 L. ed. 835; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 8 Inters. Com. Rep. 185, affirming 39 Fed. Rep. 641; *Re Savage*, 134 U. S. 178, 69 L. R. A.

188; *Ex parte Bradley*, 74 U. S. 7 Wall. 364, 19 L. ed. 214; *Kendall v. United States*, 37 U. S. 12 Pet. 524, 9 L. ed. 1181; *United States, McBride, v. Schurz*, 102 U. S. 378, 26 L. ed. 167; *M'Intire v. Wood*, 11 U. S. 7 Cranch, 504, 3 L. ed. 420; D. C. Rev. Stat. § 769; *Embry v. Palmer*, 107 U. S. 8, 27 L. ed. 846; *Dupasseur v. Rochereau*, 88 U. S. 21 Wall. 180, 23 L. ed. 588; *Ex parte Norvell*, 9 Mackay, 353; *Maye v. Carbery*, 2 Cranch, C. C. 886; *Bank of United States v. Kurtz*, 2 Cranch, C. C. 342.

Revised Statutes, § 725, prohibits the courts of the United States from punishing contempts of their authority otherwise than by fine and imprisonment.

Anderson v. Dunn, 19 U. S. 6 Wheat. 227, 5 L. ed. 247; *Ex parte Robinson*, 86 U. S. 19 Wall. 512, 22 L. ed. 208; *United States, Southern Exp. Co. v. Memphis & L. R. R. Co.* 6 Fed. Rep. 239; *United States, D. & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 16 Fed. Rep. 858;

33 L. ed. 842; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Ex parte Royall*, 117 U. S. 241, 29 L. ed. 868; *Re Hennick*, 5 Mackey, 499; *Ex parte McCready*, 1 Hughes, 568; *Re Rudolph*, 6 Sawy. 299; *Re Parrott*, 6 Sawy. 349; *Re Ah Chong*, 6 Sawy. 451; *Ex parte Davis*, 21 Fed. Rep. 393; *United States v. Patterson*, 29 Fed. Rep. 779; *Re Ah Jow*, 29 Fed. Rep. 181; *Re Beine*, 42 Fed. Rep. 645; *Re Brosnahan*, 18 Fed. Rep. 62; *Ex parte Kleffer*, 40 Fed. Rep. 399; *Re White*, 43 Fed. Rep. 918, 11 L. R. A. 284, 3 Inters. Com. Rep. 531; *Ex parte Newman*, 9 Cal. 502; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 426; *Ex parte Frank*, 52 Cal. 603, 23 Am. Rep. 642; *Ex parte Westfield*, 55 Cal. 550, 36 Am. Rep. 47; *Re Maguire*, 57 Cal. 604, 40 Am. Rep. 125; *Ex parte Cox*, 63 Cal. 21; *Ex parte Pitts*, 35 Fla. 149; *Herriock v. Smith*, 1 Gray, 1, 61 Am. Dec. 381; *Re Frasee*, 63 Mich. 386; *Re Hauck*, 70 Mich. 393; *Ex parte Rosenblatt*, 19 Nev. 439; *Re Paul*, 94 N. Y. 497; *Re Kline*, 6 Ohio C. C. 215; *Baxter v. Thomas*, 4 Okla. 605; *Ex parte Rollins*, 80 Va. 314; *State, Larkin, v. Ryan*, 70 Wis. 676.

The leading case in the Federal courts is *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717, in which it is said: "An unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus." The court expressly concludes "if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the case."

But the supreme court of Massachusetts, long before the case of *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717, declared, in *Herriock v. Smith*, 1 Gray, 1, 61 Am. Dec. 381: "That section of the law under which the conviction was had is unconstitutional, and therefore the judgment is void and the prisoner is entitled to be discharged from custody."

Where the statute under which a person was convicted was unconstitutional it was said, in *Re Paul*, 94 N. Y. 497: "That being so, it follows that the relator is held for an alleged crime which did not exist and which he could not commit, and that he should be discharged."

If the law or ordinance under which a court assumes to try and convict a person is void, its judgment is declared not to constitute a final judgment

Kirk v. Milwaukee Dust Collector Mfg. Co. 26 Fed. Rep. 608; *Re Cary*, 10 Fed. Rep. 625; *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552; *Ex parte Steinman*, 95 Pa. 220, 40 Am. Rep. 637; *Randall v. Brigham*, 74 U. S. 7 Wall. 523, 19 L. ed. 285; *Interstate Commerce Commission v. Brimson*, 154 U. S. 489, 38 L. ed. 1061, 4 Inters. Com. Rep. 545.

The operation of every judgment must depend upon the power of the court to render that judgment, or, in other words, on its jurisdiction over the subject-matter which it has determined.

Rose v. Himely, 8 U. S. 4 Cranch, 269, 2 L. ed. 617; *Hickey v. Stewart*, 44 U. S. 8 How. 762, 11 L. ed. 819; *Windsor v. McVeigh*, 93 U. S. 282, 23 L. ed. 917; *Williamson v. Berry*, 49 U. S. 8 How. 542, 12 L. ed. 1190; *Bigelow v. Forrest*, 76 U. S. 9 Wall. 351, 19 L. ed. 700; *Re Frederick*, 149 U. S. 76, 37 L. ed. 656; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149.

of a competent tribunal, and the person imprisoned under it is entitled to his discharge on habeas corpus. *Re White*, 43 Minn. 360.

Instances of the particulars in which statutes have been held unconstitutional, and therefore insufficient to sustain a judgment collaterally attacked by habeas corpus, are the following:

Violation of the provision as to religious liberty and of the provision as to liberty of citizens to acquire property. *Ex parte Newman*, 9 Cal. 502.

Provision against disqualifying a person on account of sex from engaging in any lawful business, vocation, or profession. *Re Maguire*, 37 Cal. 604, 40 Am. Rep. 125.

The provision against unreasonable searches and seizures and other provisions for the security of persons and property, and as to the law of the land. *Herrick v. Smith*, 1 Gray, 1, 61 Am. Dec. 381.

The provision against special legislation. *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47.

Statutes unconstitutional because of defective title were held insufficient to sustain a judgment when attacked by habeas corpus, in *Re Paul*, 94 N. Y. 497, and *Re Hauck*, 70 Mich. 396.

The same was held as to *ex post facto* laws. *Re Medley*, 134 U. S. 160, 33 L. ed. 835; *Re Savage*, 134 U. S. 176, 33 L. ed. 842.

In *Riley's Case*, 2 Pick. 172, the court refused relief on habeas corpus from an additional sentence by reason of former convictions in accordance with a statute passed after the last crime was committed. But the statute did not apply to prior crimes, and its constitutionality was not the question.

The constitutional questions involved in other cases present a considerable variety including matters as to delegation of power, regulation of commerce, denial of due process of law, of the equal protection of the laws, etc.

Among the numerous cases in which writ of habeas corpus has been denied when sought on constitutional grounds, because the statute or ordinance was valid, and without denying the propriety of the remedy if the Constitution had been in fact violated, are the following: *Re Curtis*, 106 U. S. 371, 27 L. ed. 232; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Ex parte Kinney*, 3 Hughes, 9; *Re Krug*, 79 Fed. Rep. 308; *Ex parte Byrd*, 84 Ala. 17; *Ex parte King*, 102 Ala. 182; *Ex parte Andrews*, 18 Cal. 679; *Ex parte Shradler*, 33 Cal. 279; *Ex parte Smith*, 38 Cal. 702; *Ex parte Burke*, 59 Cal. 6; *Ex parte Koser*, 60 Cal. 177; *Ex parte Casinello*, 62 Cal. 538; *Ex parte Benninger*, 64 Cal. 291; *Ex parte Moynier*, 65 Cal. 33; *Ex parte Wolters*, 65 Cal. 269; *Ex parte Benjamin*, 65 Cal. 310; *Ex parte Heilbron*, 65 Cal. 209; *Ex parte Mount*, 66 Cal. 448; *Ex parte White*, 67 Cal. 102; *Re Guerrero*, 69 Cal. 39 L. R. A.

Every act of a court beyond its jurisdiction is void.

Ex parte Reed, 100 U. S. 23, 25 L. ed. 539; *Re Mills*, 135 U. S. 270, 34 L. ed. 110; *Reynolds v. Stockton*, 140 U. S. 265, 35 L. ed. 467; *Ex parte Lange*, 85 U. S. 18 Wall. 176, 21 L. ed. 878; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149; *Lamaster v. Keeler*, 123 U. S. 875, 31 L. ed. 288; *Ex parte Rowland*, 104 U. S. 612, 26 L. ed. 864; *Ex parte Fisk*, 113 U. S. 718, 28 L. ed. 1119; *Ex parte Terry*, 128 U. S. 305, 32 L. ed. 409.

The question of jurisdiction is always examinable collaterally.

Ex parte Lange, 85 U. S. 18 Wall. 175, 21 L. ed. 878; *Elliot v. Peirce*, 26 U. S. 1 Pet. 340, 7 L. ed. 170; *Wilcox v. Jackson*, 38 U. S. 18 Pet. 511, 10 L. ed. 270; *Hickey v. Stewart*, 44 U. S. 8 How. 762, 11 L. ed. 819; *Williamson v. Berry*, 49 U. S. 8 How. 540, 13 L. ed. 1189; *Thompson v. Whitman*, 85 U. S.

88; *Re HangKie*, 69 Cal. 149; *Re Lawrence*, 69 Cal. 606; *Re Bickerstaff*, 70 Cal. 35; *Re Linehan*, 72 Cal. 114; *Ex parte Fisk*, 72 Cal. 125; *Ex parte Miranda*, 73 Cal. 365; *Ex parte McNally*, 73 Cal. 632; *Ex parte Armstrong*, 84 Cal. 655; *Re Tyson*, 13 Colo. 482, 6 L. R. A. 472; *Territory, McMahon v. O'Connor*, 5 Dak. 397, 3 L. R. A. 355; *State, Ohlquist v. Swan*, 1 N. D. 5; *Re Ebenhaek*, 17 Kan. 618; *State, Olson v. Brown*, 50 Minn. 353, 16 L. R. A. 691; *Ex parte Bethurum*, 66 Mo. 545; *Ex parte Swann*, 96 Mo. 44; *Ex parte Donahoe*, 24 Neb. 66; *Ex parte Robinson*, 12 Nev. 263, 28 Am. Rep. 794; *Ex parte Ammons*, 34 Ohio St. 518; *Ex parte Cooper*, 3 Tex. App. 499; *Ex parte Mabry*, 5 Tex. App. 98; *Ex parte Wilson*, 14 Tex. App. 562; *Ex parte Lynn*, 19 Tex. App. 298; *Ex parte Bell*, 24 Tex. App. 428; *Ex parte Sundstrom*, 25 Tex. App. 133; *Ex parte Murphy*, 27 Tex. App. 492; *Ex parte Tipton*, 28 Tex. App. 438, 8 L. R. A. 326.

In *Ex parte Robinson*, 12 Neb. 263, 28 Am. Rep. 794, it is said that as to the remedy by habeas corpus, "We express no opinion."

In *Re Frazee*, 63 Mich. 396, although a person was discharged on habeas corpus because the statute was unconstitutional, the court said they did not pass upon the form of the remedy.

But the remedy seems to have been assumed to be proper in *Re Hauck*, 70 Mich. 396.

In *Re Underwood*, 30 Mich. 502, the court refused to inquire on habeas corpus into the constitutionality of a statute under which petitioner had been committed as insane. But in *Ex parte Donahoe*, 24 Neb. 66, the court did inquire into the constitutionality of a statute in such a case without discussing the right to do so, and disposed of the case by holding that the statute was valid.

In Missouri, habeas corpus to test the constitutionality of a statute or ordinance was formerly denied by the supreme court of that state, where a person is held under judgment of a court of competent jurisdiction. *Ex parte Boenninghausen*, 91 Mo. 301, citing *Re Harris*, 47 Mo. 164; *Ex parte Bowler*, 16 Mo. App. 14, as authorities on this point, although those were cases in which the petitioner was held for trial before conviction.

The decisions of the courts of appeals in Missouri had also been inharmonious. Thus, in *Ex parte Boenninghausen*, 21 Mo. App. 267; *Re Wooldridge*, 30 Mo. App. 612; and *Ex parte Olden*, 37 Mo. App. 116,—the St. Louis court of appeals had refused to issue the writ in such cases on the ground that it was an obvious impropriety for that court, as a "limited appellate court," to do so, while the decision of constitutional questions belonged to the supreme court.

On the other hand, in *Re McDonald*, 19 Mo. App. 370, the Kansas city court of appeals held that it

18 Wall. 467, 21 L. ed. 901; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 877; 7 Rob. Pr. 109-118.

In the national tribunals, jurisdiction over the subject-matter and the parties is not the test of jurisdiction to render given judgments or decrees.

Ex parte Lange, 85 U. S. 18 Wall. 176, 21 L. ed. 879; *United States v. Walker*, 109 U. S. 267, 27 L. ed. 980; *Re Nielson*, 181 U. S. 182-184, 33 L. ed. 120; *Griffith v. Frazier*, 12 U. S. 8 Cranch, 23, 26, 8 L. ed. 475, 476; *Windsor v. McVeigh*, 98 U. S. 282, 23 L. ed. 917; *Stovall v. Banks*, 77 U. S. 10 Wall. 588, 19 L. ed. 1086; *Reynolds v. Stockton*, 140 U. S. 265, 35 L. ed. 467; *Bronson v. Schulten*, 104 U. S. 417, 26 L. ed. 799; *Phillips v. Negley*, 117 U. S. 671, 29 L. ed. 1014; *Tenney v. Taylor*, 1 App. D. C. 227.

This decree deprives the defendants Mc-

could exercise jurisdiction on habeas corpus to decide the unconstitutionality of a statute under which the petitioner was then held for trial.

But in *Ex parte Bethurum*, 66 Mo. 545, and *Ex parte Swann*, 96 Mo. 44, the supreme court of Missouri on writs of habeas corpus considered the constitutionality of statutes and upheld them without questioning the right to that remedy.

Moreover, in *Ex parte Marmaduke*, 91 Mo. 228, 60 Am. Rep. 250 (decided almost at the same time with *Ex parte Boenninghausen*, 91 Mo. 301), and in *Re Thompson*, 117 Mo. 83, 20 L. R. A. 462, the same court, without discussing the remedy, did hold statutes unconstitutional in habeas corpus cases and discharge the prisoners held under them.

Finally, in *Ex parte Smith*, 135 Mo. 223, 33 L. R. A. 606, the court has expressly overruled its decision in *Ex parte Boenninghausen*, and declared that it has the power to investigate the constitutionality of a statute in habeas corpus proceeding.

In Nebraska the court in *Ex parte Fisher*, 6 Neb. 306, held that the constitutionality of a statute under which a person was held must be tested by writ of error or other appropriate remedy, and not by habeas corpus. It was said: "We are not prepared to say that, upon a writ of habeas corpus, we can . . . pronounce the judgment an absolute nullity on the ground that the constitutionality of the statute . . . is controverted."

In New York, in *Re Donohue*, 52 How. Pr. 251, 1 Abb. N. C. 1, it was held that the constitutionality of a statute could not be tested by habeas corpus.

But this was disapproved in *Re Kemmler*, 7 N. Y. Supp. 145, where the contrary doctrine was declared. This decision was affirmed on other grounds without discussing the question. *People v. Kemmler*, v. Durston, 119 N. Y. 569, 7 L. R. A. 715. See also *Re Paul*, 94 N. Y. 497.

In Texas, in *Parker v. State*, 5 Tex. App. 579, it was held that a prisoner could not inquire into the constitutionality of the law under which he was arrested after indictment by writ of habeas corpus. But in *Ex parte Mato*, 19 Tex. App. 112, the court overrules its former decision in deference to the decision of the Supreme Court of the United States in *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717. It says it will follow this rule "whatever may be our individual opinion as to the expediency of such practice," for the sake of harmony. This doctrine is acted upon in later Texas cases, *supra*.

The unexpressed idea that a constitutional right is peculiarly sacred and important, and that a decision against such right is not entitled to the same respect when attacked collaterally as a decision against any other right, seems to be at bottom the basis of the collateral attack upon judgments for unconstitutionality. It is also apparently the

Donald and White of their property without due process of law.

Murray v. Hoboken Land & Improv. Co. 59 U. S. 18 How. 277, 15 L. ed. 374; *Hurtado v. California*, 110 U. S. 581, 28 L. ed. 287; *Re Nielson*, 181 U. S. 182, 33 L. ed. 120; *Dent v. West Virginia*, 129 U. S. 123, 32 L. ed. 626; *Missouri P. R. Co. v. Humes*, 115 U. S. 519, 29 L. ed. 465; *Ex parte Wall*, 107 U. S. 289, 27 L. ed. 562; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 708, 28 L. ed. 572; *Windsor v. McVeigh*, 98 U. S. 283, 23 L. ed. 917; *Harris v. Hardeman*, 55 U. S. 14 How. 341, 14 L. ed. 447; *Starbuck v. Murray*, 5 Wend. 156; *Lasere v. Rochereau*, 84 U. S. 17 Wall. 438, 21 L. ed. 695; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Ex parte Grace*, 12 Iowa, 208, 79 Am. Dec. 529; *Cason v. Cason*, 15 Ga. 405; *Enslinger v. Powers*, 108 U. S. 301, 27 L. ed. 735; *McVeigh v. United States*, 78 U. S. 11 Wall. 267,

foundation of a discrimination which is in effect made by the decisions between judgments upon ordinances which are unconstitutional and those which are otherwise invalid. A conviction under an unconstitutional ordinance, as shown above, is treated as a nullity on collateral attack, while in most of the cases (though there are exceptions, such as *Re Sic*, 78 Cal. 142, and *Ex parte Garza*, 28 Tex. App. 381) a conviction under an ordinance which is invalid for other reasons is not treated as void on collateral attack. The theory that an unconstitutional ordinance is a nullity applies equally well to ordinances which are invalid because unauthorized by statute, but the courts have not usually so applied it.

But while the theory that judgments based on unconstitutional statutes or ordinances are void because of a lack of jurisdiction seems to be untenable, as shown above, it must be conceded that the extension of the writ of habeas corpus to relieve from imprisonment under such judgments has become substantially universal in American courts. So far as the Federal cases are concerned, this doctrine is not necessary to sustain such relief by habeas corpus, since the provisions of U. S. Rev. Stat. § 753, as pointed out in the preceding division, are broad enough to sustain the writ, even in cases where the judgments attacked were rendered in the exercise of jurisdiction. Still the Federal courts have not usually claimed authority, by virtue of the statute, to use the writ by way of attack on a final judgment except for want of jurisdiction. On this point, see discussion in division III. following.

III. Judgment on unconstitutional contract.

In *Smith v. Henderson*, 23 La. Ann. 649, it was held that a judgment rendered on an obligation given for the price of slaves, which was in violation of the Constitution of the state which prohibits the court from enforcing such a contract, is void: In this case the Constitution expressly declared such contracts "null and void."

But it is held in other cases that judgments based on unconstitutional contracts are not void on collateral attack. Thus, in *Mitchell v. State Bank*, 2 Ill. 526, and *Buckmaster v. Jackson*, Carlin, 4 Ill. 104, it was held that judgments based on notes given for bills of credit which were in violation of the United States Constitution could not be collaterally attacked.

Likewise in *Cassel v. Scott*, 17 Ind. 514, a judgment on bonds given under an unconstitutional act to regulate the sale of spirituous liquors was held not to be a nullity which could be collaterally attacked. The court said: "It was founded upon the bonds, and not on the act, and of the suit upon

20 L. ed. 81; *Sabariego v. Maverick*, 124 U. S. 292, 31 L. ed. 442.

Due process of law imports, under Federal decision, compliance with established and lawful methods of procedure.

Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464; *Pennoyer v. Neff*, 95 U. S. 733, 24 L. ed. 572; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 708, 28 L. ed. 572; *Ex parte Wall*, 107 U. S. 289, 27 L. ed. 562; *Walker v. Sauvinet*, 92 U. S. 98, 23 L. ed. 679; *Windsor v. McVeigh*, 98 U. S. 288, 23 L. ed. 918; *Com. v. Keely*, *v. Perkins*, 124 Pa. 48, 2 L. R. A. 223.

The judgment is not binding upon Riggs & Co., even if they are considered to be purchasers of the bonds *pendente lite*.

State v. Matthews, 37 N. H. 454; *First Cong. Church v. Muscatine*, 2 Iowa, 71; *Williamson's Case*, 26 Pa. 9, 37 Am. Dec. 874; *New Orleans v. New York Mail S. S. Co.* 87 U. S. 20 Wall. 392, 23 L. ed. 857; *Baltimore & O. R. Co. v. Wheeling*, 13 Gratt. 40; *Alderson v. Kanawha County Comrs.* 32 W. Va. 640; *Washington A. & G. Steam Packet Co. v. Sickles*, 65 U. S. 24 How. 341, 16 L. ed. 653; *Aurora v. West*, 74 U. S. 7 Wall. 102, 19 L. ed. 49; *Lyon v. Perin & G. Mfg. Co.* 125 U. S. 700, 31 L. ed. 840; *Reynolds v. Stockton*, 140 U. S. 270, 35 L. ed. 469.

them, the circuit court had full jurisdiction." It was also said: "No authority has been cited, nor do we know of any, in support of the position assumed by the appellant."

The decision in *Strong v. Daniel*, 5 Ind. 348, that a replevin bond given to stay execution of a judgment under an unconstitutional statute was held unenforceable, overruling *Magruder v. Marshall*, 1 Blackf. 333, is clearly distinguishable as there was no judgment in question.

IV. Other cases.

In many cases the courts have declared in general terms that an unconstitutional statute is in legal contemplation a nullity. But this is not universally declared.

In respect to the objection that title obtained by sale under a judgment was not valid because the n. fa. was not signed by the clerk, and the Constitution provided that writs must "bear test and be signed by the clerk," it was said: "A directory enactment of the Constitution is of no more validity as a law than a like enactment by statute,—both are laws." The court also held that the writ being amendable, when collaterally questioned it might be considered as amended. *Whiting v. Beebe*, 12 Ark. 421.

But in this place we are considering only the effect of judgments based on such statutes. On this point also the cases are conflicting. Some hold such judgments valid when thus questioned.

"If it be admitted that the Constitution virtually repeals the law . . . it does not prove that it [a judgment of confiscation based upon the law] is therefore a mere nullity, which can be taken advantage of in this way," that is, by collateral attack. *McNeil v. Bright*, 4 Mass. 232.

"Judgments rendered under an unconstitutional law are not nullities." *Webster v. Reid*, *Morris* (Iowa) 467. It was objected in this case that the act through which the indebtedness accrued and the judgment was obtained was unconstitutional.

In an action for property sold by a marshal on execution under a judgment which was based on an unconstitutional statute, it was held that the judgment could not be treated as void by such collateral attack. *Arnold v. Booth*, 14 Wis. 181. The court said, suppose a complaint based on the un-

Riggs & Co. were not purchasers *pendente lite*.

Memphis v. Brown, 94 U. S. 715, 24 L. ed. 344; *Providence Rubber Co. v. Goodyear*, 78 U. S. 6 Wall. 153, 18 L. ed. 762; *Secombe v. Steele*, 61 U. S. 20 How. 105, 15 L. ed. 886; *Hayden v. Bucklin*, 9 Paige, 515; *Leitch v. Wells*, 48 N. Y. 585; *Weeks v. Tomes*, 16 Hun. 349, 76 N. Y. 601; *Miller v. Sherry*, 69 U. S. 2 Wall. 250, 17 L. ed. 880; *French v. Hay*, 89 U. S. 22 Wall. 248, 23 L. ed. 857; *Story*, Eq. Pl. § 904; 1 Dan. Ch. Pr. 5th Am. ed. 402, 408; *Kinsman v. Kinsman*, 1 Russ. & M. 622; *Herrington v. McCollum*, 78 Ill. 478; *Turner v. Crebill*, 1 Ohio, 373; *Ludlow v. Kidd*, 3 Ohio, 541; *Edridge v. Walker*, 80 Ill. 273; *Fox v. Reeder*, 28 Ohio St. 184, 23 Am. Rep. 370; *M'Cormick v. M'Clure*, 6 Blackf. 466, 39 Am. Dec. 441; *Pierce v. Stinde*, 11 Mo. App. 389; *Page v. Waring*, 76 N. Y. 474; *Lee County v. Rogers*, 74 U. S. 7 Wall. 181, 19 L. ed. 160, Approved, *Warren County v. Marcy*, 97 U. S. 104, 24 L. ed. 980; *Murray v. Ballou*, 1 Johns. Ch. 566; *Holbrook v. New Jersey Zinc Co.* 57 N. Y. 616; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 130 U. S. 159, 30 L. ed. 621; *Burgess v. Seligman*, 107 U. S. 33, 27 L. ed. 865.

constitutional statute was demurred to, "could it not rightfully act upon the demurrer, decide all questions raised by it, and sustain it for the reason that the law is unconstitutional?" Also "The court might have held that there was no cause of action because the law was void. It had jurisdiction to decide. This, it seems to me, is incontestable."

In *Northampton County v. Herman*, 119 Pa. 373, it was held that where an officer had accepted fees as they were settled under an unconstitutional statute, although this fixed them at a lower amount than he was entitled to, the settlement was binding upon him as against a collateral attack.

But such judgments have been held nullities.

A divorce granted under an unconstitutional statute of another state was held void in *Simonds v. Simonds*, 106 Mass. 572, 4 Am. Rep. 576.

The effect of such judgments to protect officers who act under them or the magistrates who render them is also in dispute.

Judge Cooley in his *Constitutional Limitations*, 6th ed. p. 122, says that an unconstitutional statute "constitutes a protection to no one who has acted under it." This is the doctrine of some of the cases, such as *Astrom v. Hammond*, 3 McLean, 107; *Woolsey v. Dodge*, 6 McLean, 142; *Monroe v. Collins*, 17 Ohio St. 665; *Lynn v. Polk*, 8 Lea, 121; *Campbell v. Sherman*, 35 Wis. 103.

Although it is held, on the contrary, in *People, Atty. Gen., v. Salomon*, 54 Ill. 33, that an officer who has failed to execute a statute because he believes it to be unconstitutional is not relieved from liability for contempt in failing to comply with a mandamus to execute it after the time has passed, when his inability to execute it is due to his previous disobedience of the statute. The court says it is his duty to obey the law, and not to deny its constitutionality.

So, in *State, Nicholas, v. Shakespeare*, 41 La. Ann. 156, it is held that the mayor and council of a city cannot defy the law and constitute themselves the judges of its constitutionality, but that it is their duty to obey it until it is judicially declared void.

Likewise, in *Seassums v. Botta*, 34 Tex. 335, it is held that until a statute is adjudged unconstitutional it will protect clerks and other ministerial officers in obeying it. The court says: "It is there-

Haight, J., delivered the opinion of the court:

This action was brought to have the defendants' testator adjudged to be a trustee of certain bonds for the benefit of the plaintiffs, and that they have a lien thereon, and that the defendants account to them therefor. In September, 1878, the mixed commission in British and American claims, sitting at the city of Washington, awarded to one Augustin R. McDonald the sum of \$197,000, in satisfaction of his claim for cotton destroyed during the war of the Rebellion. In the following October the plaintiffs filed in the supreme court of the District of Columbia a bill in equity against McDonald and one William White, his assignee, for the sum of \$49,297.50, alleging therein that McDonald was indebted to them under an agreement whereby, in consideration of services to be rendered in the prosecution of such claim, they were to receive a sum equal to 25 per centum of the amount that should be recovered, and that they have a lien to the extent of such sum upon the award in his favor. Such proceedings were thereafter had that one George W. Riggs, a banker in the city of Washington, was appointed receiver, and one half of the sum so awarded was paid over to him as such to meet the claim and lien of the plaintiffs. As such receiver, and pursuant to

the directions of the court, he invested the funds in certain bonds of the District of Columbia guaranteed by the United States, and payable at its treasury. The defendants then interposed a demurrer to the plaintiffs' bill, which was sustained, and on the 24th day of June, 1875, a decree was entered dismissing the plaintiffs' bill, with costs. On the same day the plaintiffs entered an appeal from the decree to the general term of the supreme court of the District of Columbia. On June 28, 1875, another decree was entered in precise conformity with the former decree, but supplemented by a direction to the receiver to pay to the defendants McDonald and White the funds in his hands as such receiver. On the same day McDonald and White called upon the receiver, and demanded the bonds in question. He thereupon first consulted with the judge holding the court in which the decree was entered, and, after being advised by such judge that the bonds should be surrendered, he delivered them over to McDonald and White, who on the same day sold and delivered the bonds for full value to the banking firm of Riggs & Co., of which the receiver was a partner. Riggs & Co. then surrendered the bonds to the treasury of the United States, receiving new bonds therefor, which were thereafter sold and delivered to various purchasers. On July 2,

fore deemed advisable for every good citizen to obey whatever may be promulgated by the law-making power as law until the same shall have been passed upon by the courts."

And a ministerial officer's belief that a statute is unconstitutional will not justify him in disobeying it, if it is valid. *Clark v. Miller*, 54 N. Y. 528.

A threat to collect a tax under an unconstitutional statute is deemed insufficient to make the payment involuntary. *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512, citing *Taylor v. Philadelphia Bd. of Health*, 31 Pa. 73, 72 Am. Dec. 724.

But without proceeding further to investigate this general question of the effect of unconstitutional statutes to protect officers, we are here concerned particularly with the effect of a judgment based upon an unconstitutional statute to protect them.

A considerable number of decisions hold that officers are not protected in the execution of judgments based on unconstitutional statutes. In *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718, which was a case of alleged illegal imprisonment, it was said that no question of law is better settled than that "ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void."

In *Kelly v. Bemis*, 4 Gray, 83, 64 Am. Dec. 50, a justice of the peace was held liable for his judgment rendered under an unconstitutional statute.

The same was said to be the law in *Barker v. Stetson*, 7 Gray, 53, 66 Am. Dec. 457, although the real question in that case was as to the liability of persons who made the complaint before the justice.

In *Ely v. Thompson*, 3 A. K. Marsh. 70, also, a justice of the peace was held liable for giving sentence under an unconstitutional statute. The court said that if it be the correct doctrine that magistrates are liable for issuing a warrant unknown to the provisions of the law, "how much more so ought it to be in a case where the Constitution is violated?" and that the justice "cannot justify an act against its provisions, even with the authority of the legislature to aid him."

On the other hand, some cases hold that officers in such instances are protected.

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Thus, in *Webster v. Reid*, *Morris (Iowa)* 487, it was held that the sheriff was not a trespasser for levying and selling under a judgment based on an unconstitutional statute.

"It was no part of the officer's duty to examine into and decide upon the constitutionality or construction of the statute which authorized his warrant." This was said respecting a deputy sheriff in *State v. McNally*, 34 Me. 210, 56 Am. Dec. 650.

Where a justice of the peace proceeded under a void ordinance, it was held in *Henke v. McCord*, 55 Iowa, 378, that he was not personally liable. The court said: "There is neither reason nor justice, it seems to us, in holding a justice of the peace liable to a civil action for such an error in judgment." The ordinance does not seem to have been attacked on constitutional grounds, but the court expressly disapproves of *Kelly v. Bemis*, 4 Gray, 83, 64 Am. Dec. 50.

As to the personal liability of judicial officers in general, see *Austin v. Vrooman* (N. Y.) 14 L. R. A. 138, and *note*; also *Thompson v. Jackson* (Iowa) 27 L. R. A. 92, and *note*.

It should be said in reference to this review of the cases on this subject, that a careful search has been made for all the decisions that have been rendered on the specific question of effect of judgments upon collateral attack when they are based on unconstitutional statutes or deny in any way a constitutional right; but the difficulty of the subject is such as to make it uncertain whether this has been literally accomplished.

The conclusion seems plain that the courts have quite generally, although not universally, regarded constitutional questions as essentially different from other questions to be decided, and have in numerous cases held in substance that a wrong adjudication of a constitutional question renders the judgment an entire nullity, even when the jurisdiction of the court to decide the question, provided it shall decide correctly, is unquestioned. Yet while this seems to be the necessary foundation for these decisions, the courts have not treated it so. The result is an unsatisfactory condition of the subject.

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1875, the plaintiffs took an appeal to the general term of the supreme court of the District of Columbia from the decree of June 28, 1875; and on March 4, 1876, that decree, as well as the one that preceded it, was reversed, and the cause was remanded to the special term, with leave to the defendants to answer. An answer was then interposed, and, upon the issues raised thereby, testimony was taken at divers times during the years 1876 and 1877. On the 15th day of June, 1877, plaintiffs obtained an order from the supreme court of the District of Columbia, requiring the defendants McDonald and White to pay over to the registry of the court the sum which had been delivered to them by the receiver. This order was not complied with, and thereupon the plaintiffs moved that the defendants McDonald and White show cause why they and each of them should not be punished as for a contempt; and such proceedings were thereupon had that they were adjudged to be guilty of a contempt, and that the answer filed by them in the cause be stricken out, and removed from the files of the court. Judgment was thereafter entered against them *pro confesso* adjudging that the plaintiffs had a lien upon the bonds. This action is based upon the judgment so entered, and is prosecuted upon the theory that notice to Riggs of the pendency of the action was notice to all of his partners. *Weetjen v. St. Paul & P. R. Co.* 4 Hun, 529; 8 Kent, Com. 105. The defendants' testator resided in the city of New York, and was one of the members of the banking firm of Riggs & Co. He only was served with summons in this action. The referee has found, as conclusions of law: "First, that, in order to enable the plaintiffs to sustain this action, the decree rendered by the supreme court of the District of Columbia must be a valid decree, binding upon the defendants; second, that from the operation of that decree the defendants in this action enjoy exemption and immunity, under § 725 of the Revised Statutes of the United States; third, that from the effect and operation of the decree the defendants enjoy immunity and exemption, under that provision of the 5th Amendment to the Constitution of the United States which prohibits the deprivation of property without due process of law; fourth, that the supreme court of the District of Columbia had no jurisdiction to render the said decree, and that the same was and is null and void," etc.

As to the first conclusion of law the parties agree. The controversy is in reference to the other three. The third conclusion is based upon the 5th Amendment to the Constitution of the United States, which prohibits the deprivation of persons or property without due process of law. Inasmuch as the consideration of what is due process of law will to some extent be involved in the determination of the validity of the judgment upon which this action is based, we only deem it necessary to consider the second and fourth conclusions of law found by the referee. We shall also, for the purpose of this review, assume, without deciding the question, that Riggs & Co. were purchasers of the bonds *pendente lite*, with knowledge of the existence of the suit, although it appears that the purchase was made

after judgment, for full value, in good faith, under the supposition that they had the right to purchase freed from all liens, and that they had no notice that an appeal had been taken.

Considering them as such purchasers, were they bound by the determination made in the action then pending? Section 725 of the United States Revised Statutes provides that "the said courts [referring to the courts of the United States] shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." Under this statute the referee has reached the conclusion that the supreme court of the District of Columbia had no power to punish the defendants for a contempt by striking out their answer, and adjudging that the plaintiffs had a lien upon the bonds.

In *Ex parte Robinson*, 86 U. S. 19 Wall. 512, 22 L. ed. 208, Field, J., in delivering the opinion for the court, says: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence, and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2, 1831. The act in terms applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may, perhaps, be a matter of doubt, but that it applies to the circuit and district courts there can be no question. These courts were created by an act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is therefore to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases; . . . the law happily prescribes the punishment which the court can impose for contempts. The 17th section of the judiciary act of 1789 declares that the court shall have power to punish contempts of their authority in any cause or hearing before them, by fine or imprisonment, at their discretion. The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment. The judgment of the court disbarring the petitioner, treated as a punishment for a contempt, was therefore unauthorized and void." In *Anderson v. Dunn*, 19 U. S. 6

Wheat, 204-227, 5 L. ed. 242, 248, Johnson, J., says: "It is true that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; . . . it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment." In *United States, D. & N. O. R. Co., v. Atcheson, T. & S. F. R. Co.* 16 Fed. Rep. 853, McCrary, J., says: "The power of the court is limited to the punishment of the party charged with contempt, and, under the provisions of § 725 of the Revised Statutes of the United States, such punishment must be by fine or imprisonment. That section provides that circuit courts shall have power 'to punish by fine or imprisonment, at the discretion of the court, contempts of their authority.' This enactment, says the supreme court, is 'a limitation upon the manner in which the power may be exercised, and must be held to be a negation of all other modes of punishment,'"—citing *Ex parte Robinson*, 86 U. S. 19 Wall, 512, 22 L. ed. 208. In *United States, Southern Exp. Co., v. Memphis & L. R. R. Co.* 6 Fed. Rep. 287-289, Hammond, J., says: "Obedience to an injunction against privileged persons and corporations was sometimes enforced by sequestration, which placed the property of the contemnor in custody until obedience was given. 2 Dan. Ch. Pr. 5th ed. 1685, 1687; 2 Bishop, Crim. L. 6th ed. §§ 241, 278; *Spokes v. Bunbury Bd. of Health*, L. R. 1 Eq. 42, and cases cited by these authorities. Our Revised Statutes, taken from the act of March 2, 1831, chap. 99, and prior acts of Congress, have prescribed the mode of punishment, and directed that it shall be by fine or imprisonment, and this operates as a negation of all other modes of punishment." See also *Re Cary*, 10 Fed. Rep. 622, 625; *Re Graves*, 29 Fed. Rep. 60; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447-489, 88 L. ed. 1047-1061, 4 Inters. Com. Rep. 645; *Ex parte Bradley*, 74 U. S. 7 Wall. 864, 19 L. ed. 214. It may be that the cases above referred to are not in strict accord with the rule recognized in this state, in which a court of equity may refuse to a party in contempt the benefit of proceedings pending in it, when asked by him as a favor, until he has purged himself of his contempt. *Brinkley v. Brinkley*, 47 N. Y. 40; *Walker v. Walker*, 82 N. Y. 260; *Gross v. Clark*, 87 N. Y. 272. But in this state the supreme court, on its equity side, is invested by the Constitution with all the power and authority that formerly existed in the high court of chancery in England, the common law remaining in force excepting so far as it has been changed by statute. The legislature in this state, therefore, may not be able to limit or deprive the supreme court of any of its jurisdiction or powers.

Has the supreme court of the District of Columbia like jurisdiction and powers? It was created by act of Congress, and not by the Constitution. It consequently follows that Congress, which gave it life and invested it with power, may restrict and limit its exercise, 39 L. R. A.

and this notwithstanding the fact that it may have given it general jurisdiction in law and equity. To Congress is given the exercise of exclusive legislation in all cases whatsoever over such district as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States. U. S. Const. art. 1, § 8, subsec. 17. It may therefore create, empower, limit, and remove. In creating the supreme court of the District of Columbia, it was provided that it "shall possess the same powers and exercise the same jurisdiction as is now possessed and exercised by the circuit court of the District of Columbia, and the justices of the court so to be organized shall severally possess the powers and exercise jurisdiction now possessed and exercised by the judges of said circuit court." Act March 3, 1863 (12 Stat. at L. 762, chap. 91). The circuit court of the District of Columbia and the judges thereof, prior thereto, had been invested with "all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States." 2 Stat. at L. 105, chap. 15, § 3. And by the judiciary act of February 13, 1801, it was provided "that the circuit courts shall have, and hereby are invested with, all the powers heretofore granted by law to the circuit courts of the United States, unless where otherwise provided by this act." 2 Stat. at L. 92, chap. 4, § 10. By the judiciary act passed September 24, 1789, it was provided that "the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state." 1 Stat. at L. 78, chap. 20, § 11. This provision was re-enacted in the revision of 1873. U. S. Rev. Stat. § 629. In 1871 it was provided that "the Constitution and all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States." 16 Stat. at L. 426, chap. 62, § 34; D. C. Rev. Stat. § 93. By § 760 of the Revised Statutes of the District of Columbia it is provided that "the supreme court shall possess the same powers and exercise the same jurisdiction as the circuit courts of the United States." It is thus apparent that the supreme court of the District of Columbia and the circuit courts of the United States are placed upon the same footing and invested with the same jurisdiction and powers, except as to the residence of parties. They are each given jurisdiction of suits of a civil nature at common law or in equity. Neither has common-law jurisdiction except that conferred by statute, and consequently each is controlled by subsequent legislation. In 1801 the laws of Maryland were continued in force over that portion of the District of Columbia ceded to the government by that state, but this statute only remained in force in so far as it was not inconsistent with other statutes or not modified or repealed. D. C. Rev. Stat. § 92; 2 Stat. at L. 104, chap. 15, § 1.

Does § 725 of the Revised Statutes apply to the District of Columbia? Our attention has been called to no rule of the supreme court of the District of Columbia, or statute that is in conflict with its provisions. It is not locally inapplicable, and, under § 98 of the statute above referred to, we see no reason why it is not given the same force and effect within the District that it has elsewhere within the United States. It may be that other sections of the same chapter may not apply to the District of Columbia, but it is because they are either locally inapplicable or there are local rules or statutes covering the same subject-matter. See *Hovey v. McDonald*, 109 U. S. 150, 27 L. ed. 888, construing § 1007 of the Revised Statutes of the United States. We consequently are of the opinion that § 725 of the Revised Statutes of the United States is in force in the District of Columbia, and, as construed by the United States courts, it restricts the supreme court of the District, in its punishment for contempt, to either a fine or imprisonment.

Was the decree entered in the action against McDonald and White void, or was it merely voidable, and are the defendants in this action bound thereby? In 12 Am. & Eng. Enc. Law, at page 1470, under the head of "Judgments," it is said that "it is an axiom of the law that judgments entered without any jurisdiction are void, and will be so held in a collateral proceeding, and there is a strong and growing tendency in all the courts to hold that although a court had jurisdiction over both the person and the subject-matter, but did not have jurisdiction to enter the particular judgment entered in the case, such judgment is void, and may be collaterally impeached." See note 3 thereunder and note 1 on page 247. In *McVeigh v. United States*, 78 U. S. 11 Wall. 259-267, 20 L. ed. 80, 81, a libel for information was filed in the district court for the district of Virginia for the forfeiture of certain real and personal property of one William McVeigh. The libel alleged that he held an office under the Confederate government, and that he had taken the oath of allegiance to support the Constitution of that government. He appeared by counsel, made a claim to the property, and filed an answer. The attorney for the United States moved that the claim, answer, and appearance be stricken from the files, upon the ground that he was at the time a resident of the city of Richmond, within the Confederate lines, and a rebel. The motion was granted, and subsequently his default was taken, and a decree rendered *pro confesso* for the condemnation and sale of his property. The judgment was reversed in the supreme court. Justice Swayne, in delivering the opinion, says: "In our judgment, the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot

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upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." In *Windsor v. McVeigh*, 93 U. S. 274, 28 L. ed. 914, the same question was again brought before the court under an action of ejectment to recover certain real property which had been acquired under the decree mentioned in the former case. Justice Field, in delivering the opinion of the court, says: "The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of action, such as civil or criminal, or to particular modes of administering relief, such as legal or equitable. . . . Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel, or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases." In *Ex parte Lange*, 85 U. S. 18 Wall. 163-176, 21 L. ed. 872-879, the prisoner had been convicted of the crime of stealing mail bags. He was sentenced to one year's imprisonment, and to pay a fine of \$200, and was on the same day committed to jail in execution of his sentence. On the following day he paid the fine. The statute authorized imprisonment or fine. It did not authorize both. On the next day the prisoner was brought before the court, and an order was entered vacating the former judgment, and the prisoner was again sentenced to one year's imprisonment. Mr. Justice Miller, in delivering the opinion of the supreme court, says in reference thereto: "We are of the opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. . . . It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense, under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any

judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, it would, for the same reason, be void. Or if, on an indictment for treason, the court should render a judgment of attainder whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court, be confiscated to the state, it would be void as to the attainder, because in excess of the authority of the court and forbidden by the Constitution." *Ex parte Fisk*, 118 U. S. 718-718, 28 L. ed. 1117-1119; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149; *Re Mills*, 135 U. S. 268-270, 34 L. ed. 107-110; *Ex parte Terry*, 128 U. S. 289-304, 32 L. ed. 405-408; *Ex parte Reed*, 100 U. S. 18-23, 25 L. ed. 588, 589; *Re Frederick*, 149 U. S. 70-76, 37 L. ed. 658-656; *Bigelow v. Forrest*, 76 U. S. 9 Wall. 389, 19 L. ed. 696. See also note entitled *Want of Authority under Jurisdiction Conferred*, in *Morrill v. Morrill*, 11 L. R. A. 157, 20 Or. 96.

We have examined, but do not here refer to, the cases in which irregularities only appear in the judgment entered, in which it has been held that they are voidable only, and cannot be attacked collaterally. The question presented may be close and upon the border, but we are inclined to the view that as to Riggs & Co. the judgment is void; that, after the answer had been interposed by the defendants, the court had no power to order judgment without a trial of the issues presented. In the language of Justice Field, above referred to, the court, although having jurisdiction of the case and of the parties, "is still limited in its modes of pro-

cedure and in the extent and character of its judgments." Assuming that the members of the firm of Riggs & Co. purchased the bonds with notice of the pendency of the action, and that they took the same subject to the determination therein to be made, they had the right to have the questions at issue determined upon the merits. McDonald and White were, as to them, assignors for value, and they had no power, by acts or declarations thereafter done or made, to impeach the title so transferred to Riggs & Co. McDonald and White could not, by fraud or collusion with the plaintiffs, impair their title, or, by a confession of judgment, deprive them of their rights to the bonds. Riggs & Co. were not parties to that action, and it does not appear that they ever had notice of the proceedings in contempt. As purchasers *pendente lite*, Riggs & Co. took the risk of the litigation then pending, but in so doing did not assume the risk of any punishment that might be inflicted upon McDonald & White in an independent proceeding. *Conner v. Reeves*, 108 N. Y. 527-532; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589.

It is contended that the decree striking out the defendants' answer was not based upon the proceedings in contempt; but the proceedings, orders, and decree do not support this contention. If the answer was not stricken out as a punishment for the contempt of which the defendants had been convicted, then by what authority were the defendants deprived of their right to a trial and a determination of the issues involved? Again, it is said that § 725 of the Revised Statutes has reference to criminal and not civil contempts; but no such distinction is found in the statute, or is made by the authorities construing the same.

The judgment appealed from should be affirmed, with costs.

All concur.

ARKANSAS SUPREME COURT.

James H. PEAY, *Appt.*,
v.

WESTERN UNION TELEGRAPH COM-
PANY.

(.....Ark.....)

Damages for mental anguish, independent of and unaccompanied by physical injury of any kind, cannot be recovered for delay in delivering a telegram.

(January 8, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Greene County in favor of defendant in an action brought to re-

cover damages for defendant's neglect to promptly deliver a telegram. *Affirmed.*

Statement by **Hughes, J.:**

This action was commenced to recover damages by the appellant against the appellee for a failure to deliver promptly the following telegram, sent to appellant, at Paragould, Ark., to wit:

Central City, Ky. 6-23-1894.

To James Peay, City:

Sallie, Dot, Saline Smith, and Jim Maddox killed in accident at McHenry to-day. Madge Smith seriously injured.

[Signed]

Ed. Batsill.

NOTE.—For cases on both sides of the question as to the right to damages for mental suffering on account of the default of a telegraph company, see note to *Western U. Teleg. Co. v. Rogers* (Miss.) 13 L. R. A. 859.

For subsequent cases in the negative, see *Wilcox v. Richmond & D. R. Co.* (C. C. S. C.) 17 L. R. A. 804; *Connell v. Western U. Teleg. Co.* (Mo.) 20 L. R. A. 89 L. R. A.

172; *Western U. Teleg. Co. v. Wood* (C. C. Tex.) 21 L. R. A. 706; *International Ocean Teleg. Co. v. Saunders* (Fla.) 21 L. R. A. 810; *Francis v. Western U. Teleg. Co.* (Minn.) 25 L. R. A. 406; *Morton v. Western U. Teleg. Co.* (Ohio) 32 L. R. A. 735.

For a recent case in the affirmative, see *Mentzer v. Western U. Teleg. Co.* (Iowa) 28 L. R. A. 72.

The complaint stated that the telegram was received at Paragould, Arkansas, where plaintiff resided, at 9:15 o'clock p. m., and that it was not delivered until 8:10 o'clock the next morning; that, if it had been promptly delivered, the plaintiff could and would have left Paragould on a north-bound train, on the Cotton Belt Railroad, that departed thence at or about 8:30 A. M. of said morning, and would have reached McHenry, Kentucky, in time to have attended the funeral of the persons named in the telegram, who were killed, and to have administered to the wants of the person named therein who was injured, who, the complaint alleged, were all of close kin to the plaintiff. The complaint further alleged that, by reason of the delay in delivering said telegram, he could not leave Paragould on that road till the second morning succeeding the day of the receipt of the telegram by the company's agent at Paragould, or arrive at McHenry, Kentucky, until after the burial of the relatives of his who had been killed in the accident referred to; that, by reason of such delay in delivering said telegram, he was deprived of the opportunity to attend the burial of his dead relatives, or to administer to the wants of his relative who was injured; that, by reason thereof, he suffered great mental anguish, disappointment, and grief, and was damaged \$1,000. A general demurrer to the complaint was sustained, and the plaintiff declined to amend. Judgment was rendered against him, and he appealed to this court.

Messrs. Luna & Johnson and W. C. Rodgers, for appellant:

The following authorities hold that the action can be maintained:

So Relle v. Western U. Teleg. Co. 55 Tex. 308, 40 Am. Rep. 805; *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278; *Stuart v. Western U. Teleg. Co.* 66 Tex. 580, 59 Am. Rep. 623; *Gulf, C. & S. F. R. Co. v. Wilson*, 69 Tex. 739; *Western U. Teleg. Co. v. Brown*, 71 Tex. 723, 2 L. R. A. 766; *Western U. Teleg. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728; *Western U. Teleg. Co. v. Broesche*, 73 Tex. 654; *Western U. Teleg. Co. v. Simpson*, 73 Tex. 422; *Western U. Teleg. Co. v. Feegles*, 75 Tex. 587; *Rowell v. Western U. Teleg. Co.* 75 Tex. 26; *Western U. Teleg. Co. v. Moore*, 76 Tex. 66; *Western U. Teleg. Co. v. Kirkpatrick*, 76 Tex. 217; *Gulf, C. & S. F. R. Co. v. Richardson*, 79 Tex. 649; *Western U. Teleg. Co. v. Rosentreter*, 80 Tex. 407; *Western U. Teleg. Co. v. Jones*, 81 Tex. 271; *Western U. Teleg. Co. v. Lydon*, 82 Tex. 364; *Western U. Teleg. Co. v. Nations*, 82 Tex. 539; *Potts v. Western U. Teleg. Co.* 82 Tex. 545; *Western U. Teleg. Co. v. Beringer*, 84 Tex. 38; *Western U. Teleg. Co. v. Wisdom*, 85 Tex. 261; *Western U. Teleg. Co. v. Carter*, 85 Tex. 580; *Western U. Teleg. Co. v. Evans*, 1 Tex. Civ. App. 297; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695; *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669; *Thompson v. Western U. Teleg. Co.* 107 N. C. 448; *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583; *Western U. Teleg. Co. v. Cline*, 8 Ind. App. 864; *Chapman v. Western U. Teleg. Co.* 90 Ky. 265; *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510; *Beasley v. Western U. Teleg. Co.* 89 Fed. Rep. 181; *Montzer v. Western U. Teleg.* 89 L. R. A.

Co. 93 Iowa, 753, 28 L. R. A. 72; *Curtin v. Western U. Teleg. Co.* 16 Misc. 347; *Sherrill v. Western U. Teleg. Co.* 116 N. C. 654; *Little Rock & Ft. S. R. Co. v. Dean*, 43 Ark. 529, 51 Am. Rep. 584; *Western U. Teleg. Co. v. Robinson*, 97 Tenn. 638, 84 L. R. A. 431; *Gray, Communications by Telegraph*, § 65; 4 *Lawson, Rights, Rem. & Pr.* § 1970; 2 *Thomp. Neg.* § 7, p. 847; *Thompson, Electricity*, § 379; *Sedgw. Damages*, 8th ed. § 894; 1 *Sutherland, Damages*, 2d ed. pp. 2, 156, 157, 298-300; 3 *Sutherland, Damages*, pp. 975-980; 2 *Shearm. & Redf. Neg.* 2d ed. § 605, p. 684; 29 *Am. Law Rev.* p. 213; 38 *Cent. L. J.* p. 5; 44 *Cent. L. J.* p. 176, and authorities there cited; *Sandels & Hill's Dig.* § 7332.

The following authorities define what notice is requisite to put the company on inquiry as to the importance of the message and the relationship of the parties:

Western U. Teleg. Co. v. Carter, 2 Tex. Civ. App. 624; *Western U. Teleg. Co. v. Nations*, 82 Tex. 539; *Western U. Teleg. Co. v. Moore*, 76 Tex. 66; *Western U. Teleg. Co. v. Feegles*, 75 Tex. 587; *Western U. Teleg. Co. v. Adams*, 75 Tex. 581, 6 L. R. A. 844; *Western U. Teleg. Co. v. Edsall*, 74 Tex. 329; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695.

The following authority holds that the sendee or beneficiary of a telegraphic message can maintain an action:

Martin v. Western U. Teleg. Co. 1 Tex. Civ. App. 148.

The message in this case was ample to put the company on notice of its urgency, and if it desired further information that might have been had by inquiry; it was its duty to inquire.

Erie Teleg. & Teleph. Co. v. Grimes, 82 Tex. 89; *Western U. Teleg. Co. v. Hines*, 96 Ga. 688; *Western U. Teleg. Co. v. Carter*, 85 Tex. 580; *Western U. Teleg. Co. v. Adams*, 75 Tex. 581, 6 L. R. A. 844; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654; *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583; *Western U. Teleg. Co. v. Nations*, 82 Tex. 539; *Evans v. Western U. Teleg. Co.* (Iowa) 71 N. W. 219.

Messrs. Rose, Hemingway, & Rose and George H. Fearons, for appellee:

In actions for damages, the recovery must be limited to such matters of loss as might reasonably have been anticipated as a natural and probable consequence of the wrong complained of.

3 *Sutherland, Damages*, p. 216; *Morrell v. Pacific Exp. Co.* 54 Ark. 22; *Western U. Teleg. Co. v. Short*, 53 Ark. 434, 9 L. R. A. 744; *Thompson, Electricity*, § 386; *Daughtery v. American U. Teleg. Co.* 75 Ala. 168.

The plaintiff does not show any damage for which he can recover in this case.

There is not the slightest intimation in the telegram that the persons referred to were related to the plaintiff.

Even in Texas the complaint is fatally defective.

Western U. Teleg. Co. v. Brown, 71 Tex. 723, 2 L. R. A. 766; *Western U. Teleg. Co. v. Kirkpatrick*, 76 Tex. 217; *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583.

Even if defendant was negligent in not delivering the message more promptly, it was

plaintiff's duty to make reasonable exertions to save himself from loss.

Warren v. Stoddart, 105 U. S. 224, 26 L. ed. 1117; *Marsh v. McPherson*, 105 U. S. 709, 26 L. ed. 1189; *Cunningham Iron Co. v. Warren Mfg. Co.* 80 Fed. Rep. 878; *Daughtery v. American U. Teleg. Co.* 75 Ala. 168; 2 Greenl. Ev. § 287, note 3; *Walworth v. Pool*, 9 Ark. 394; *Miller v. Mariner's Church*, 7 Me. 51.

This is not a case of failure to deliver the message, or of delivering it in a changed form, which are technical breaches of contract for which nominal damages are recoverable.

It is not a case where the law allows nominal damages for the breach of a contract.

8 Sutherland, Damages, p. 295.

Mental anguish of itself has never been treated as an independent ground of damages so as to enable a person to maintain an action for that injury alone, neither has insult nor contumely.

Wood's Mayne, Damages, p. 75; *Cooley*, Torts, 270, 271; 3 Sutherland, Damages, pp. 715, 716, and note; *Pierce*, Railroads, p. 302; *Pollock*, Torts, enlarged Am. ed. pp. 54-56; 2 Greenl. Ev. § 287.

Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.

Lynch v. Knight, 9 H. L. Cas. 598; *Alloep v. Alloep*, 5 Hurst. & N. 534; *Flemmington v. Smithers*, 2 Car. & P. 292; *Hobbs v. London & S. W. R. Co.* L. R. 10 Q. B. 111; *Victorian R. Comrs. v. Coultas*, L. R. 18 App. Cas. 222.

The decisions of the American courts upon the question, generally, are to the same effect.

Kennon v. Gilmer, 181 U. S. 22, 33 L. ed. 110; *Wilcox v. Richmond & D. R. Co.* 8 U. S. App. 118, 52 Fed. Rep. 264, 3 C. C. A. 73, 17 L. R. A. 804; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 820; *Haile v. Texas & P. R. Co.* 28 U. S. App. 80, 60 Fed. Rep. 551, 9 C. C. A. 184, 23 L. R. A. 77; *Paine v. Chicago, R. I. & P. R. Co.* 45 Iowa, 569; *Salina v. Trooper*, 27 Kan. 544; *Black v. Carrollton R. Co.* 10 La. Ann. 38, 63 Am. Dec. 586; *Wyman v. Leavitt*, 71 Me. 227; *Covington Street R. Co. v. Packer*, 9 Bush, 459, 15 Am. Rep. 725; *Canning v. Wilkinstown*, 1 Cush. 451; *White v. Dresser*, 185 Mass. 150, 46 Am. Rep. 454; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Welch v. Ware*, 32 Mich. 84; *Clinton v. Lanning*, 61 Mich. 355; *Johnson v. Wells, F. & Co.* 6 Nev. 224, 3 Am. Rep. 245; *Triggs v. St. Louis, K. C. & N. R. Co.* 74 Mo. 147, 41 Am. Rep. 805; *Lehman v. Brooklyn City R. Co.* 47 Hun, 355; *Tervoilliger v. Wanda*, 17 N. Y. 54, 72 Am. Dec. 420; *Ewing v. Pittsburgh, C. O. & St. L. R. Co.* 147 Pa. 140, 14 L. R. A. 66; *Bones v. Danville*, 58 Vt. 190; *Stuts v. Chicago & N. W. R. Co.* 73 Wis. 147; *Gulf, O. & S. F. R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781; *Joch v. Dankwardt*, 85 Ill. 331.

The "ground of recovery must be something beside an injury to the feelings and affections."

Little Rock & Ft. S. R. Co. v. Barker, 33 Ark. 350, 34 Am. Rep. 44; *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 Ark. 41; *Davis v. St. Louis, I. M. & S. R. Co.* 58 Ark. 117, 7 L. 69 L. R. A.

R. A. 288; Simpson v. Grayson, 54 Ark. 404.

Man had suffered all kinds of mental injury at the hands of his neighbors for centuries,—his hopes had been disappointed, his pride had been humbled, his anger had been aroused, he had been frightened, grieved, and subjected to every conceivable form of mental discomfort,—but such wrongs alone had never been made the subject of compensation in damages until 1881, when *So Belle v. Western Union Teleg. Co.* 55 Tex. 308, was determined by the commission of appeals in Texas.

After the decision in that case, the principle was invoked in many other cases in the courts of Texas, with varying results.

Gulf, O. & S. F. R. Co. v. Levy, 59 Tex. 568, 46 Am. Rep. 278; *Western U. Teleg. Co. v. Brown*, 71 Tex. 723, 2 L. R. A. 766; *Western U. Teleg. Co. v. Kirkpatrick*, 76 Tex. 217; *Roswell v. Western U. Teleg. Co.* 75 Tex. 26.

The Texas rule has found no support in the Federal courts, except in a charge delivered by Judge Maxey to a jury in the circuit court for the western district of Texas in 1889.

Beasley v. Western U. Teleg. Co. 39 Fed. Rep. 181.

But it has been approved, partially or wholly, by the highest courts of six states as follows:

Wadsworth v. Western U. Teleg. Co. 86 Tenn. 695; *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583; *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510; *Chapman v. Western U. Teleg. Co.* 90 Ky. 265; *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L. R. A. 72.

The Texas rule has been considered and repudiated in the Federal courts as follows:

Western U. Teleg. Co. v. Wood, 13 U. S. App. 317, 57 Fed. Rep. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Chase v. Western U. Teleg. Co.* 44 Fed. Rep. 554, 10 L. R. A. 464; *Crawson v. Western U. Teleg. Co.* 47 Fed. Rep. 544; *Tyler v. Western U. Teleg. Co.* 54 Fed. Rep. 684; *Kester v. Western U. Teleg. Co.* 55 Fed. Rep. 603; *Gahan v. Western U. Teleg. Co.* 59 Fed. Rep. 438; *Wilcox v. Richmond & D. R. Co.* 8 U. S. App. 118, 52 Fed. Rep. 264, 3 C. C. A. 73, 17 L. R. A. 804; *Gilmer v. Kennon*, 181 U. S. 22, 33 L. ed. 110.

It has been repudiated entirely by the decisions of the highest state courts as follows:

West v. Western U. Teleg. Co. 39 Kan. 98; *Russell v. Western U. Teleg. Co.* 3 Dak. 315; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L. R. A. 810; *Chapman v. Western U. Teleg. Co.* 88 Ga. 768, 17 L. R. A. 430; *Butner v. Western U. Teleg. Co.* 2 Okla. 234; *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 20 L. R. A. 173; *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L. R. A. 406; *Summerfield v. Western U. Teleg. Co.* 87 Wis. 1; *Curtin v. Western U. Teleg. Co.* 18 App. Div. 253.

The mature and better considered judgments of the courts are against the rule.

Hughes, J., delivered the opinion of the court:

Pretermittin discussion of other questions in the case, we proceed to consider the main and most important question involved. In

considering this question, the labor of the court has been minimized in the investigation of cases by the full and excellent briefs of counsel on both sides of the question. The question we propose to consider is whether or not injury to the feelings,—anguish and pain of mind,—unattended by physical injury, occasioned by the breach of duty on the part of the telegraph company, in failing to deliver the telegram promptly, can be regarded as an element of damages, under the law. Are damages recoverable at law for mental anguish, caused by the negligent omission of duty upon the part of the telegraph company, when such mental anguish is independent of and unaccompanied by physical injury of any kind? Upon this question the decisions of the courts of last resort are not harmonious.

While there is considerable conflict in the adjudged cases upon this question, we are of the opinion that the better considered cases are against the right of recovery for mental pain and anguish, unaccompanied by physical injury. The best cases we have read which so hold are *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 859; *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L. R. A. 406; *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 20 L. R. A. 172. See also *West v. Western U. Teleg. Co.* 39 Kan. 98; *Russell v. Western U. Teleg. Co.* 8 Dak. 315; *Butner v. Western U. Teleg. Co.* 2 Okla. 284; *Summersfield v. Western U. Teleg. Co.* 87 Wis. 1; *Curtin v. Western U. Teleg. Co.* 13 App. Div. 258. The first case in this country of which we have any knowledge that held damages recoverable for mental anguish, independent of physical injury, is the case of *So Relle v. Western U. Teleg. Co.* 55 Tex. 808, 40 Am. Rep. 805, decided in 1881. Judge Lumpkin, in his able discussion of this question in *Chapman v. Western U. Teleg. Co.*, says that the court in the *So Relle Case* "adopts as law a bare suggestion made by the text-writers Shearman and Redfield, in their work on Negligence, vol. 2, § 756. The cases referred to in the opinion were actions for physical injuries, of which the mental agony forms an inseparable component." The decision in the *So Relle Case* is followed in Texas in quite a number of other cases, and the doctrine seems to have involved that court in some inconsistencies commented upon in *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 859. This doctrine, which seems to have had its origin, in this country, in Texas, has been followed in *Beasley v. Western U. Teleg. Co.* 39 Fed. Rep. 181; *Chapman v. Western U. Teleg. Co.* 90 Ky. 265; *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669; *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695; *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510; *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 588; Thompson, *Electricity*, §§ 878 *et seq.*; and in Iowa, in *Montener v. Western U. Teleg. Co.*, 98 Iowa, 752, 23 L. R. A. 72. In case of *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, Judge Caldwell delivered the opinion of the court, and maintained his position with much ability; but we are of the opinion that the very able dissenting opinion in that case by Judge Lester announces the correct doctrine. We ad-

here to the doctrine announced in the cases which held that for mental pain and anguish alone, unaccompanied by physical injury, damages are not recoverable at law. We could not hope to add anything in support of this view to the able, full, and elaborate discussion of this question in the cases we have referred to.

It is not to be controverted that in cases of torts that produce physical injury, attended with mental suffering, the mental suffering is an element of damages, recoverable in an action at law, because they are so intimately connected as to make separation impracticable. So, also, damages may be recovered for torts that are wilful and calculated to injure the feelings, but only in aggravation of damages, on account of the wanton and wilful character of the wrong done; but no action lies for injury to the feelings merely, or for mental anguish alone. It will be borne in mind that the damages claimed in this case are alleged to have been caused by a breach of contract. In a majority of instances the breach of a contract merely causes disappointment, annoyance, and more or less mental trouble or distress. But it would be an unwarranted stretch of the law, in our opinion, to hold that, for mental anguish caused by violation of a contract merely, damages could be recovered in an action at law. We do not think that damages for mental pain and suffering alone can be measured by any practical or just rule.

It is asked, What difference can there be between allowing damages for mental pain and anguish unattended with physical wrong and allowing damages for pain and anguish resulting from physical injury? There is the difference with us that damages for mental pain and anguish caused by physical injury have always been allowed by law, while damages for mental pain and anguish unattended with physical injury have been allowed by law only since the decision of the *So Relle Case*, in 1881, when the decision of the Texas court departed from the doctrine of the common law, which we think sound, and announced a new doctrine, unsupported by authority, as we believe, of any well-considered case before it. While we do not want to be understood as clinging to ideas and doctrines that are ancient, because they are ancient merely, if they are contrary to reason and right, yet we have great respect for the conservatism of the law, and will not depart from its long and well settled doctrines, supported by eminent authority, and founded in reason and justice. Even if the difference in principle between allowing damages for mental pain and anguish, the result of physical injury, and disallowing damages for such pain and anguish unaccompanied by physical injury, be such as not to be defined,—merely chimerical,—this is no reason why we should say that damages for mental anguish, independent of physical injury, should be allowed. No statute allows them in such case. The common law does not allow them, and, in our opinion, the weight of adjudication is against the right of recovery in such cases. In determining a principle in the law which in its application, at least, seems to be new and but recently thought of, it is highly important to consider precedents, and is legiti-

mate, in our view, to look to consequences that will follow as certainly as night follows the day from the recognition of a doctrine that will affect most seriously the welfare of the people. The intolerable and interminable litigation such a doctrine would foster is beyond the reach of an ordinary imagination.

The decisions of the state courts repudiating this doctrine find support in the decisions of the courts in England. In *Lynch v. Knight*, 9 H. L. Cas. 598, the court says: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." In *Allopp v. Allopp*, 5 Hurlst. & N. 584, Pollock, C. B., said: "We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it." In *Victorian R. Comrs. v. Coultas*, L. R. 18 App. Cas. 22, the court holds that an action cannot be maintained for mental shock unaccompanied by physical injury. This seems to be the settled doctrine of the courts in England. In the case of *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44, Judge English, in delivering the opinion, said: "There must be a loss to the claimant that is capable of being measured by a pecuniary standard. . . . and mere injury to feelings cannot be considered." Pages 359 and 360. He said this is the rule in England, under Lord Campbell's act, and in this country, under similar statutes. However, the precise question at bar has not been decided in this court before this. The Federal courts have also repudiated the doctrine that an action can be maintained for mental pain and anguish not accompanied with physical injury. *Western U. Tele. Co. v. Wood*, 13 U. S. App. 317, 57 Fed. Rep. 471, 6 C. C. A. 482, 21 L. R. A. 706; *Chase v. Western U. Tele. Co.* 44 Fed. Rep. 554, 10 L. R. A. 464; *Crawson v. Western U. Tele. Co.* 47 Fed. Rep. 544; *Tyler v. Western U. Tele. Co.* 54 Fed. Rep. 684; *Kester v. Western U. Tele. Co.* 55 Fed. Rep. 608; *Gahan v. Western U. Tele. Co.* 59 Fed. Rep. 433; *Cobb v. Telegraph Co.* (Kan.; not yet published). Only one Federal court in Texas has followed the Texas cases, as far as we know. In Wood's *Mayne on Damages*, at page 75, it is said: "Mental anguish of itself has never been treated as an independent ground of damages, so as to enable a person to maintain an action for that injury alone; neither has insult nor contumely." Pierce on Railroads says (p. 302): "Mental is not readily distinguished from physical suffering. Pain of mind, when connected with bodily injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity. See Pollock, Torts, enlarged Am. ed. pp. 54-56, and note by editor, p. 56; 2 Greenl. Ev. 267; Field, Damages, §§ 26, 73; 26 Am. & Eng. Enc. Law, p. 862. Several of the recent text-writers have approved the doctrine of the Texas courts, notably Thompson on Electricity and Sedgwick on Damages. To support the opinion in the *So Relle Case*, § 756 of Shearman & Redfield on Negligence is quoted in the opinion, which is as follows: "In case of delay or total failure of

delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages." This may be true, but, if so, it presents a question for the action of the legislature. The courts do not make law, but determine what it is, not what it ought to be. At furthest, this is their legitimate province only. After the fullest argument by the learned counsel in this cause, and the best consideration we have been able to give the question, we are all agreed that no recovery can be had at law for damages for mental suffering alleged to have been endured in this case, no physical injury having been alleged.

The judgment of the Circuit Court is affirmed.

ST. LOUIS, IRON MOUNTAIN, &
SOUTHERN RAILWAY COMPANY,
Appt.,

v.

W. J. MATHEWS.

(.....Ark.....)

1. If a provision in a contract for the employment of railroad engineers, by which the employer undertakes to reinstate any engineer discharged from service whenever, upon his complaint, specified persons shall on investigation decide that the discharge was unjust, is void as against public policy, such provision does not render invalid a further provision in the contract that the engineers shall not be discharged without just cause.
2. Want of mutuality in the contract will permit the discharge at any time of a railroad engineer employed under a contract by which the employer agrees to pay him according to specified rates for his services, not to discharge him without just cause, to promote him according to specified grades of service, and when discharges of engineers are made to discharge in the order of juniority in service, where there is no agreement on his part to serve for any specified time.

(Bunn, Ch. J., dissents.)

(November 6, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiff in an action brought to recover damages for breach of an employment contract. *Reversed.*

The facts are stated in the opinion.

Messrs. Dodge & Johnson, for appellant:

The contract is void because it binds the defendant railway company, and prevents it from performing those duties to the public which are enjoined by law and public necessity.

West Virginia Transp. Co. v. Ohio River Pipe Line Co. 22 W. Va. 600, 46 Am. Rep. 527; *Hale v. Henderson*, 4 Humph. 199; *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759; *Weld v. Lancaster*, 56 Me. 455.

Railway companies, as common carriers of

NOTE.—As to discharge from employment under a contract for permanent employment, see note to *Carnig v. Carr* (Mass.) 35 L. R. A. 512.

passengers, are bound to the utmost diligence which human skill and foresight can effect; and if injury occurs by reason of the slightest omission, in regard to the highest perfection of all the appliances of transportation, in the mode of management at the time the injury occurs, whether caused by defective appliances, or incompetent or careless servants, the carrier is liable.

George v. St. Louis, I. M. & S. R. Co. 34 Ark. 618; *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298. 48 Am. Rep. 10; *Missouri P. R. Co. v. Nevill*, 60 Ark. 881, 28 L. R. A. 80.

When a contract seeks to bind the maker to do something opposed to the public policy of the state or nation, or conflicts with the wants, interests, or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, it is void, however solemnly the same may be made.

Greenhood, Public Policy, Rule 2; Bishop, Non-Cont. L. p. 1074.

If the tendency of contracts is towards a corrupt or illegal result, they will be unhesitatingly declared void.

Bestor v. Wathen, 60 Ill. 188; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 668, 32 L. ed. 827; *Fuller v. Dame*, 18 Pick. 472; *Oscanyan v. Winchester Repeating Arms Co.* 108 U. S. 261-267, 278, 26 L. ed. 539-542, 544; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868; *Hamilton v. Hamilton*, 89 Ill. 351; *Thomas v. Caulkett*, 57 Mich. 394, 58 Am. Rep. 369; Cooley, Torts, p. 687; *Johnson v. Richmond & D. R. Co.* 86 Va. 975; *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 27 U. S. App. 1, 61 Fed. Rep. 993, 4 Inters. Com. Rep. 578, 9 C. C. A. 664; *Pope Mfg. Co. v. Gormully*, 144 U. S. 288, 36 L. ed. 418; *Home Ins. Co. v. Morse*, 87 U. S. 20 Wall. 451, 22 L. ed. 368; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 660, 24 L. ed. 536; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana"), 129 U. S. 440, 441, 32 L. ed. 792; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 51, 35 L. ed. 65.

In making its contracts with its servants a railway company does not act strictly in its capacity as common carrier, and yet it cannot screen itself from liability for injuries inflicted upon such servants through its own negligence. Such contracts have been repeatedly held to be contrary to public policy and void.

Kansas P. R. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 480; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 476.

Every contract is declared void which contravenes any legal principle or enactment.

Aubert v. Maze, 2 Bos. & P. 874; *Cannan v. Bryce*, 3 Barn. & Ald. 188; *Greenough v. Balch*, 7 Me. 461; *White v. Buss*, 3 Cush. 448.

In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals.

Burke v. Child, 88 U. S. 21 Wall. 448, 22 L. ed. 624; *Thomas v. West Jersey R. Co.* 101 U. S. 77, 25 L. ed. 950; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Chicago & N. W. R. Co. v. People*, 56 89 L. R. A.

Ill. 865, 8 Am. Rep. 690; *Pueblo & A. Valley R. Co. v. Taylor*, 6 Colo. 1, 45 Am. Rep. 512; *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 869; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 128 Mo. 224; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 86 U. S. App. 153, 70 Fed. Rep. 301, 80 L. R. A. 103, 17 C. C. A. 66; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana"), 129 U. S. 440, 441, 32 L. ed. 791, 792.

Railway companies are bound in selecting engineers and servants to the exercise of diligence and care that they employ and retain in their service, in their different departments, only such persons as are safe, capable, and trustworthy.

Rorer, Railroads, p. 833; *Beale v. Railway*, 1 Dill. 568; *Atcheson v. Mallon*, 48 N. Y. 149, 8 Am. Rep. 678; *White v. Middlesex R. Co.* 135 Mass. 219.

There is no mutuality and no privity of contract existing between plaintiff and defendant.

Hamlin v. Wheelock, 42 Hun. 533; Pom. Contr. § 165; *Lees v. Whitcomb*, 2 Moore & P. 86, 5 Bing. 34; *Sykes v. Dixon*, 9 Ad. & El. 698; *Bates v. Cort*, 3 Dowl. & R. 876; *James v. Williams*, 5 Barn. & Ad. 1109; *Young v. Timmins*, 1 Crompt. & J. 840; *Hulse v. Hulse*, 17 C. B. 725, 25 L. J. C. P. N. S. 177; Addison, Contr. § 18.

Messrs. Rose, Hemingway, & Rose for appellees.

Battle, J., delivered the opinion of the court:

On or about the 18th day of May, 1894, W. J. Mathews instituted this action against the St. Louis, Iron Mountain, & Southern Railway Company. The complaint filed in the action is as follows:

"The plaintiff is by profession a locomotive engineer, and has been such for many years, and for over four years past he has been in the employment of the St. Louis, Iron Mountain, & Southern Railway Co. as such locomotive engineer, working under a contract, a copy of which is herewith filed, and made part hereof. By article 1 of said contract it is provided: 'No engineer shall be discharged or suspended without just and sufficient cause, and, in case an engineer believes his discharge or suspension to have been unjust, he shall make a written statement of the facts in the premises, and submit it to his master mechanic, and at the same time designate any other engineer who may be in the employ of the company at the time; on the same division; and the master mechanic, together with the engineer last referred to, shall, in conjunction with the superintendent, investigate the case in question, without unnecessary delay, and give prompt decision, and, in case the aforesaid discharge or suspension is decided to have been unjust, he shall be reinstated, and paid half time for all the time he has lost on such account.'

"By rules 18, 14, 16, and 17 of said contract it is provided that engineers shall be employed and discharged in the order of their seniority, the oldest engineer in service being entitled to be first employed, and the youngest engineer in the service being subject to be first dis-

charged in case the company should reduce its force.

"The plaintiff was one of the oldest engineers in the service of the company, and, there being no possibility of the requirements of the service being diminished to such an extent as ever to necessitate his discharge under the contract, his employment was for life, or during good behavior.

"The plaintiff was earning under that contract from \$185 to \$185 per month, and would have continued to earn that sum during the remainder of his natural life, but on the 2d day of January, 1894, in violation of said contract, and without cause, the plaintiff was, by the defendant, discharged from its service.

"Plaintiff has pursued the steps required by said article 1 for reinstatement, but the master mechanic of the defendant, acting under its orders, and without cause, refuses to reinstate him in the service.

"The plaintiff therefore prays judgment for the sum of \$10,000."

Rules 18, 14, 16, and 17, referred to in the complaint, are as follows:

"(13) When, from temporary slackness of business, an engineer in road service is thrown out of employment, he will be reduced from passenger to freight service, from freight to pusher service, and from pusher to switch-engine service, according to his seniority on the division. If it is necessary to lay off an engineer, the youngest engineer in switch-engine service will be taken off. This not to apply to switch engineers who are not eligible to road or pusher service by reason of not having fired on the road, or having waived their rights to same.

"(14) During slackness of business, employment for surplus engineers will be found, if possible, on other parts of the system where needed, in preference to hiring new men, or promoting men already in service, with the understanding that whoever accepts such temporary transfer will be required to remain until business on his own territory justifies his recall by his own master mechanic. No man to be promoted, or engineer hired, during absence of such transferred engineer, and while subject to recall to his own division, unless to meet an emergency or pressing demand of business; in which case such newly hired or promoted engineer shall hold no rights over the absent engineer. Men so transferred will hold seniority rights on their own territory for a period of six months only, unless the master mechanic of the territory to which they are transferred finds it necessary for despatch of business to retain them for a longer period. Further, they have a preference, in accordance with seniority, to any engine becoming vacant on their own territory over extra men still remaining on said territory. If, after accepting such transfer, they return to their own territory, before they are recalled by their own master mechanic, they shall be considered new men on said territory."

"(16) Promotions of engineers will be made according to seniority from switch-engine service to pusher-engine service, if any, on the division, and from pusher service to road service.

"(17) When a passenger engine becomes

vacant, the oldest freight engineer on the division where the vacancy occurs is entitled to the same. When a freight engine becomes vacant, the oldest freight engineer in regular service on the division where the vacancy occurs is entitled to the same. When any run becomes vacant, and the engineer entitled to said run refuses same, he loses his right to this run only, but will retain his rights, according to seniority, to next vacancy that may occur. When a passenger run extends over two or more freight divisions, each division is entitled to representation *pro rata* upon said run, each freight division selecting a representative in turn, as may be agreed upon by the divisions interested. In the absence of regular passenger engineer, when the extra passenger engineer is not available, the oldest freight engineer on the division shall be assigned to this service. Any freight engine becoming vacant for a period of fifteen days or more shall be given the oldest extra freight engineer. No engineer shall be allowed to run on territory other than that to which he is assigned, except in case engineers assigned to such territory are not available. This shall not apply to systems officers, specials."

These rules, among others, were signed only by Frank Reardon, Superintendent of Locomotive and Car Department," and "Geo. C. Smith, Assistant General Manager."

The defendant answering, admitted that the plaintiff was a locomotive engineer, and was in its employ as such on the 2d day of January, 1894, and that it had entered into an agreement with the engineers in its employment, which became effective on the 1st of January, 1892, and was in force on January 1, 1894, and that article 1 of the agreement is set out in the complaint; but denied all the other allegations of the complaint, and averred that it discharged him from its service on the 2d of January, 1894, for gross negligence, and stated in what it consisted.

The issues in the case were tried by a jury. In the trial it was shown that the plaintiff was employed by the defendant as a locomotive engineer. It was admitted in the answer that the following article was a part of the contract:

"Article 1. No engineer shall be discharged or suspended without just and sufficient cause, and, in case an engineer believes his discharge or suspension to have been unjust, he shall make a written statement of the facts in the premises, and submit it to his master mechanic, and at the same time designate any other engineer who may be in the employ of the company at the time on the same division; and the master mechanic, together with the engineer last referred to, shall, in conjunction with the superintendent, investigate the case in question without unnecessary delay, and give a prompt decision; and, in case the aforesaid discharge or suspension is decided to have been unjust, he shall be reinstated, and paid half time for all the time lost on such account."

On the 2d of January, 1894, while he was in the employment of the defendant, he was in control of one of its locomotives pulling a freight train going north. When near Higginson station, 50 miles north of Little Rock,

the boiler exploded. The company discharged him, and he demanded an investigation under article 1 of his agreement. He designated M. W. Cadle as the person who should make the investigation in conjunction with the master mechanic of the defendant. Cadle and the plaintiff appeared before the master mechanic and demanded the investigation, which was granted. They made a joint examination of the boiler, and together discussed the cause of the explosion. The master mechanic reached the conclusion that the cause was the failure of the engineer to keep the boiler supplied with a sufficient quantity of water, and so reported to the proper officer. Cadle made no announcement of his conclusion,—perhaps disagreed with the other arbitrator. No appeal to the superintendent was made, and no other investigation was demanded.

The names appended to the rules before referred to were those of Frank Reardon, the superintendent of the locomotive and car department of the Missouri Pacific Railroad Company, and of George C. Smith, the general manager of the same company. The rules were agreed upon by the Brotherhood of Locomotive Engineers and the company, and were accepted by them as modifications of the agreement entered into by them, of which article 1 of plaintiff's contract was a part. There is no direct evidence that these rules were made a part of the contract of plaintiff and defendant adduced, except that the plaintiff was a member of the Brotherhood of Locomotive Engineers, and the admission of the defendant that article 1 was a part of their contract.

Evidence was adduced in the trial on the part of the plaintiff to show that he was discharged without sufficient cause, and on the part of the defendant that the explosion of the boiler was occasioned by the negligence of the plaintiff in permitting the water to get too low, and for that reason he was discharged.

The court, over the objection of the defendant, instructed the jury at the request of the plaintiff, as follows:

"1. If you find that the plaintiff was discharged from the service of the defendant because of the blowing down of the crown sheet of the engine of which he was in charge, and that said crown sheet was not blown down in consequence of his misconduct, then you will find for the plaintiff, and will assess his damages at the sum which he might reasonably be expected to have earned under his contract with the defendant down to the time of this trial, deducting such sums as he, by reasonable diligence, might have earned in similar business; but the burden of proof is on the defendant to show that the plaintiff might have obtained other similar employment."

At the request of the defendant the court instructed the jury as follows:

"The court charges the jury that, if they find from the evidence that plaintiff was careless in the handling of his engine, and that such carelessness contributed to cause the said engine to blow down its crown sheet, then the discharge of said plaintiff by defendant railway company was not a violation of the con-

tract sued on, and your verdict must be for defendant."

Except upon the credibility of witnesses, and the preponderance of evidence, and the burden of proof, no other instructions were given. The jury returned a verdict for \$500 in favor of the plaintiff, and the court rendered judgment accordingly, and the defendant appealed.

Appellant contends that the contract sued on is void, because it is contrary to public policy. The reason given for this contention is that it takes from it the right to discharge its employees without the approval of a board of arbitration, and thereby deprives the railroad company of the power to discharge those duties imposed upon it by law which can be fully exercised only when it is allowed to discharge incompetent, careless, or inefficient servants, whenever, in its opinion, it may be necessary to do so. It is true that appellant undertook to reinstate any engineer who shall be discharged from its service, whenever, upon his complaint, its master mechanic and superintendent, and an engineer selected by him, shall, upon investigation, decide that the discharge was or is unjust. But if we assume that this stipulation is void because it is contrary to public policy, it may be eliminated without affecting the remainder of the contract; for it is separate and distinct from, and independent of, the other promises of the railroad company, which are legal, and the whole contract founded upon one lawful consideration,—the services of appellee. If, therefore, it be illegal, it is void, and the remainder of the contract is valid; the rule in such cases being that, "where the consideration is tainted by no illegality, but some of the promises . . . are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable, or dependent upon one another." *Western U. Teleg. Co. v. Burlington & S. W. R. Co.* 8 McCrary, 130, 11 Fed. Rep. 1; *State, Laskey, v. Perrysburg Bd. of Edu.* 35 Ohio St. 519; *Erie R. Co. v. Union Locomotive & Exp. Co.* 35 N. J. L. 245; *Corcoran v. Lehigh & F. Coal Co.* 188 Ill. 390; *Peltz v. Eichele*, 62 Mo. 171; *Dean v. Emerson*, 102 Mass. 480; *Clark*, Contr. p. 474.

But appellee is not seeking to enforce the article as to arbitration. He has abandoned that, and now asks for compensation for the damages occasioned by his discharge. Assuming that he can waive the arbitration, is he entitled to recover? That depends upon the terms of his contract. This brings us at once to inquire what the stipulations of the contract were. As said by Mr. Justice Strong in *Coffin v. Landis*, 46 Pa. 481: "It matters not what, in our opinion, would have been a reasonable arrangement, nor what it may be supposed the parties anticipated, nor whether the plaintiff's early discharge was a hardship to him. The true question is, What was the contract? To what did the parties bind each other? We are not at liberty to make contracts for them, or to add any stipulations which they have not seen fit to incorporate. We cannot give to a mere expectation the

sanction, or the binding force of a covenant."

Appellee, for a stipulated consideration, agreed to serve appellant in the capacity of an engineer. There was no contract as to the time he should continue to serve. Appellant agreed to pay him according to certain rates for his services, not to discharge him without just cause, to promote him according to certain grades of service, and, when it saw fit to reduce the number of its engineers, to discharge them in the order of their juniority in service, first discharging the youngest, and then the next, and so continuing until the number should be sufficiently reduced. There might have been in these promises an implied undertaking on the part of appellant to retain appellee in its service so long as he should serve it acceptably as an engineer, unless he should be sooner discharged in the manner indicated. But we fail to discover any evidence of an agreement on the part of appellee to serve any specified time. Hence there was no contract that he would serve, and that the appellant would employ him, for any stated time,—the agreement of both being necessary to fix the time of service,—and, consequently, no violation of a contract by the discharge of appellee before the expiration of any particular time.

Quotations from the opinions of courts in a few cases will add force to and explain what we have said. In *Harper v. Hassard*, 113 Mass. 188, Chief Justice Gray, speaking for the court, said: "The written agreement in which the parties have expressed the contract between them, and by the construction of which this case must be determined, consists of, 1, a recital that the defendants intend to carry on the business of making oil and water colors, and wish to secure the services of the plaintiff in the making of said colors; 2, an agreement of the plaintiff with the defendants that he will, during the term, not exceeding three years from the date of this agreement, render and give his exclusive time, service, skill, and energy to them in the manufacture of oil and water colors, and also instruct and teach them during the said term the art of manufacturing or making colors in all its details, so far as it is in his power to do so; 3, in consideration of the above, an agreement of the defendants 'during said term' to pay to the plaintiff 'thirty dollars per week as compensation for his services so rendered;' 4, an agreement of the plaintiff that he will not, 'during the continuance of this agreement, be connected with any other persons in the manufacture of colors. . . . There is no express agreement of the defendants to employ the plaintiff for three years, and no stipulation from which, in our judgment, such an agreement can be implied. The agreement appears to have been framed and adapted to secure to the defendants the right to the exclusive services of the plaintiff for such time, not extending beyond three years from its date, as he should perform such services, . . . paying him the stipulated compensation weekly, so long only as he should be employed by and faithfully serve them; but not to oblige them to continue the business, or to employ him therein, except at their own elec-

tion, or to pay him any compensation after reasonable notice that they should no longer require his services."

In *East Line & R. River R. Co. v. Scott*, 72 Tex. 70, the agreement alleged was "that the said company thereafter, when this plaintiff should ask for and accept service and employment by the said company in the running and operating its said railroad, in the employment of locomotive engineer, that this being and still is the trade, occupation, and profession of your petitioner, would employ petitioner for whatever length of time your petitioner might desire to retain such employment, and at the reasonable and customary pay and wages of such employee on railroads, which then was and still is from \$100 to \$150 per month," etc. The court in speaking of this contract, said: "We must take the contract as alleged in the petition to be the contract on which appellee must recover, if at all; and, looking to that, there can be no doubt that whether appellee should serve the appellant, and the term of such service, depended upon his own will. It is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at will and so without cause. *Harper v. Hassard*, 113 Mass. 187; *Coffin v. Landis*, 46 Pa. 431; *Wood, Mast. & S.* 133, 136, and citations. When such a state of agreement exists it is no breach of contract to refuse to receive further services; and the refusal to accept any at all, it would seem, at most would entitle the engaged servant only to nominal damages. If the pleadings of appellee be accepted as true, there can be no doubt that there was an agreement that appellant would give employment to appellee; but, as the period for which this should be done was dependent on the will of appellee, to be exercised in the future, there was no contract binding appellant to employ appellee for any fixed period. The minds of the parties had not met as to a material element of the contract to which the agreement looked—the period of service."

In *Bolles v. Sachs*, 37 Minn. 315, the parties executed an agreement in writing "whereby, for the expressed consideration of the agreement of the plaintiff to conduct the business of the defendants, selling such goods at Minneapolis as provided in that instrument, the defendants agreed, for so long a time as the plaintiff might elect, to employ the plaintiff in that business; agreeing also that the plaintiff should have absolute and sole control of the business, and that the defendants would not employ any other agent or sell their goods to any other person. The defendants further agreed by this instrument to pay to plaintiff \$2,000 out of the first moneys collected from the accounts of the firm of Bolles & Co., . . . and as compensation for such employment, to pay to the plaintiff one half of all the profits to be derived from the business conducted by the latter," who agreed to conduct and manage it to the best of his ability. No period was specified for the continuance of the service of the plaintiff. He was discharged. He then brought an action, and recovered about \$1,100 on account of an alleged breach of the con-

tract. The court said: "The period of service or agency was left expressly and entirely to plaintiff's election; and in view of this it is most reasonable to construe the plaintiff's engagement to manage the business to the best of his ability, etc., not as qualifying his right of election, but as meaning that during such time as he may elect to carry on the business he will do so to the best of his ability. There was not, then, any obligation on the part of the plaintiff to enter upon the employment; and, unless the agreement of the defendants to employ him is supported by some other consideration, it would not be obligatory upon them, but might be revoked before the other party had acted upon it. . . . But here we come to a difficulty which must avoid the verdict, involving, as it does, a receiving of some \$1,100 for the breach of this agreement. The damages so assessed consisted of the supposed loss of the profits of the business for a little more than a year intervening between the time of the plaintiff's discharge and the time of the trial. The difficulty to which we refer is the want of certainty in the contract respecting the period of service. The contract was, perhaps, effectual to give to the plaintiff the option to himself fix the duration of it; but unless he exercised that election, and actually determined the period so as to make certain that which, by the terms of the contract, was uncertain, he could recover only for the period of his actual service. He could not recover, as damages for the breach of the contract, the profits or remuneration which the business might have yielded during any period beyond the time when the contract was broken and the employment terminated."

For the reasons given, we conclude that there was no breach of the contract, in the case before us, by the discharge of the appellee before the expiration of any particular period of time, and that he was not entitled to recover any sum except compensation for actual service. As the instruction given by the circuit court at the request of appellee is in conflict with this conclusion, *the judgment against appellant must be reversed*, and it is so ordered, and the cause is remanded for a new trial.

Hughes, Wood, and Riddick, JJ., concur.

Bunn, Ch. J., dissenting (Filed November 27, 1897):

The judgment in this case is reversed mainly, if not altogether, on the ground of a want of mutuality in the contract or agreement sued on, in this: that the said contract, while it in effect binds the appellant company to give the appellee permanent or life employment, with certain exceptions, it does not compel the appellee to continue in its service for any particular period, or to continue at all. In support of this theory the majority of the court cites, and mainly relies upon the rule of the common law as stated in *East Line & R. River R. Co. v. Scott*, 72 Tex. 70, and *Bolles v. Sachs*, 37 Minn. 315,—the first a railroad case, and the other a trader's employment case,—and some cases therein cited. In *East Line & R. River R.*

Co. v. Scott, an engineer (whether while in the employ of the defendant company or not he received the injury is not stated) sued the company for personal injuries, laying his damages at a certain amount; and before the termination of the suit it was compromised by the defendant paying plaintiff the sum of \$4,500, and, as the plaintiff claims in addition to this, the defendant, as part of the consideration of the compromise, was to furnish plaintiff employment in his line for such time as he might desire; and when the plaintiff demanded to be employed under this agreement, defendant refused to employ him, and the plaintiff sued for such refusal, laying damages in the sum of \$20,000. There was judgment for plaintiff in the sum of \$2,400, and defendant appealed to the supreme court of Texas, where the same was reversed mainly on the ground that the contract sued on was too indefinite, and wanting in mutuality, the plaintiff having the election and choice for fixing the period for his services to continue, and failed to exercise that choice; thus leaving the courts without definite basis upon which to found a judgment, as in that case, for damages for refusal to employ as agreed, which case demanded the same definiteness and clearness of proof as if the prayer had been for specific performance of the contract; and a lengthy discussion is indulged as to the doctrine of mutuality in contracts in general. The case of *Bolles v. Sachs* went off on pretty much the same course of reasoning as the case of *East Line & R. River R. Co. v. Scott*, and was somewhat the stronger, because the nature of the employment was necessarily less permanent than the other, in the very nature of things. The case at bar is quite different, and therefore the authorities cited by the majority of the court, in my opinion, are more or less inapplicable, principally because they are decisions in which it was not necessary for the courts rendering them to look away from the mere letter of the law, formulated in a different age, and in times when men's conditions as respect labor and employment, to the changed condition of things and circumstances by which we are now surrounded. The case at bar is not for refusal to employ, but for discharging unjustly and without a cause, which the contract forbade, and for refusing to keep the agreement to investigate the causes of discharge, and reinstate if found to be proper. The plea of want mutuality in the contract or agreement sued on is simply to the effect that a railway company cannot obligate itself to keep a competent engineer in its service for life, or as long as its business continues, and it needs the services of such a one, because that one may have the option to quit its service when his business, convenience, or pleasure may move him to do so. I do not care to worry the profession with a lengthy argument on this subject; but in support of my dissent I beg leave to refer to and adopt the decision in the case of *Carnig v. Carr*, 167 Mass. 544, 85 L. R. A. 512, and especially the very copious notes thereunder, wherein, I think, the position of the court is successfully overturned. I cannot refrain from expressing the opinion that the decision in this case is more far-reaching than any that

has been rendered by this court in a long time. I am of the opinion that the contract or agreement sued on is not only not objectionable for want of mutuality, but, on the contrary, is the result of the best thought of men, both professional and practical, whose lives have been devoted to the peculiar and wonderfully complicated and intricate business of operat-

ing modern railways. It is, in fact, a necessity to the employee, and an advantage to the employer's business at the same time, that some such arrangement be had between them; and I think it should be embodied in their contracts rather than in attempts at legislation on the subject, for obvious reasons.

WASHINGTON SUPREME COURT.

H. O. SHUEY, Receiver of Seattle Savings Bank, *Resp't.*,
v.

George B. ADAIR, *Appt.*

(..... Wash.)

1. Oral evidence is inadmissible to show that the maker of a note was only an agent and signed it under an agreement with the payee that the principal only should be liable.
2. The sole apparent maker of a note when sued thereon is not entitled to have his alleged principals brought in as defendants.
3. An agent who made a note in his own name is not released by an agreement after its maturity between the payee and the principal for the substitution of the latter's note, when this was never made.

(December 6, 1897.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. McCutcheon & Gillian, for appellant:

It may be shown "that the principal was doing business in the agent's name." Such was the case here. The agency was disclosed to the bank and it had full knowledge of the true relations of the parties.

Brookway v. Allen, 17 Wend. 40; *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050.

Both parties understood and meant that the contract was to be and in fact was between the bank and Ballard, Holmes, Rinehart, & Robertson, and not with Adair.

Hill v. Ely, 5 Serg. & R. 368, 9 Am. Dec. 376; *Mechanics' Bank v. Bank of Columbia*, 18 U. S. 5 Wheat. 326, 5 L. ed. 100; *Michels v. Olmstead*, 14 Fed. Rep. 219, and note; *Dix v. Akers*, 30 Ind. 481; *Rawlings v. Fuller* 31 Ind. 255; *Small v. Smith*, 1 Denio, 588; *Kost v. Bender*, 25 Mich. 515; 1 Dan. Ch. Pr. 4th Am. ed. 230, 281; 8 Randolph, Com. Paper, §§ 1875 et seq.; *Edwards, Bills & Notes*, p. 316; *Murray v. Reed*, 17 Wash. 1; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059; *Metcalf v. Williams*, 104 U. S. 99, 26 L. ed. 667; *Merchants' Exch. Bank v. Luckow*, 37 Minn. 542; *Roberts v. Austin*, 5 Whart. 313; *Milligan v. Lyle*, 24 La.

Ann. 144; *Westman v. Krumweide*, 30 Minn. 313, and cases cited in opinion.

The fact that the contract was one which the statute of frauds requires to be in writing makes no difference. Such a contract may be signed for the principal by a person thereunto lawfully authorized, and though the agent sign his own name alone, the principal may still be charged by parol evidence.

Mechem, Agency, § 449, and cases cited; *Neaves v. North State Min. Co.* 90 N. C. 412, 47 Am. Rep. 529.

Ballard, Holmes, Rinehart, & Robertson became by their promise to and agreement with the bank the principal debtors, and the indebtedness evidenced by the note became their own.

1 Brandt, Suretyship & Guaranty, §§ 55, 56, 67, 70, 77; *McLaren v. Hutchinson*, 23 Cal. 188, 83 Am. Dec. 59; *Fowler v. Clearwater*, 35 Barb. 148; *Barringer v. Warden*, 12 Cal. 312; *Durham v. Manrow*, 2 N. Y. 538.

The actual credit was given by the bank to Ballard, Holmes, Rinehart, & Robertson, and to them alone.

De Colyar, Guaranties and Principal & Surety, p. 67, and cases cited.

They were subserving a pecuniary and business purpose of their own, and were not attempting to answer for the debt of another.

Farley v. Cleveland, 4 Cow. 437, 15 Am. Dec. 387; *Low v. Treadwell*, 12 Me. 441; *Rogers v. Kneeland*, 18 Wend. 114; *DeColyar, Guaranties and Principal & Surety*, p. 137 et seq.; *Kingsley v. Balcome*, 4 Barb. 131; *Emerson v. Slater*, 68 U. S. 22 How. 28, 16 L. ed. 360; *Davis v. Patrick*, 141 U. S. 479, 35 L. ed. 826; *Mitchell v. Beck*, 88 Mich. 342.

The receiver has no greater right in the premises than the bank would have had if it had sued upon the note.

Brown v. Toledo, P. & W. R. Co. 35 Fed. Rep. 444; *Easton v. Houston & T. C. R. Co.* 38 Fed. Rep. 784; *Scott v. Armstrong*, 146 U. S. 499, 36 L. ed. 1059.

All questions pertaining to a note or the giving of the same can be litigated between the original parties, where the note has not been transferred.

Lockwood v. Coley, 23 Fed. Rep. 192, and note; *Kost v. Bender*, 25 Mich. 515.

The act of the agent was further ratified by Ballard, Holmes, Rinehart, & Robertson at the time they agreed to and with the bank to substitute a note signed by them for and in the stead of the note sued upon.

Conro v. Port Henry Iron Co. 12 Barb. 53.

NOTE.—For extrinsic evidence to show who is liable as the maker of a note, see *Keidan v. Winegar* (Mich.) 20 L. R. A. 706, and note. See also *Bulkley v. House* (Conn.) 21 L. R. A. 247. 39 L. R. A.

Messrs. Clise & King, for respondent:

Where an agent contracts in his own name and pledges his own credit, he will bind himself.

1 Am. & Eng. Enc. Law, pp. 388, 408, and authorities cited.

The English rule is that in cases in which the note is signed by the agent, and the suit is against him, he is personally liable, and that proof is not admissible as between the maker and the payee, to show that the latter knew the representative character of the signer and accepted the paper as the principal's contract.

Byles, Bills, 6th ed. 87.

The rule in the United States is: Upon a negotiable promissory note, made by an agent in his own name, and not disclosing on its face the name of the principal, no action lies against the principal.

Nash v. Towne, 73 U. S. 5 Wall. 689, 18 L. ed. 527; *Cragin v. Lovell*, 109 U. S. 198, 27 L. ed. 908.

A person not a party to a promissory note cannot be charged upon parol proof that the ostensible party signed or indorsed as his agent.

Davis v. England, 141 Mass. 587; *Wing v. Glick*, 56 Iowa, 473, 41 Am. Rep. 118; *Briggs v. Partridge*, 64 N. Y. 358, 21 Am. Rep. 617; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Bank v. Cook*, 38 Ohio St. 442; *Bryan v. Duff*, 12 Wash. 285.

Where an agent contracts in his own name, and does not disclose his principal, the principal having the right to sue, is also, when discovered, liable to a third party on the contract. The third party may elect whom he will sue. And the same rule holds good when the agent discloses his principal at the time.

1 Am. & Eng. Enc. Law, p. 416, and authorities cited; *Crum v. Boyd*, 9 Ind. 289; 8 Thomp. Corp. § 8905.

Parol testimony is not admissible for the purpose of showing that the signer of a promissory note was not intended by the parties to be liable in any capacity.

Tacoma Mill Co. v. Sherwood, 11 Wash. 498.

¶ This secret agreement alleged to have been entered into between Mr. Adair and a number of the trustees of the bank was not a defense to the receiver's cause of action.

To hold that one could have stock issued to him and allow the same to stand in his name upon the books of the bank, and yet by a secret agreement with such bank be released from all liability growing out of the issue of such stock, would be contrary to the provisions of our statutes and to public policy.

Barlo v. Nix, 15 Wash. 569; *Seoville v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Allibone v. Hager*, 46 Pa. 48; *Gogebic Invest. Co. v. Iron Chief Min. Co.* 78 Wis. 427; *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.* 97 Ill. 587, 37 Am. Rep. 129; *Hoespes v. Northwestern Mfg. & Car. Co.* 48 Minn. 174, 15 L. R. A. 470.

¶ One to whom stock is issued by the corporation, and who has the same placed in his name on the corporation books as owner, is liable to the creditors of the corporation, as though he were the absolute owner; and this 89 L. R. A.

whether he was in fact a pledgee, agent, or trustee for the real owner.

Baines v. Babcock, 95 Cal. 581; *Germania Nat. Bank v. Case*, 99 U. S. 681, 25 L. ed. 449; *Thompson v. Reno Sav. Bank*, 19 Nev. 108.

Dunbar, J., delivered the opinion of the court:

The appellant executed to the Seattle Savings Bank the following note:

2,000.00. Seattle Wash., May 6th, 1892.

One year after date, without grace, for value received, I promise to pay to the order of the Seattle Savings Bank, at the banking house of said bank, in the city of Seattle, the sum of two thousand dollars, with interest at the rate of ten per cent per annum, payable semiannually, from date hereof until paid. And if suit shall be commenced for the recovery of any amount due upon this note, I agree to pay an attorney's fee of fifty dollars.

Geo. B. Adair,

P. O. Address, City, No. 230.

Due May 6th, 1893.

This note was discounted by the bank to Ballard, Rinehart, Holmes, & Robertson; and the proceeds thereof, the sum of \$2,000, were paid by the bank to the above-named parties. In course of time, after the maturity of the note, the bank sued the appellant, the maker of the note. The essential parts of the amended answer were as follows: "(3) That at the time said note was so discounted as aforesaid, and in consideration thereof, and of the payment of the said proceeds to them, said Ballard, Rinehart, Holmes, & Robertson, agreed to and with said bank and this defendant that they, the said Ballard, Rinehart, Holmes, & Robertson, would within a few days thereafter take up the said note, and pay the amount thereof to said bank. (4) That, at and before the discount of said note as aforesaid, said bank well knew that the same was made and executed by the defendant so as aforesaid for and in behalf of said Ballard, Rinehart, Holmes, & Robertson, and not otherwise, and that the proceeds thereof were to be used by, and for the sole benefit of, the said Ballard, Rinehart, Holmes, & Robertson, and that it was discounting the same for, and for the sole benefit of, the said Ballard, Rinehart, Holmes, & Robertson, and the said defendant received no part of the consideration thereof. And the said bank then and there agreed to and with defendant and said Ballard, Rinehart, Holmes, & Robertson that it, the said bank, would look to the said Ballard, Rinehart, Holmes, & Robertson for the payment of said note, and that this defendant should never at any time be held by said bank liable upon or for the note so made by him as aforesaid, nor be called upon to pay the same. And the said bank, pursuant to said agreement, has never asked said defendant to pay said note, or any part thereof, but, on the contrary, has at all times held the said Ballard, Rinehart, Holmes, & Robertson liable and responsible to it to pay the same, pursuant to the said agreement so made as aforesaid when said note was discounted by it. (5) That there was no other

consideration for the note upon which this action is brought, and no part thereof was received by defendant, or any other person for him, as is hereinabove stated, all of which was well known to said bank at and before it discounted said note. (6) Defendant further answering, says that since he so made and executed said note he has frequently demanded of said Ballard, Rinehart, Holmes, & Robertson that they pay and take up the said note so made by the defendant as aforesaid, and that they frequently promised him they would do so, but have neglected to carry out their said promise and agreement to and with defendant and said bank. (7) Defendant further answering, says that, about two years after said bank had so discounted said note as aforesaid, it, said bank, entered into an agreement to and with the said Ballard, Rinehart, Holmes, & Robertson, that it would accept the note of said Ballard, Rinehart, Holmes, & Robertson for the amount of, and in place of, the said note so discounted by it for the said Ballard, Rinehart, Holmes, & Robertson as aforesaid, and that the said Ballard, Rinehart, Holmes, & Robertson thereupon agreed to and with said bank that they would make, execute, and deliver to said bank their note for the said amount and take up and deliver to defendant said note so discounted for them."

The plaintiff interposed a general demurrer to the said affirmative defense, which demurrer was sustained by the court. Appellant, standing upon his answer, moved the court for an order to bring in the said Ballard, Rinehart, Holmes, & Robertson as necessary and proper parties to this action, which motion was overruled by the court; and judgment was entered, as prayed, for plaintiff, and against defendant. From such judgment an appeal is taken to this court. So that it will be seen that this case involves the question whether an agent who executes a promissory note for his principal can introduce parol evidence to exonerate himself from responsibility, for it may be conceded that paragraph 4 of the answer is sufficient to raise this question. It is contended by the appellant that the authorities sustain this rule, while the respondent contends that the case falls squarely within the rule that the terms of a written contract cannot be contradicted by parol evidence. Many cases have been cited by the counsel for appellant, all of which we have carefully examined; and it must be said that upon this important question there is at least an apparent conflict of authority, and the expressions of different courts are somewhat bewildering. But, while there were expressions used by the courts in some of the cases cited by the appellant which would seem to sustain his contention, yet, when the case itself is examined, the decision in most of them will be found to be based upon a state of facts unlike the state of facts disclosed by the answer in this case; and most of them fall within one of the three following principles, which seem to be well established, *viz.*: (1) Where the check or order drawn by the agent discloses the principal; (2) where there is enough on the face of the written instrument to render it doubtful whether it was the intention to bind the agent or the principal; and (3) where the instrument was to be

delivered upon the taking effect of some future stipulated condition, and it has been delivered before such condition is performed. In each case parol evidence is admissible to show the actual contract; as, for instance, the first case cited by appellant, *viz.*, *Brockway v. Allen*, 17 Wend. 40, a case which has been cited by many of the subsequent cases, falls within the first rule announced. A note was given by the trustees of the First Baptist Church and Society of the Village of Brockport. This Society was indebted to the plaintiff for materials furnished to the society, and on account of such indebtedness the note was executed. The trustees signed the note individually, adding, "Trustees of Baptist Society." In that case it was held by the supreme court of New York that the principal was bound, and not the agent, but the court gives as the reason of its decision that the fact of the agency substantially appeared on the face of the note. In *Whitney v. Wyman*, 101 U. S. 392, 25 L. ed. 1050, there are some expressions, as we have before indicated, used by the court, which, if applied to the general proposition, would support appellant's contention; as, for instance, that the question is always one of intent, and the court being untrammelled by any other consideration, is bound to give it effect. It is also said: "The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so." The whole case, however, shows that the order for machinery plainly indicated that the same was ordered for the use and benefit of the company, the Prudential Grand Haven Fruit-Basket Company. As in the case above mentioned, the agent's name alone was signed to the order, but to it was added, "Prudential Committee, Grand Haven Fruit-Basket Company." And, while it is true that these words are merely *descriptio personarum*, yet it brought the case within the rule announced above, that there was sufficient on the face of the order to disclose the principal, or at least to render ambiguous the meaning of the order, so far as the responsibility was concerned. In *Hill v. Ely* (Pa.) 9 Am. Dec. 376, the syllabus of the case was as follows: "In an action by an indorsee against the indorser of a note in blank, parol evidence is admissible to show that at the time of the indorsement the indorsee agreed that he would not have recourse upon it against the indorser; and that the note so indorsed was delivered upon that express condition." The court, in its opinion [5 Serg. & R. 364], says: "The notes of Jabez Lamb, were drawn in favor of William Hill, and by him handed to Elisha Ely, without indorsement. Elisha Ely then said, 'Hill you must indorse these notes,' to which Hill replied, 'That is not our understanding.' Elisha Ely rejoined: 'They are made payable to you; how will you convey them to me? You must indorse them in order that I may collect them.' William Hill then said, 'I indorse them, but remember, I am not to be held responsible for the payment by this indorsement;' and Elisha Ely accepted the notes on that condition." This case was especially decided by the court on the ground

of actual fraud, and, as will be readily perceived from the statement given by the court, the transaction was actually fraudulent; and, as a matter of course, the defense of fraud or mistake is always available. The case of *Mechanics' Bank v. Bank of Columbia*, 18 U. S. 5 Wheat. 326, 5 L. ed. 100, was a case where there was an ambiguity on the face of the instrument, which was a check, and which falls within the second rule *supra*. The court, after arguing this case, says: "But it is enough for the purposes of the defendant, to establish that there existed, on the face of the paper, circumstances from which it might reasonably be inferred that it was either one or the other;" having reference to the question whether it was the check of the party who signed, or whether the check was given for the benefit of the bank. *Michels v. Olmstead*, 14 Fed. Rep. 219, is another case where the want of the happening of some future condition provided for was pleaded in exoneration of the agent. In this case the agreement stipulated for machinery to be furnished by the plaintiff to the defendant at specified prices, and the defense was that it was the understanding at the time the contract was made that the defendant, who had signed the contract, was not to be held liable personally in the event that the corporation for which the machinery was ordered was not formed; but the court recognized and stated the principle that "the contract read in evidence must be taken to set out the whole of the agreements of the parties, and no change of it can be made by verbal testimony unless the instrument itself shows on its face that certain matters pertaining to it are left undetermined; and when this is the case testimony may be admitted to complete the contract, so to speak." But that is an entirely different proposition from the one at bar, where the conditions of the contract are absolutely and plainly disputed, and one defendant is sought to be substituted for another without any future conditions agreed upon not having been complied with, and without any indication or ambiguity on the face of the note as to who the actual payor was. The next case cited (*Dix v. Akers*, 30 Ind. 481), we think, has no bearing on the subject in controversy; and the same might be said of *Rawlins v. Fuller*, 31 Ind. 255. It simply decides that "one who contracts merely as the agent of another, and has no personal interest in the contract, is not the trustee of an express trust within the meaning of the statute, and cannot, under the Code, sue on such contract in his own name." There was no promise to pay the rent here to Fuller, and no claim of title whatever in Fuller to the property, and the complaint expressly stated that the property belonged to Sarah Floyd. *Small v. Smith*, 1 Denio, 588, is another case of fraud, where a note was indorsed under an agreement that it should not be deposited until a future condition had been complied with. And the court especially found that it was clear that the note was delivered in violation of the agreement on which it had been indorsed by the defendant. The case of *Kost v. Bender*, 25 Mich. 515, simply decides that "the general rule that a purchaser from a bona fide holder of negotiable paper,

takes with it all the rights of such holder, whether he has notice of any infirmity, as between the original parties, or not, is subject to the exception that, when the payee becomes such purchaser, he takes it subject to all equities and defenses originally existing."

We do not think that the citation from Randolph, Com. Paper, §§ 1875 *et seq.*, states the rule contended for by the appellant, although it is somewhat difficult to determine what the author's views are on this particular point. In substance, the announcement is that the general doctrine is now that, where the purchaser takes a general bill or note with notice, he is subject to defense, like the payee. Thus, the maker may set up against such holder that he had retired from a partnership before the firm note was delivered, or that the note was given especially on condition of another surety being added,—a proposition which we have discussed above,—or that the consideration was illegal, or on conditions as to purchase of goods or other consideration, or he may show that the note was obtained by fraud, or he could show that it was for accommodation for a particular purpose, which had failed or been disregarded, or that the accommodated party had fraudulently diverted the paper; but the announcement is made that the mere fact of its being accommodation paper constitutes no defense, even against a party with notice. While the note in question, according to the answer, is not technically accommodation paper, not being made for the benefit of the payee, it was really for the accommodation of Ballard, Rinehart, Holmes, & Robertson; and the same reasons, it seems to us, would apply for making the fact of its being drawn for the accommodation of the parties mentioned above no defense, even against a party with notice, as, for instance, the payee in this case. *Edwards, Bills & Notes*, p. 316, is not very definite on this subject, but what is said, we think, must be construed rather against the contention of the appellant. *Murray v. Reed*, 48 Pac. 348 [17 Wash. 1], simply decided that "where a note is executed with an agreement that a new one shall be substituted when the exact amount of the debt is ascertained, a subsequent delivery of the new note to the payee renders the original note unenforceable in the hands of one who purchased the same after maturity with notice of the agreement;" citing 3 Randolph, Com. Paper, § 1876, and *Small v. Smith*, 1 Denio, 588. This is simply the announcement of the admitted doctrine that one who purchases a note after its maturity takes it subject to any equities which really existed in its favor. We can scarcely see what application it has to the case at bar. *Merchants' Exch. Bank v. Luckow*, 37 Minn. 542, is not in point on the question under discussion, but was probably cited to support the next proposition, *viz.*, that the receiver in this case stood in no different relation to the appellant than did the bank,—a proposition which is, we think, indisputable. The case of *Metcalf v. Williams*, 104 U. S. 93, 26 L. ed. 665, is another case where the instrument, upon its face, was ambiguous as to who was the actual payee, and it was decided by the court on that proposition; and the court cites the case of *Kean v. Davis*, 21 N. J. L. 683, 47

Am. Dec. 182, in regard to which case it says: "The court of errors and appeals of New Jersey, in an elaborate opinion by Chief Justice Green, decided that parol proof was admissible to show that the bill was the bill of the company, and not of the defendant individually; and held that, although where a written instrument is not ambiguous or uncertain on its face, parol proof cannot be resorted to to show what was the real intention of the parties; yet, that in cases of ambiguity on the face of the instrument, as in that case, it might be introduced to explain which of two doubtful constructions was the intent of the parties." *Merchants' Bch. Bank v. Luckow*, 35 N. W. 434 [87 Minn. 542], is another case where the defense was that the written instrument was to become operative only on the happening of some contingent future event, as, on its being signed by some other person, and falls within the rule above mentioned, and cites *Michels v. Olmstead*, 14 Fed. Rep. 219, deciding that "it is always admissible to show by parol that a document was conditioned on an event that never occurred." Nothing else is decided in this case.

The case that most nearly sustains the construction claimed by appellant is a Pennsylvania case (*Roberts v. Austin*, 5 Whart. 313); and it may here be said that the Pennsylvania cases are generally quoted as sustaining the doctrine that parol evidence may be introduced to release a payor of the responsibility of payment, where it can be shown that he signed as agent with the knowledge of the payee; but we think these cases, as we shall hereafter show, have been misunderstood. In this case the defendant gave the following note:

Dolls. 187.50. Kensington, Philada., October 1st, 1886.

Four months after date, pay to the order of Mr. Charles B. Austin, agent of the Union Glass Works, one hundred and thirty-seven dollars and fifty cents, for value received, and charge the same to the account of, yours, &c.,
Wm. Roberts, Jr.

Mr. Richard Jukes, Newark, N. J.

Across the face was written; "Accepted, for Richard Jukes. Richard Jukes, Jr." Indorsed. "Chas. B. Austin, Agt. Union Glass Works." The affidavit of defense showed that the payor was the agent for Richard Jukes, and purchased merchandise for which this note was given, that the name of the principal was disclosed to the plaintiff before the time of said purchase, and that the said merchandise was furnished to the said principal upon the credit and for the use of this said principal, and averred that he had received no consideration whatever for said bill. The district court, after argument, gave judgment for the plaintiff, for want of a sufficient affidavit for defense, and it was taken to the supreme court of Pennsylvania on a writ of error. There is no argument by the attorneys reported in this case, and the opinion is exceedingly meager; the argument of the opinion principally going to the question of the real meaning of the affidavit, rather than its legal effect. The case of *Milligan v. Lyle*, 24 La. Ann. 144, is another meager case, where it was held that

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an agent who had given a draft for his principal was exonerated upon showing that he was simply an overseer upon a plantation, and that the parties in whose favor the draft was given for work knew that they were working for the principal and not for the agent. The case of *Westman v. Krumweide*, 30 Minn. 318, is another case deciding that "parol evidence is admissible to show that a contract not under seal, delivered by the maker to the party in whose favor it runs, was not intended to be operative as a contract from its delivery, but only on the happening of some future contingent event." *Neaves v. North State Min. Co.* [90 N. C. 412], 47 Am. Dec. [Rep.] 529, is evidently a miscitation, as the case is not reported in that volume. The appellant also cites *Mechem, Agency*, § 449, and cases cited. We think the section cited sustains the announcement that we have made. It is simply that: "Where an agent has entered into a contract which in terms charges himself, parol evidence is not admissible to discharge him by showing that he intended to charge the principal, although it is admissible to show that it was the intention to charge himself personally; but where the contract bears upon its face evidence that the person signing was in fact an agent, and where the contract is so framed as to render it uncertain whether the agent or the principal was intended to be bound, parol evidence may be received to show that it was the intention to bind the principal, and not the agent." And it is shown conclusively, in the opinion of the author, that evidence of this kind is not admissible for the purpose of contradicting the express provisions of a contract. He proceeds: "But although parol evidence may not be admissible to release the agent, it may be made use of to charge the principal. Thus, the principal, as will be seen hereafter, may be charged as such by parol evidence upon a single contract made by his agent, even though the contract gives no indication on its face of an intention to charge any other person than the signer. And this doctrine applies as well to those contracts which are required to be in writing as to those to whose validity a writing is not essential. This rule is not obnoxious to the principle which forbids the contradiction of written instruments by parol testimony, for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound, also."

And as casting some light upon the decisions of the Supreme Court of the United States, which are cited by the appellant in favor of his contention, and as showing how the Supreme Court of the United States construed the Pennsylvania cases, which are conceded the cases which support the admissibility of this kind of testimony, if they are supported by the cases at all, we cite the case of *Bast v. First Nat. Bank*, 101 U. S. 93, 25 L. ed. 794, a Pennsylvania case appealed from the circuit court for the eastern district of Pennsylvania, and where the Supreme Court of the United States would have followed the decisions of the Pennsylvania courts in a matter of this kind. There the court said, through Chief Justice Waite: "No principle of evidence is better settled at the common

law than that when persons put their contracts in writing, it is, in the absence of fraud, accident, or mistake, 'conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing.' . . . In Pennsylvania, the stringency of this rule has been very considerably relaxed, but we have been referred to no case where, in the absence of fraud or mistake, parol evidence has been admitted to alter the plain and unequivocal terms of a written instrument. In *Martin v. Borens*, 67 Pa. 468, the court says: 'Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be, not only the best, but the only, evidence of their agreement; and we are not disposed to relax the rule. It has been found to be a wholesome one, and now that parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative.' In this case the Pennsylvania decisions are extensively reviewed, and the exceptions to the rule of the common law which they recognize carefully stated; but the conclusion is that, 'as a general rule, it (parol evidence) is inadmissible to contradict or vary the terms of a written instrument.' Again, in *Bornhart v. Riddle*, 29 Pa. 96, this language is used: 'Where parties have deliberately put their engagements in writing, and no ambiguity arises out of the terms employed, you shall not add to, contradict, or vary the language mutually chosen as most fit to express the intention of their minds. What if parol evidence prove, never so clearly, that they used such and such words in making their bargain; the writing signed, if it contain not those words, is final and conclusive evidence that they were set aside in favor of the other expressions that are found in the written instrument. . . . It is not always easy to determine when in Pennsylvania parol evidence is admissible to explain a written instrument; but in *Anspach v. Bast*, 62 Pa. 356, it is expressly declared that 'no case goes the length of ruling that such evidence is admitted to change the promise itself, without proof, or even allegation, of fraud or mistake. The contrary has been repeatedly decided.' To the same effect is the case of *Hacker v. National Oil Ref. Co.* 78 Pa. 98, as well as many others that might be cited." In this case of *Bast v. First Nat. Bank*, the judgment was assigned to the bank as collateral security for the payment of certain notes, with authority, in case said notes were not paid at maturity, to sell said judgment, and apply the proceeds to their payment, with the provision that the bank should not, before the maturity of the notes, take measures to collect the judgment assigned, without the consent of Bast. The offer was to prove a contemporaneous agreement that it should do so. The court concludes by saying, "This is a clear contradiction of the terms of the written contract, in a matter where there is no pretense of ambiguity, and where there has been no fraud or mistake;" and it was not allowed. The authorities, however, holding that this kind of testimony is inadmissible, speak with no uncertain sound; and in *Cragin v. Lovell*, 109 U. S. 194, 27 L. ed. 908, the 89 L. R. A.

cases of *Metcalf v. Williams* and *Mechanics' Bank v. Bank of Columbia*, cited by the appellant, are distinguished, and shown not to come within the rule that "upon a negotiable promissory note, made by an agent in his own name, and not disclosing on its face the name of the principal, no action lies against the principal" — a rule which is distinctly announced in *Cragin v. Lovell*. And this, it will be seen, goes beyond the proposition in this case, where it is simply sought to hold the alleged agent or payor, and where the payee has elected to sue the payor or maker of the note. In *Nash v. Towne*, 73 U. S. 5 Wall. 689, 18 L. ed. 527, it is decided that "where an agent has entered into a written contract in which he appears as principal, parol evidence is inadmissible to show, with a view of exonerating him, that he disclosed his agency, and mentioned the name of his principal at the time the contract was executed;" and the court, in concluding its opinion in this case, said: "Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal and in that state of the case he may have his remedy against either, at his election;" citing *Thomson v. Davenport*, 9 Barn. & C. 78: "Evidence to that effect will be admitted to charge the principal or to enable him to sue in his own name; but the agent who bids himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal;" citing *Jones v. Littledale*, 6 Ad. & El. 486; 1 Parsons, Contr. 5th ed. 64; *Titus v. Kyle*, 10 Ohio St. 444; 2 Smith, Lead. Cas. 6th Am. ed. 421. In *Sharswood's Byles, Bills*, p. *37, the rule is stated as follows: "An agent will be personally liable to third persons on his drawing, indorsing or accepting, unless he either sign his principal's name only, or expressly state in writing his ministerial character, and that he signs only in that character; 'unless,' to use the words of Lord Ellenborough, . . . 'he states upon the face of the bill that he subscribes it for another,' unless he says, plainly, 'I am the mere scribe.' Thus, where the defendant, agent of a banker, drew the following bill, 'Pay to the order of A. B. £50 value received, which place to the account of the Durham Bank, as advised,' and subscribed his own name, it was held that the defendant was personally answerable, and he alone, though the plaintiff, the payee, knew that he was only agent." And the final announcement is made: "The rule of law as to simple contracts in writing, other than bills and notes, is, that parol evidence is admissible to charge unnamed principals, and so it is to give them the benefit of the contract; . . . but it is inadmissible for the purpose of discharging the agent, who signs, as if he were principal, in his own name. . . . And the rule of law is reasonable, for in the two former cases the evidence is consistent with the instrument, for it admits the agent to be entitled or bound; but in the latter case such evidence would be inconsistent with the terms of the instrument." In support of this rule, see *Davis v. England*, 141 Mass. 587; *Wing v. Glück*, 56 Iowa, 473, 41 Am. Rep. 118; *Hypes v. Griffin*, 89 Ill. 135, 31 Am. Rep. 71; *Bank v. Cook*, 38 Ohio St. 442.

Many of these cases go further than it is necessary to go to sustain the demurrer in this case. See also 1 Am. & Eng. Enc. Law, pp. 415, 416, and cases cited.

We are satisfied, from such investigation as we have been able to make, that the answer in this case was demurrable, and that parol evidence could not have been admitted to prove the facts alleged in the answer. It is contended by the appellant that in any event the motion to make *Rinehart et al.* parties to this action should have been sustained, for the reasons that the law abhors a multiplicity of suits, and that all the rights might have been determined in one action; but, the plaintiff here having a right to elect, the defendant cannot invoke this rule in this case, for it would delay the rights of plaintiff for the defendant's benefit. The plaintiff had a right to sue the real party, as disclosed by the instrument itself; and, having done so, if the defendant is entitled to contributions from his alleged principals, that is a matter in which this plaintiff has no interest, and his rights cannot be affected or delayed by it.

As to the seventh paragraph of the answer, *vis.* that the bank entered into an agreement some two years after the note had been discounted, and evidently a year after it had become due, with said Ballard, Rinehart, Holmes, & Robertson, that it would accept their note for the amount of, and in place of, the said note so discounted by it for the said Ballard, Rinehart, Holmes, & Robertson as aforesaid, and that the said Ballard, Rinehart, Holmes, & Robertson thereupon agreed to and with said bank that they would make, execute, and deliver to said bank their note for the said amount, and take up and deliver to defendant

said note so discounted to them, we do not think it states sufficient. This was not done. Either party could have withdrawn. It was no part of the original agreement. There was no consideration for any such contract, and there is no allegation that the new note was ever tendered. A may enter into an agreement with B that, if B will tender him his note at a certain time, he will deliver to B a note which A holds against C. But such agreement would be no defense in an action on the note against C providing the agreement had not been executed. It is also claimed that in any event this demurrer should not have been sustained, for the reason that the defendant pleaded want of consideration; but the want of consideration that he urges depends upon the oral testimony which he seeks to introduce in this case under his pleadings, and which we have found is not competent testimony. Consequently the plea of want of consideration falls when the foundation for such a plea is stricken from the case.

This court has always been of the opinion that the faith and credit attaching to written agreements should not be easily destroyed, and the best of reasons could be adduced for holding a contract of this kind sacred, and unchangeable by the admission of parol testimony,—except, of course, in cases of fraud or mistake. These reasons have been so often advanced by courts and law writers, and are so well understood by the profession, that it is not necessary to repeat them here.

The judgment will be affirmed.

Scott, Ch. J., and Reavis, Gordon, and Anders, JJ., concur.

ILLINOIS SUPREME COURT.

GAGE HOTEL COMPANY, *Appt.*,

v.

UNION NATIONAL BANK.

(171 Ill. 581.)

After a check is given, the depositor cannot, in Illinois, by arrangement with the bank, prevent the application of future deposits to its payment.

(February 14, 1898.)

APPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to enforce payment of a bank check. *Reversed.*

The facts are stated in the opinion.

Mr. F. M. Cox, with **Messrs. Ashcraft & Gordon**, for appellant:

The appellant was entitled to receive payment of the check on presentation.

NOTE.—As to the right to stop payment of a check, see *note* to *Canterbury v. Bank of Sparta* (Wis.) 80 L. R. A. 845.

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Munn v. Burch, 25 Ill. 85; *Chicago, M. & F. Ins. Co. v. Stanford*, 28 Ill. 168; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *Bickford v. First Nat. Bank*, 42 Ill. 288, 89 Am. Dec. 486; *National Bank v. Indiana Bkg. Co.* 114 Ill. 488.

The attempt to stop payment of the check was a fraud upon the appellant, of which the bank had notice.

Thom v. Sinsheimer, 66 Ill. App. 555; 2 Dan. Neg. Inst. 2d ed. § 1596; *Ames v. Merriam*, 98 Mass. 294.

The appellee was legally bound to pay the check, if the depositor had sufficient funds when the check was presented.

Barton v. People, 35 Ill. App. 578; *Queen v. Hazelton*, L. R. 2 C. C. 184; *Munn v. Burch*, 25 Ill. 85; *Bickford v. First Nat. Bank*, 42 Ill. 288, 89 Am. Dec. 486; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 898; *Metropolitan Nat. Bank v. Jones*, 187 Ill. 684, 12 L. R. A. 492; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185.

Messrs. Tenney, McConnell, Coffeen, & Harding, for appellee:

The bank was not bound to pay the check

out of funds which it received after the check was drawn, and with specific directions not to pay them out on that check.

The principle of the cases is that the depositor, having a right to the money, may transfer his right to another by drawing a check, and that the bank is bound to recognize this transfer and pay the money to the holder, subject to the contingency that the money which was thus assigned is not otherwise appropriated before the check is presented.

When Knill drew his check his balance was only \$98.53, and he therefore had no right to draw a check for \$300. The initial step in the transaction was a violation of the contract under which appellant claims the right to recover.

Pabst Brewing Co. v. Reeves, 43 Ill. App. 154.

When this check came to appellant's hands, payment of it had already been refused because the drawer had not then funds sufficient to meet it.

The next step was the transfer of the check from Payne to the Gage Hotel Company for value, and without notice of the want, or failure, of consideration between Knill and Payne and of the fact that it was already dishonored. Still no liability had attached to the bank.

The bank was under no obligation to anyone, either upon the check or because of the check. It could with safety have paid to Knill the small balance standing to his credit. Knill was under no obligation to make further deposits, the bank was under no obligation to receive them, even if tendered.

The bank and Knill, then, were at liberty to deal further with each other or not, as they saw fit, and no limitation on this right was created by the fact that this check was outstanding.

Richardson v. International Bank, 11 Ill. App. 532.

While the drawing of the check operates as an assignment *pro tanto* of the fund, this is so only as between the drawer and the payee; and it has no effect whatever upon the rights of the bank until the check is presented for payment.

Bank of Antigo v. Union Trust Co. 60 Ill. App. 434, 149 Ill. 343, 23 L. R. A. 611.

Cartwright, J., delivered the opinion of the court:

Henry C. Knill was a depositor in the bank of appellee, and on June 21, 1893, drew his check on appellee for \$300 payable to the order of Leroy Payne, and delivered it to the payee. Payne on the same day indorsed the check, and delivered it to appellant, who paid him \$300 for it. Appellant deposited the check to the credit of its account with its bank, the Union Trust Company of Chicago; and the latter sent it through the clearing house, and it was presented to appellee for payment on June 23. On the day the check was drawn the amount of Knill's deposit was \$98.53, but he made subsequent deposits, and when the check was presented he had on deposit with appellee funds in excess of the amount of the check. Appellee refused payment on the ground that Knill had ordered it not to pay the check, and the paying teller marked it, "Payment stopped." On June 24 the dishonored check

was returned to appellant by the Union Trust Company, and appellant on that day again presented it to appellee, which still had sufficient money to Knill's credit to pay it; but payment was again refused on the ground that it had been stopped by Knill. Thereupon the appellant brought this suit against appellee for the amount of the check. A jury was waived, and the cause tried before the court, resulting in a finding and judgment for appellee. On appeal the judgment was affirmed by the appellate court for the first district, which granted a certificate of importance, and the case has been brought to this court.

There is no dispute as to the material facts as above stated, and the rights of the parties depend upon the question whether appellee was justified in its refusal to pay the check because of the order of Knill that it should not be paid. This question is presented by the action of the court in refusing and modifying propositions of law presented at the trial. The relation of the banker to the check holder has been frequently considered by this court, and the right of the check holder to payment on presentation of the check, provided there are sufficient funds on deposit to meet it, has been recognized and upheld in every case. This court has constantly held that when the check of a depositor is presented to the banker, if the deposit is sufficient to pay the check, it is an absolute appropriation of the amount of the check to the holder, and that the contract implied by law between the banker and his depositor, for the benefit of whoever may become the holder of a check, is one upon which such holder can maintain an action. A different rule prevails in some other jurisdictions, but this one has been affirmed by many courts and leading text-writers as the logical one. The case of *Munn v. Burch*, 25 Ill. 35, has been generally regarded as the leading case in this country stating the nature of the contract, and affirming the right of the check holder to sue and recover from the bank for refusing to honor a depositor's check under such circumstances. In that case, after stating the universal custom which enters into, and forms a part of, every contract between a banker and depositor, it was said (p. 40): "This universal custom shows us what the contract of all the parties is. It shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out, on the presentation of his checks, in such sums as those checks may call for, and to the person presenting them; and with the whole world he agrees that whoever shall become the owner of such check shall, upon presentation, thereby become the owner, and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit. Who shall object to that portion of the contract which the law raises by implication on the part of the banker to the third person,—to anybody and to everybody?" And it was further said: "We hold, then, that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery; and when presented to the banker, he becomes the holder of the

money to the use of the owner of the check, and is bound to account to him for that amount, providing the party drawing the check has funds to that amount on deposit, subject to his check at the time it is presented. In *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398, this court said (p. 402): "The universal custom informs us what the contract of all the parties to such transaction is. It informs us that the banker, when he receives the deposit, agrees with the depositor to pay it out, on the presentation of his checks, in such sums as those checks may specify, and to the person presenting them; and with the whole world the banker agrees that whoever shall become the owner of such check shall, upon presentation thereof, become thereby the owner, and entitled to receive the amount specified in the check, provided the drawer shall at that time have that amount on deposit." The same doctrine has been affirmed in the following cases: *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *National Bank v. Indiana Bkg. Co.* 114 Ill. 488; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 684, 12 L. R. A. 492; *Bank of Antigo v. Union Trust Co.* 149 Ill. 348, 28 L. R. A. 611. It is also the rule that the drawer of a check cannot stop payment of it after it has passed into the hands of a bona fide holder. *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185.

These decisions are not controverted by appellee, but the argument in its behalf is that, after the check was given, Knill could make an arrangement with appellee that future deposits should not be applied to its payment. When the check was drawn the amount to Knill's credit was not sufficient to pay it, and after Knill had given the order not to pay it the bank received deposits before the presentation which increased his balance to more than the amount of the check. It is insisted that Knill was free to make, and appellee to receive, deposits under an arrangement that this check should not be paid. Of course, if Knill could make such an arrangement on June 21 as to further deposits, he or any other depositor in a bank could make a special contract, when opening an account, that only certain checks should be paid, or at any time limit the liability of the bank by a secret arrangement between himself and the bank as to checks that might be drawn in the future, in any manner that they saw fit. We think such a proposition plainly unsound, and in conflict with the decisions above referred to. If such a special agreement could be made, a person about to take a check could not rely upon the contract implied by the law, but would be compelled to go to the bank and ascertain whether the account had been opened under any special or private arrangement between the banker and depositor, or whether any instructions had been given by the depositor as to what checks should be paid. Even if he should find that there was no agreement or instruction, and should take the check, he could not then rely upon the banker's contract to pay it if the funds were on deposit, since they might be checked out or withdrawn, and a new deposit made under an agreement or instruc-

tion that he should not be paid. The basis of the decisions has been that by universal custom there is a contract between the banker and depositor, created by the deposit and receipt of the money, with the whole world, and for the benefit of every person who shall become the holder of a check. If the funds are in the bank when the check is drawn, the drawing is an appropriation, as between the drawer and the payee, of the sum of money named in the check, which is to lie in the bank until called for by a presentation of the check. It is true that in such a case there is no privity between the bank and the check holder until presentment, and that priority in drawing a check does not give priority of right to the fund, as against the banker, but that such priority of right is determined by the order of presentation. In *Munn v. Burch*, 25 Ill. 85, it was said (p. 40): "Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker, on the one side, and the receiving of the check for value, and presenting it, on the other. It is a familiar principle of daily illustration, that a promise made to the public that the performance of a particular act shall entitle the person performing the act to a particular right is a valid assumption to such person. The promise on the one hand, and the performance on the other, creates a privity between the parties as intimate and as obligatory as if the promise had originally been made to the particular person." In 3 Daniel on Negotiable Instruments (§ 1638), the author says: "The objection to the check holder's suing the bank, on the ground that there is no privity between him and the bank, seems to us utterly untenable. It is true that there is no privity before the presentment of the check, but by that very act they are brought in privity, and the check holder's right to sue the bank completed. Knill had a right to draw his check in the reasonable expectation that he would have funds at the time of presentment, adequate to meet it, and he did have sufficient funds to his credit at the time of presentment. By giving the check he assumed the obligation that the funds should be there. Of course he might have withdrawn his deposit before presentment, or have declined to make a further deposit to meet the check, and have thus committed a fraud upon appellant; but, if he had done so, it would have been his fraud, and not that of appellee, and appellee would have been in no wise responsible for it. If does not aid appellee that Knill might have committed a fraud in that way, so that appellant is no worse off than it would have been if he alone had committed the fraud. Its duty was to stand indifferent and perform its obligation. When it accepted his account, it did so with an agreement with the whole world that whoever should become the owner of his check should, upon presentation thereof, become the owner and entitled to receive the amount specified in the check,—not as a matter of favor, but as a matter of right,—provided Knill at the time had the amount on deposit. This agreement was for the benefit of such check holder, and we think no special contract could be made to abrogate it, without the consent of

the check holder. Appellant in taking the check had a right to rely upon the contract implied by the law and was entitled to enforce it.

The judgments of the Appellate Court and Circuit Court are reversed, and the cause is remanded to the Circuit Court.

Randolph E. FISHBURN *et al.*, *Appts.*,
v.
City of CHICAGO.

(171 Ill. 388.)

An ordinance precluding competition for a street-paving contract by requiring the use of asphaltum which can be obtained only from premises owned and controlled by one private corporation is void as against public policy in creating a monopoly, although the ordinance provides that the work shall be awarded to the lowest responsible bidder.

(February 14, 1896.)

APPEAL by defendants from a judgment of the Circuit Court for Cook County enforcing payment of an assessment for the paving of Gladys avenue. *Reversed.*

The facts are stated in the opinion.

Messrs. Wilson, Moore, & McIlvaine and Charles D. Richards, for appellants:

The provision limiting the material to asphaltum obtained from Pitch lake in the island of Trinidad, is contrary to law, being in restraint of trade, and contrary to public policy.

1 Dill. Mun. Corp. § 362, note 3, p. 544; *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205; *Nicholson Pavement Co. v. Painter*, 85 Cal. 699; *Dolan v. New York*, 4 Abb. Pr. N. S. 397; *Burgess v. Jefferson*, 21 La. Ann. 143.

Boggs, J., delivered the opinion of the court:

This was a petition for judgment confirming a special assessment to defray the expense of improving Gladys avenue, in the city of Chicago. Objections interposed by the appellants were overruled, and judgment entered in accordance with the prayer of the petition. This is an appeal to bring the judgment into review in this court.

The ordinance provides that "the cementing material shall be a paving cement prepared from refined Trinidad asphaltum, obtained from Pitch lake, in the island of Trinidad;" and the objection is, that the effect of this provision is to prevent competition among those desiring to contract to perform such work and furnish the material necessary to complete the improvement. It is conceded this alleged objection does not appear from the face of the ordinance, but appellants offered to produce evidence to show said Pitch lake, in the island of Trinidad, is, and was when the ordinance was passed, the private property, and under the absolute control, of the Barber Asphalt Company; that said Bar-

ber Asphalt Company is a private corporation, having its principal office in the city of Chicago; that there were at least five other companies or corporations having offices in the city of Chicago engaged in the business of selling asphaltum procured in the island of Trinidad for street paving, but not procured at Pitch lake, in said island, but which asphaltum was equal, for street-paving purposes, to the asphaltum obtained from said Pitch lake; and that all of said companies and said Barber Asphalt Company were competitors in the business of supplying asphaltum for paving streets in the city of Chicago.

It is a well-settled general rule that all contracts, in which the public are interested, which tend to prevent competition, whenever a statute or known rule of law requires competition, are void. *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *People, Peabody, v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *Poss v. Cummings*, 149 Ill. 353; 1 Addison, Contr. p. 273; 2 Beach, Modern Law of Contr. § 1108. The statute by the authority of which the city council enacted the ordinance under consideration provides as follows: "All contracts for the making of any public improvement, to be paid for in whole or in part by a special assessment, and any work or other public improvement, when the expense thereof shall exceed \$500, shall be let to the lowest responsible bidder, in the manner to be prescribed by ordinance—such contract to be approved by the mayor or president of the board of trustees; provided, however, any such contract may be entered into by the proper officer without advertising for bids, and without such approval, by a vote of two thirds of all the aldermen or trustees elected." 1 Starr & C. Anno. Stat. 1896, chap. 24, p. 777, ¶ 166. The ordinance in question provided the contract to perform the work should be awarded to the lowest responsible bidders. If the requirement that the asphaltum to be used in the improvement should be obtained from Pitch lake, in the island of Trinidad, tended to restrict competition among those who might desire to become bidders for the performance of the work of improving the street, or tended to create a monopoly in favor of anyone having for sale the asphaltum necessary to be used in the work of paving the said street, it would fall under the ban of this general rule of the law, and must be declared inoperative and void. It does not appear from the face of the ordinance that the effect is necessarily to so prevent competition or create a monopoly; but the proffered proof, which the court excluded, unmistakably disclosed that the asphaltum required by the ordinance to be used in making the street was a product which could only be obtained by purchase from a single corporation. The direct effect of the requirement, therefore, was to create a monopoly in favor of that corporation and to restrict competition in bidding accordingly. The principle under which the rejected evidence under consideration must be, as it is, held by us to be competent, came before this court for discussion in the case of *Chicago v. Rumpff* and *Chicago v. Turner*, which cases were consolidated and decided together, and are reported in 45 Ill. 90. The conclusion of the court was that the ordinance then under

NOTE.—For municipal contracts for work or articles which embody a patented invention, see *Kilvington v. Superior* (Wis.) 18 L. R. A. 45.

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consideration tended necessarily to create a monopoly, and was therefore void; and the doctrine of the case is approved in *People, Peabody, v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, and *Foss v. Cummings*, 149 Ill. 353.

The only cases to which we have been referred which support the view that a city, when providing by ordinance for a public improvement, where the work is to be done and materials to be furnished by the lowest responsible bidder, may, by provisions in the ordinance, restrict the bidders, or provide for the use of an article solely controlled by one person, are cases where the city desired to use some patented article or process covered by patent. The supreme courts of Michigan and of New York (in the former state, by a divided court) entertained the view that an ordinance which provided a contract should be let to the lowest bidder for the improvement of the street by the use of a designated patented pavement was valid; and the decisions of the supreme court of Kansas in *Yarnold v. Lawrence*, 15 Kan. 126, is frequently cited as an authority in support of the same view of the question. In *Yarnold v. Lawrence*, 15 Kan. 126, the decision was rested upon the ground the statute of that state did not require the contract in question should be let to the lowest bidder, and for that reason that court upheld the ordinance, without deciding the question here involved. The supreme court of Wisconsin and other states have adopted the view that such ordinances are void; and Mr. Dillon, after discussing the question in the first volume of his work on Municipal Corporations (in § 467), says, "The question is close, but there seems, so far, to be a tendency in the courts to adopt the Wisconsin view." In all of the cases where an ordinance has been held valid which provided for the use of some patented article or process, the argument most relied upon by the courts to justify the view the ordinance was valid is that municipal corporations ought not to be denied the right to avail themselves of the advantages arising from the discoveries and inventions of the age, and that when the general government protected a discovery or invention by a patent, which created a monopoly therein, competition in the purchase or use of such patented article or process became impossible, and that the monopoly which it was urged the ordinance tended to create in fact had legal existence entirely independently of the ordinance, and that, therefore, the ordinance did not have any effect to create a monopoly, or prevent competition among bidders. In Mr. Dillon's view, these cases are rather overcome by the current of authority; but, if they should be accepted as stating the correct

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rule, they have little application to the case in hand, for the reason the monopoly created under the ordinance under consideration is not in favor of a patented article. The asphaltum offered for sale by the Barber Asphalt Company has no superior legal right in the markets, and is not entitled to be given any by the terms of the ordinance, nor is it lawful for the ordinance to give it an improper preference; but it should be left to depend upon its merits for any monopoly it may obtain in the good opinion of the public. But it may be said that cities, in the construction of public improvements, ought to have, as have individuals in the construction of private structures, the right to select for use the article or substance best fitted and adapted to the purpose, and that to deprive the public of the right to select and use such superior articles is opposed to public policy, and positively disadvantageous to the public. The force of this argument must, of course, be admitted; but upon reflection it is readily seen it is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance or article, and no other, shall be used. If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance, or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed. An ordinance making it indispensable that an article or substance in the control of but a certain person or corporation shall be used in the construction of a public work must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation. If all the ordinances adopted by the city council of the city of Chicago providing for the paving of streets and public places in the city should select the stock in trade of a particular firm or corporation as the only material to be used in making such street improvements, the evil would be intolerable; and, if they may lawfully select such article in one ordinance, it cannot be unlawful to make it the settled policy of the city that material for paving streets shall be purchased of but one seller.

Because of the error of the court in ruling the proffered testimony was inadmissible, the judgment must be reversed, and the cause remanded.

IOWA SUPREME COURT.

Donald C. MCGREGOR, *Appt.*,

John CONE.

(.....Iowa.....)

1. An original package is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped.
2. The determination of the internal revenue department that a package is a proper and original package for purposes of taxation does not show that it is an original package of commerce.
3. A pine box in which are packed for convenience in shipment packages of cigarettes, each of which contains ten cigarettes and is sealed with an internal revenue stamp, without any other packing or inclosure around or about them except the box itself, is the original package of commerce; and when that is opened the packages of cigarettes are subject to the police power of the state as a part of the common mass of property therein.

(January 24, 1898.)

A PPEAL by petitioner from an order of the Superior Court of Cedar Rapids County denying a petition for writ of habeas corpus to obtain petitioner's release from custody of the sheriff of Linn County to which he had been committed for violation of the anti-cigarette law. *Affirmed.*

Statement by Deemer, Ch. J.:

This is a habeas corpus proceeding in which plaintiff and appellant alleged that he was unlawfully restrained of his liberty by defendant, who is sheriff of Linn county, under a warrant of commitment issued by one Rall, a justice of the peace in and for said county, in pursuance of a judgment of conviction for violation of what is familiarly known as the "Anti-Cigarette Law." Plaintiff alleges that his commitment was and is illegal, for the reason that while he sold cigarettes, yet that the same were sold in the "original package" in which imported, and that the law under which he was convicted is unconstitutional in so far as it applies to such sales. The trial court remanded the petitioner, and from the order and judgment so entered he appeals.

Messrs. John M. Redmond and W. W. Fuller, for appellant:

It was admitted by the Supreme Court of the United States that the prohibitory liquor laws "were enacted in the exercise of the police power of the state" (*Leisy v. Hardin*, 135 U. S. 100, 84 L. ed. 128, 8 Inters. Com. Rep. 86; *Wilkerson v. Rahrer* (Re *Rahrer*), 140 U. S. 559, 85 L. ed. 576), "and not at all as regulations of commerce" (*Wilkerson v. Rahrer* (Re *Rahrer*), 140 U. S. 559, 85 L. ed. 576); that they "were enacted solely to protect the health and morals of the people, and to promote peace

and good order among them" (*Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 514, 515, 31 L. ed. 700, 717, 1 Inters. Com. Rep. 823; *Leisy v. Hardin*, 135 U. S. 114, 84 L. ed. 184, 8 Inters. Com. Rep. 86), by suppressing the manufacture and sale of an "article the use or abuse of which it [the state of Iowa] deemed deleterious" (*Leisy v. Hardin*, 135 U. S. 114, 84 L. ed. 128, 8 Inters. Com. Rep. 86); and that those laws were "fairly adapted to accomplish those objects."

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 514, 515, 31 L. ed. 700, 717, 1 Inters. Com. Rep. 823.

And yet that court in passing on these laws, held that a state cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of other states of the Union, in order to effect its end, however desirable such a regulation might be.

Leisy v. Hardin, 135 U. S. 113, 84 L. ed. 184, 8 Inters. Com. Rep. 86; *Wilkerson v. Rahrer* (Re *Rahrer*), 140 U. S. 559, 85 L. ed. 576.

The sealed packages, containing ten cigarettes each, were the "original packages" notwithstanding that, for convenience of shipment, a number of them were put in a wooden case.

United States v. Goldback, 1 Hughes, 529; *Ex parte Jervey*, 66 Fed. Rep. 957; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Re Beine*, 42 Fed. Rep. 545; *Re Harmon*, 43 Fed. Rep. 872.

The very question in issue here has been decided more than once by this court, and it would seem to be unnecessary to fortify the court by the citation of decisions in other jurisdictions, and that the appellant should be able to invoke with confidence and safety the wholesome maxim, *Stare decisis*.

Collins v. Ellis, 77 Iowa, 181, 8 L. R. A. 110; *State v. Coonan*, 82 Iowa, 400, 8 Inters. Com. Rep. 670; *Hopkins v. Lewis*, 84 Iowa, 690, 15 L. R. A. 397; *State v. Miller*, 86 Iowa, 638.

Identical cases, in all respects, with the case at bar, were the cases of *State of Washington v. Covert*, decided by the United States Circuit Judge Hanford in June, 1898.

State v. Goetze, 27 S. E. 225, decided in June, 1896, by the circuit court of West Virginia, was a case where the facts were in every particular identical with the facts in this case.

Mr. Milton Remley, Attorney General, for appellee:

Putting up goods for the convenience of the seller at retail into bundles, papers, bottles, or boxes carries with it nothing of the idea of putting goods in packages for transportation.

A small paper box or bundle or bottle which in that form is unsuitable for shipment but is required to be packed in the same kind of a box, barrel, crate, or bundle for shipment after it is taken out of the package in which it was shipped, is not an original package.

Keith v. State, 91 Ala. 2, 10 L. R. A. 490; *State v. Parsons*, 124 Mo. 436; *Com. v. Philadel-*

NOTE.—As to what constitutes an original package of commerce, see also *State v. Chapman* (S. D.) 10 L. R. A. 438; *Keith v. State* (Ala.) 10 L. R. A. 490; 89 L. R. A.

Com. v. Philadelphia County, v. Schollenberger (Pa.) 22 L. R. A. 155, and *Com. v. Paul* (Pa.) 30 L. R. A. 396.

phia County, v. Schollenberger, 156 Pa. 201, 22 L. R. A. 155; *Com. v. Zell*, 138 Pa. 615, 11 L. R. A. 602; *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Allen, Spickler, v. Black*, 48 Fed. Rep. 228; *State v. Emert*, 108 Mo. 24, 11 L. R. A. 219, 3 Inters. Com. Rep. 527; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68.

Bearing in mind that the package in which the cigarettes were shipped into Cedar Rapids was broken open, or, to use the language of some cases, "the bulk was broken," it became incorporated as a part of the mass of the property of the state; it lost its distinctive character as an import.

Brown v. Maryland, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Com., Philadelphia County, v. Schollenberger*, 156 Pa. 201, 22 L. R. A. 155; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Com. v. Huntley*, 156 Mass. 236, 15 L. R. A. 339.

The conservation and promotion of public health, good order, and prosperity belong to the state, and laws looking to these ends are upheld, even if they to some extent interfere with interstate commerce.

Sherlock v. Ailing, 98 U. S. 99, 23 L. ed. 819; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 348, 2 Inters. Com. Rep. 232.

While the Federal courts have extended the "commercial power" of Congress much further than the framers of the Federal Constitution evidently contemplated, yet in all the cases is a tacit admission that the "commercial power" of Congress is itself limited by the power of the state which was never surrendered to the general government.

Wilkerson v. Rahrer (Re Rahrer), 140 U. S. 545, 35 L. ed. 572; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

The general assembly are the sole and exclusive judges of the time and manner in which the police power of the state shall be exerted and its action must be liberally construed.

Garrett v. Aby, 47 La. Ann. 618; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989.

Pauperism, insanity, and crime follow in the wake of the degeneration caused by the use of cigarettes, and, in the light of the decisions of the Supreme Court of the United States, the law must be sustained.

Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793; *McCreedy v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 963, 4 Inters. Com. Rep. 649; *Com. v. Zell*, 138 Pa. 615, 11 L. R. A. 602.

Mr. J. M. Grimm also for appellee.

Deemer, Ch. J., delivered the opinion of the court:

The case was tried upon the following agreed statement of facts: "The defendant purchased in Illinois from the American Tobacco Company, a corporation organized under the laws of the state of New Jersey, and having a factory for the manufacture of cigarettes in the city of New York and 89 L. R. A.

state of New York, a number of packages of cigarettes, manufactured at its said factory in New York by said company. Each said package so purchased contained ten cigarettes, and had upon it the label bearing the name or brand of the cigarettes contained in it, the caution notice, the number of the factory and of the revenue district in which the factory was located, the name of the state in which such factory was, the name of the manufacturer, and the internal revenue stamp for ten cigarettes, duly canceled, pasted across the end of each of said packages so as to seal the same (which said stamp had to be broken and destroyed in opening said package), and all other requirements of the acts of Congress and of the internal revenue laws governing the packing, shipment, and sale of cigarettes. The packages of cigarettes so purchased by said defendant of said company were placed in a common pine box, for convenience of shipment, without any other packing or inclosure around or about said packages of ten cigarettes each, and were so shipped by said company to said defendant by a common carrier, from the factory of said company in the city of New York, in the state of New York, to the warehouse and offices of said company in the city of Chicago, in the state of Illinois, and from Chicago, in the state of Illinois, shipped by said company in the same package, without opening the same, to the defendant, in Cedar Rapids, in the state of Iowa, by common carrier. Upon the arrival of such pine box at the place of business of defendant in Cedar Rapids, in the state of Iowa, he opened said pine box, by taking the lid therefrom, and sold one of the packages, containing ten cigarettes, in Cedar Rapids, Linn county, Iowa, on July 10, 1896, to Andrew Harmon. The remaining packages of cigarettes were not removed from said pine box, and are still therein as they were received. The one package of ten cigarettes, sold to said Andrew Harmon, was of like kind in every respect with the other packages in the same box, and said Andrew Harmon was not a customer outside of the state but resided in the state of Iowa." It further appears that the American Tobacco Company submitted to the department of internal revenue of the general government a sample package of cigarettes similar to the one for the selling of which appellant was convicted, and received the following letter in response:

American Tobacco Company, No. 45 Broadway, New York, N. Y.

Gentlemen: In reply to your inquiry of April 3d, submitting a sample package of cigarettes bearing thereon the internal revenue stamp, and the printed marks and caution label, and inquiring as to the necessity for a reinclosing, in an additional covering of paper, wood, or other material in placing the same upon the market, you are notified that said package being a statutory quantity, and properly stamped and canceled, and bearing thereon the caution label and the number of the manufactory, the district and state, and the number of cigarettes contained therein, meets with the approval of this bureau, being a proper and original package, as contemplated by existing laws and regulations.

Therefore the repacking of said packages in additional coverings of wood, paper, etc., is optional with the manufacturer, and does not concern this bureau. The option is permissible, under existing regulations (series 7, No. 8, Revised, page 46, and Internal Revenue Record, Vol. 32, page 365, dated November 22, 1886).

Respectfully yours,
[Signed] John W. Mason, Commissioner.

The so-called "Anti-Cigarette Law," being chapter 96, Acts 26th Gen. Assem., prohibits the sale of cigarettes within this state by all persons whomsoever, save jobbers doing an interstate business with customers outside of the state. Appellant contends that this law is unconstitutional, in so far as it interferes with commerce among the several states; that the package which he sold was an "original package;" and that his detention was and is illegal. This statute was enacted in virtue of the police power of the state, and, unless it infringes upon some constitutional provision, it is undoubtedly valid. The contention is, however, that the statute is invalid in so far as it interferes with, interrupts, or embarrasses interstate commerce, on the theory that the Federal Constitution (art. 1, § 8) confers upon Congress the exclusive right to regulate commerce among the several states. It seems to be well settled by the latter decisions of the United States court that, while the states have the undoubted right to control their purely internal affairs, yet whenever the law enacted in the exercise of this power amounts to a regulation of commerce among the states, as it does when it directly or indirectly inhibits the receipt of an imported commodity, or its disposition, before it has ceased to become an article of trade between one state and another, it comes in conflict with a power which has been invested in the general government, and is therefore void. That the use of the article is deleterious to the inhabitants of the state is not regarded as material, so long as it is recognized by the commercial world, by the laws of Congress, and by the decisions of the courts as a commodity in which a right of traffic exists. *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Leisy v. Hardin*, 185 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Wilkerson v. Rahrer (Re Rahrer)*, 140 U. S. 559, 35 L. ed. 576; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823.

That cigarettes are a recognized commercial commodity must be conceded, and it follows that, in so far as the law in question amounts to a regulation of commerce, it is unconstitutional and void. There must of necessity be a time, however, when an article which is the subject of interstate commerce becomes subject to the taxing power and police regulations of the state; a time when the article loses its character as an import, and its owner becomes subject to local regulations. In the case of *Brown v. Maryland* it is said that the point of time when the prohibition ceases, and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with

the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; and that the right to sell any imported article is an inseparable incident to the right to import it. In another case (*Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823), it is said in the dissenting opinion that while the question involved did require a decision, yet the argument of the majority conduces to the conclusion that the right of transportation included by necessary implication the right of the consignee to sell in unbroken packages at the place where the transportation terminated. This language was subsequently approved by a majority of the court in the case of *Leisy v. Hardin*.

Again in the *License Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256, Chief Justice Taney said: "These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the state." Justice Field declared in the *Bowman Case* that "it is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its regulations can act upon it, except so far as it may be necessary to insure safety in the disposition of the import until thus mingled." In the case of *Leisy v. Hardin* the beer was held for sale in the original barrels and cases in which it was imported, and none of it was broken or opened upon the premises. Chief Justice Fuller said, referring to these facts, that the brewers who brewed and owned the beer had the right to import it into this state, and also had the right to sell it, by which act alone it would become mingled in the common mass of property within the state, and that up to that time the state had no power to interfere by seizure or otherwise. All the cases agree that, when the article is once sold by the importer, it then becomes subject to the taxing and police power of the state; and it is quite generally held that the same result occurs when the original package in which it is imported is broken, and the several parcels are so mingled with other property, or so exposed for sale, as to destroy the identity of the package as imported. See *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694.

As the law is confessedly valid, except in so far as it interferes with or impedes commerce between the states, it follows that the constitutional provision has reference to and protects that which is the subject of commerce, and only so long as it preserves the form and remains the exact subject of importation. It is the "original package" which is protected. The question then arises, what is an "original package?" The definition commonly accepted, and believed by us to be cor-

rect, is that "it is a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance. See *State, Gelpi, v. Orleans Bd. of Assessors*, 46 La. Ann. 145; *Keith v. State*, 91 Ala. 2, 10 L. R. A. 430; *United States v. One Hundred and Thirty-Two Packages of Spirituous Liquors & Wines*, 40 U. S. App. 333, 22 C. C. A. 228, 76 Fed. Rep. 364. In the case of *State, Cochran, v. Winters*, 44 Kan. 723, 10 L. R. A. 616, it is said: "The original package . . . was and is the package . . . as it existed at the time of its transportation from one state into the other." It is quite apparent, we think, that the words "original package" have reference to the unit which the carrier receives, transports, and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form, or broken and transformed, it is the subject of interstate commerce. But when sold or broken, or when it changes form, it ceases to be an article of interstate commerce, and no longer enjoys this protection. The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received; for, if the package be broken after such delivery, it, by that act alone, becomes a part of the common mass of property within the state, and is subject to the laws of that state passed in virtue of its police power.

Appellant contends that the internal revenue department has declared the small package sold by him to be "an original package," and that this is conclusive. We do not so regard it. The package referred to in the letter from the internal revenue department is the one recognized by that department for the purposes of taxation, and has no reference to the unit of commerce which is protected by the Federal Constitution. The commissioner of internal revenue, in his letter heretofore set forth, says that "the repacking of said packages in additional coverings is optional with the manufacturer, and does not concern this bureau." In the case at bar the "original package," the unit of commerce, was broken, the contents exposed to sale, and one of the small packages was sold. Such sale was, as it seems to us, of an article which had lost its distinctive character as an import, and was therefore in violation of law. In this respect it differs from most of the cases to which our attention has been called, for in all but one of them it appears that the sales were of original and unbroken packages. See *Re Minor*, 69 Fed. Rep. 285, 5 Inters. Com. Rep. 829; *Iowa v. McGregor*, 76 Fed. Rep. 957; *Sauris v. Tennessee*, 82 Fed. Rep. 615. The one case, and the only one, which we have been able to find holding to a contrary doctrine (*State v. Goets* (W. Va.) 27 S. E. 225), fails to recognize the distinction between the original package of commerce and that recognized by the internal revenue department of the general government for purposes of taxation. There are a number of

liquor cases in line with our holding as to what constitutes an original package. *State, Cochran, v. Winters*, 44 Kan. 723, 10 L. R. A. 616; *Keith v. State*, 91 Ala. 2, 10 L. R. A. 430, and *State, Gelpi, v. Orleans Bd. of Assessors*, 46 La. Ann. 145. See also *State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432; *Haley v. State*, 42 Neb. 556; *Com. v. Zell*, 138 Pa. 615, 11 L. R. A. 602; *Com. v. Bishman*, 138 Pa. 639; *Com. v. Paul*, 170 Pa. 284, 296, 30 L. R. A. 396, 5 Inters. Com. Rep. 506; *Com., Philadelphia County, v. Schollenberger*, 156 Pa. 201; *Re Beine*, 42 Fed. Rep. 545; *Smith v. State*, 54 Ark. 248; *Re Harmon*, 43 Fed. Rep. 372; *United States v. One Hundred and Thirty-Two Packages of Spirituous Liquors & Wines*, 40 U. S. App. 333, 76 Fed. Rep. 364, 22 C. C. A. 228; *Tinker v. State*, 96 Ala. 115. We find no cases in the Federal courts holding to a contrary doctrine. On the contrary, it is said specifically in the case of *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678, that, "if the importer breaks up the original packages for sale or for use, or changes the form in which they were imported, or they pass into second hands, the goods will lose their distinctive character as imports, and become subject to the taxing power of the state; and in such cases nothing that has been said will protect an article so acted upon by the importer." *Walton v. Missouri*, 91 U. S. 275, 23 L. ed. 347. See also *State v. Shapleigh*, 27 Mo. 344; *State v. North*, 27 Mo. 464.

The question as to what constitutes an original package of liquor imported into the state was considered in the following cases, heretofore decided by this court: *Collins v. Hills*, 77 Iowa, 181, 3 L. R. A. 110; *State v. Coonan*, 82 Iowa, 400, 3 Inters. Com. Rep. 670; *State v. Miller*, 86 Iowa, 638; *Hopkins v. Lewis*, 84 Iowa, 690, 15 L. R. A. 397. The matter was also referred to in *Wind v. Iler*, 93 Iowa, 324, 27 L. R. A. 319. What was said in *Collins v. Hills*, 77 Iowa, 181, 3 L. R. A. 110, must be regarded as dictum, for it was not essential to the determination of the question involved. Moreover, the decision of the controlling point in that case was overruled by the Supreme Court of the United States. Reference to the point in *Wind v. Iler*, was purely *arguendo*, and *Hopkins v. Lewis* contains nothing in conflict with the views here expressed. Moreover, the rule of the *Collins Case* was questioned. *State v. Miller* simply follows *State v. Coonan*. In the *Coonan Case* it appeared that Coonan was the agent of nonresident importers; that he kept an "original package house" which was leased by his principals; that the liquor was shipped by the importers, consigned to themselves; that the beer was put into bottles and sealed and labeled at the brewery, and for the convenience of shipment was placed in open frame boxes, with twenty-four separate compartments; that the whisky was sealed and labeled, and packed in barrels, and that Coonan removed the bottles from boxes and barrels, and sold them as sealed and labeled. It was held, under this state of facts, citing the *Collins* and the *Beine Cases*, that the separate bottles were the original packages. We have already seen that the *Collins Case* should not be regarded as authority upon the proposition involved, and an examination of the *Beine*

Case will disclose that it does not hold to any such rule. The contrary seems to be the holding in that case. Aside from this, however, the facts are essentially different from those of the case at bar. Here the appellant is a resident of the state, engaged in the business of selling cigarettes at retail, and as such is amenable to all its laws which do not deprive him of some constitutional right. When he received the package which had been made up by the manufacturer, and started upon its journey, he opened it and displayed its contents, not the package, for sale; and it affirmatively appears that he sold one of the small parcels from the original package to a customer who applied for the same. We think these distinguishing features are quite important; for if it is to be the rule that all imported goods, no matter how treated or sold, are exempt from state taxation or regulation, it is apparent that the state must forego the exercise of the power of taxation and regulation in cases where the right has never heretofore been questioned. See *State v. Wheelock*, 95 Iowa, 577, 80 L. R. A. 429. But, aside from these distinctions, we are abidingly convinced that the *Coonan Case*, if it holds to the doctrine contended for by the appellant, is wrong, and ought to be overruled; and in so far as it may be said to be out of harmony with this opinion, and the great weight of reason and authority, it is overruled.

The order of the district court remanding the appellant is right, and it is *affirmed*.

—
Allan COOK, *Appt.*,

v.

J. E. FOGARTY.

(.....Iowa.....)

1. **The one alleging the unconstitutionality of a statute** has the burden of substantiating his claim.
2. **Continuing a case to the following day** to permit the completion of the jury from the regular panel, rather than from talesmen, is no abuse of discretion or violation of law.
3. **Negligence in failing to turn to the right** upon meeting a traveler on the highway is not established by the mere fact that it would have been possible to discover his approach in time to do so.
4. **Absence of negligence in failing to turn out** upon meeting a traveler upon the highway in the night is shown by the fact that the driver was watching the horse and the road in advance for the purpose of seeing anyone who might be on the road, and did not see or hear anyone until a collision occurred.
5. **No duty rests upon one driving on a highway** to turn out until he knows or with reasonable care could have known that someone was approaching, under a statute making one failing to turn out liable for the damages resulting therefrom.

NOTE.—As to the negligence of a bicycle rider meeting other travelers, see *Peltier v. Bradley*, D. & C. Co. (Conn.) 32 L. R. A. 651; also note to *Twilley v. Perkins* (Md.) 19 L. R. A. 682.
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6. **A person who rides a bicycle** without a light or other signal of warning in a public thoroughfare when he is liable to meet moving vehicles or pedestrians, at a time when objects can be discerned readily at a distance of but a few feet, is guilty of negligence.
7. **Contributory negligence will prevent a recovery** under a statute making one driving on a highway liable for the damages caused by his failure to turn to the right upon meeting another vehicle.

(October 26, 1897.)

A PPEAL by plaintiff from a judgment of the District Court for Greene County in favor of defendant in an action brought to recover damages for injuries resulting from a collision in a highway. *Affirmed*.

The facts are stated in the opinion.

Mr. J. A. Gallaher, for appellant:

When the plaintiff saw defendant coming towards him, and hallooed two or three times and turned his wheel 2 feet beyond the beaten track of the highway, he had a right to presume that the defendant would turn to the right and obey the law, and he had a stronger right to presume that defendant would not turn to his (defendant's) left and run into him, and there is no evidence showing that any other condition existed. The only excuse that defendant makes is "that he did not see him."

Schimpf v. Sliter, 64 Hun, 463.

A bicycle is a vehicle, and comes under the same laws governing vehicles in general.

State v. Collins, 16 R. I. 371. 3 L. R. A. 394;

Thompson v. Dodge, 58 Minn. 555, 28 L. R. A. 608.

There is a presumption against the plaintiff's contributory negligence, and the burden of proof rests upon the defendant.

Hoyt v. Hudson, 41 Wis. 105, 22 Am. Rep. 714; *Weiss v. Pennsylvania R. Co.* 79 Pa. 387; *Johnson v. Hudson River R. Co.* 5 Duer. 21.

In an action for negligence the plaintiff need not allege that the injury of which he complains was caused without his fault, or that he was not guilty of contributory negligence, as the rule is that "it is not necessary to allege matters which would come more properly from the other side," and contributory negligence is considered a defense that the defendant must make.

Mayer v. Chicago, R. I. & P. R. Co. 63 Iowa, 562; *Abree v. Floyd County*, 46 Iowa, 177; *Priedenau v. Mineral Point*, 43 Wis. 524, 23 Am. Rep. 558.

Where one, by the negligence of another, is so placed that he must choose on the instant and in the face of grave and impending peril between two hazards, and he makes such a choice as an ordinarily prudent person might make, his choice cannot constitute contributory negligence.

Twomley v. Central Park, N. & E. R. R. Co. 69 N. Y. 158, 25 Am. Rep. 162; *Coulter v. American Merchants Union Exp. Co.* 56 N. Y. 585, Reversing 5 Lans. 67; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25; *Shockley v. Shepherd*, 9 Houst. (Del.) 270; *Luedtke v. Jeffery*, 89 Wis. 136.

Mr. W. W. Turner for appellee.

Robinson, J., delivered the opinion of the court:

In the evening of August 20, 1895, the plaintiff was riding a bicycle from Grand Junction westward towards Jefferson, on a public highway, and when midway between the two towns met the defendant, who was in a buggy, drawn by one horse, and was driving from Jefferson to Grand Junction. At the moment of meeting, a collision occurred between the plaintiff and the horse of the defendant and a shaft of his buggy, which caused the damages for which the plaintiff seeks to recover. The plaintiff claims that he called to the defendant as they were about to meet, and finally dismounted from his wheel, and stood with it by the roadside; but that, in consequence of the negligent and careless driving of the defendant, his horse jumped to the side of the road, and into the wheel, destroying it, and causing a buggy shaft to strike the plaintiff in the breast, thereby knocking him down, and bruising him, and tearing his clothes. The defendant admits the collision, but denies all negligence on his part, and alleges that he exercised due care; that the accident occurred in the night-time, when it was so dark that a man approaching on a bicycle without a light or signal of any kind could not be readily seen; and that the defendant did not see or know of the plaintiff's approach until the collision occurred. The defendant further avers that the plaintiff traveled without a signal light, and was negligent in not carrying a light or in some manner warning the defendant of his approach, or in not turning out of the highway to avoid the horse and buggy.

1. The appellant contends that chapter 70 of the Acts of the 25th General Assembly, under which the jury was drawn, is unconstitutional because it is provided in § 4 thereof that in preparing the lists and ballots containing the names of persons who are to constitute the jury list "the name of each alternate juror on the list from cities and towns where the courts are held shall be deposited in a box to be known as the talesman box and not in the first box." It is said this provision violates both the Constitution of the United States and of this state, but the part violated is not pointed out. In the absence of a more satisfactory argument on this point, we deem it sufficient to say that the appellant has failed to satisfy us that the act in question is unconstitutional. The appellant also complains of the manner in which the jury was drawn, as in violation of the act specified. When this case was called for trial, ten men were drawn from the regular panel, and, no others being present, the plaintiff asked that the jury be completed by calling talesmen, but the court refused the request, and continued the cause until the next day, when the jury was completed from the regular panel. We do not think any violation of law or abuse of discretion in what was done is shown.

2. The evidence authorized the jury to find the facts to be substantially as follows: At the time of the accident it was so dark that a man on a wheel could not have been seen readily further than a short distance. The defendant states that he ought to have seen a man dressed in light-colored clothing a dis-

tance of 80 yards or more, and the plaintiff states that he wore such clothing at the time of the accident. But he was not seen by the defendant until the collision had occurred. The plaintiff saw the defendant and his horse, which was gray or white in color, 150 yards before meeting them, and began to slacken his speed. He says he hallooted to the defendant and a companion who was riding with him when they were 50 feet distant, and again a moment later. The defendant did not heed nor hear the warning, but continued to drive his horse in the traveled road, although the sides were level, and he could have turned out easily. The plaintiff turned to the north side of the road, and, a moment before he was struck, threw himself from his wheel, but not in time to avoid the collision. Section 1000 of the Code of 1878 is as follows: "Persons meeting each other on the public highways, shall give one half of the same by turning to the right. All persons failing to observe the provisions of this section shall be liable to pay all damages resulting therefrom. . . ." The plaintiff was entitled to use the public highway with his wheel, and was entitled to one half of it when he met persons going in an opposite direction. He turned to the right as he approached the defendant, as the law provides, and the fact that the latter did not is prima facie evidence of negligence on his part. *Riepe v. Elting*, 89 Iowa, 88, 26 L. R. A. 769. The appellant contends that the presumption authorized by law has not been overcome, and that the testimony of the defendant shows conclusively that, if he had been giving proper attention to his horse and the road, the accident would not have occurred. But we think the jury was authorized to find that the presumption of negligence on the part of the defendant was overcome. The fact that it would have been possible for him to discover the approach of the plaintiff in time to turn to the right does not show that he was negligent in not doing so. The defendant states that at the time of the accident he was watching his horse and the road in advance for the purpose of seeing anyone who might be on the road, but that he was not expecting to meet anyone, and did not see or hear the plaintiff until the accident occurred. The defendant's companion also states that he was watching the road in advance of the horse, but did not see the plaintiff until the moment of the accident. In view of this evidence the jury was justified in finding that the defendant used due care to ascertain the approach of persons on the highway. Until he knew, or with reasonable care could have known, that the plaintiff was approaching, it was not his duty to turn out for him, and he was not negligent in keeping in the traveled way.

3. The plaintiff would not necessarily have been entitled to recover had the defendant failed to discover him in time to avoid the accident through inattention to his duties as driver. Contributory negligence on the part of the plaintiff would prevent a recovery. He contends that there was no evidence whatever that he was guilty of such negligence; but, if the testimony for the defendant was entitled to credit, we think the plaintiff must have been negligent. He says he saw the defendant

when he was distant 150 yards. The defendant was driving at a rate of 5 or 6 miles an hour, and the plaintiff was going as fast, and probably faster. If that rate of speed had been continued, they would have met in about thirty seconds from the time the plaintiff saw the defendant. The plaintiff says he slackened his speed, and, if he did so, the collision may not have occurred until nearly a minute after the plaintiff was first made aware of the defendant's approach. The plaintiff must have known that he was making little, if any, noise; that he did not carry a light or other means of attracting attention at a distance; and that his approach might not be discovered. True, the law of this state did not make it his duty to carry a light, to sound a bell, or to give other signal of his movements; and the same was true of the defendant. But a horse and buggy traveling 5 miles an hour are apt to make some noise, and, with the occupants of the buggy, are more readily seen, even in the night-time, than is a single pedestrian or bicycle rider. These are matters of common knowledge; and a person who rides a bicycle without a light or other signal of warning, in a public thoroughfare, when he is liable to meet moving vehicles or pedestrians, at a time when objects can be discerned readily at a distance of but a few feet, is guilty of negligence. That appears to be what the plaintiff did. He does not claim to have called to the defendant until within 50 feet of him, or but two or three seconds at most before the collision occurred, and probably too late for the defendant to avoid it if he had heard the warning. The plaintiff had no reason to think that he was seen. In fact, he states that the occupants of the buggy did not seem to hear him. We do not think the jury could well have found that the plaintiff was not negligent.

4. The appellant complains of the refusal of the court to permit him to testify that he expected the defendant to turn out of the road when they met. We do not think prejudice could have resulted from that ruling. The court charged the jury that it was the duty of the defendant to give the plaintiff a share of the road if the approach of the latter was seen, or should have been known; and the plaintiff states that he did not know that the defendant would not turn out. Moreover, we think that the testimony of the plaintiff shows that for some moments before the accident occurred he must have known that he was not seen, and that the defendant would not turn out for him.

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5. The eighteenth paragraph of the charge is as follows: "In the matter of carrying a light or the failure to carry a light, the matter of ringing a bell or not ringing a bell, you are instructed that the failure to carry a light or failure to ring a bell is not conclusive proof that plaintiff was guilty of contributory negligence; but these facts, like the other evidence in the case, should be taken into consideration by you in reaching your conclusion regarding the circumstances and surroundings of the accident." The appellant complains of this as instructing the jury, in effect, that the plaintiff would be guilty of negligence in not carrying a light or ringing a bell, and would be excusable for failing to do so only under unusual circumstances. It was evidently designed to meet the claim made by the defendant in his answer and in the evidence, and no doubt in argument, that the plaintiff should not recover because of his negligence in not carrying a light or sounding a bell, and to that extent the paragraph was in the interest of the plaintiff. A light and a bell are well-known means by which wheelmen give notice of their presence. We think that the plaintiff was negligent in not giving a signal of his approach, and that he has no just ground for complaining of the part of the charge quoted.

6. The appellant complains of the refusal of the court to charge the jury that "plaintiff was not obliged to carry a lamp or bell any more than was the defendant." The court did not charge the jury that the defendant was not under obligation to carry a light, but said that the plaintiff and the defendant possessed equal rights to the highway when they met, and that whether either was negligent should be determined by all the facts of the case. We think the rights and obligations of the plaintiff were fairly presented to the jury, and that there was no occasion to give the instruction under consideration, which was refused.

7. Many other questions are referred to by the appellant, and a few are discussed in argument. What we have said disposes of the most important of them. We need not say more in regard to them than that we do not find any sufficient reason for disturbing the judgment of the district court. A motion was submitted with the case to strike an additional abstract from the files, and to tax the cost thereof to the appellee. We do not find that the motion is well founded, and it is overruled.

The judgment of the District Court is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

D. M. MILLER

v.

John A. HARE, *Appt.*

(.....W. Va.....)

*1. **A general demurrer to a bill in equity** is properly overruled if the bill as a whole states facts which entitle the plaintiff to relief.

2. **H., after acquiescing and even assisting M. in maintaining a boom for the catching and preserving of ties, timber, etc., and receiving the benefits thereof in the saving of large numbers of his ties at an expense**

*Headnote by MCWHORTER, J.

NOTE.—*Right to construct log booms.*

The custom has very generally prevailed of maintaining booms in streams which are used largely for the floating of logs. So far as these booms have not interfered with the rights of the public in the stream, they have been held to be lawful. Even the public right has been permitted to be encroached upon to an extent which was not regarded as unreasonable under the circumstances.

Each person has an equal right to the reasonable use of navigable water. What constitutes reasonable use depends upon the circumstances of each particular case. *Davis v. Winslow*, 51 Me. 288, 81 Am. Dec. 573.

In *Harold v. Jones*, 86 Ala. 274, 3 L. R. A. 408, it is said that in a stream navigable for the floating of timber temporary obstructions for the purpose of preparing and securing timber for future transportation and necessary for the useful navigation of the stream at suitable seasons do not violate the rights of others if they are in the customary and contemplated mode and are not unnecessarily and unduly continued. If a boom is indispensable to a reasonable enjoyment of the stream as a public highway, and it is discontinued or removed in a reasonable time after the necessity for it ceases, its erection during a low stage of the water when the stream cannot be used for floating or rafting, is not unlawful.

The owner of land to low-water mark, who operates a sawmill upon his land, may, to facilitate his business, construct a boom into the river to receive his logs if he does not interfere with the right of the public to navigate the river. *Williamsburg Boom Co. v. Smith*, 84 Ky. 372.

In an action for damages for the filling up of a channel so as to prevent the floating of logs through it, it appeared that plaintiff hung a guide boom across it for the purpose of driving logs into his pond; and the court says that for that purpose it would not be unreasonable for him to use temporary guide booms which should not obstruct the passage through the channel, but he was not authorized to permanently obstruct the channel for such purpose. *Veazie v. Dwinel*, 50 Me. 479.

As incident to the reasonable use of a river for running and securing logs the owner may use temporary sheer or guide booms to direct the logs into proper places in which to detain them for use. But they are not authorized by the construction of booms to convert navigable streams into permanent places of deposit for logs or other materials so as thereby to obstruct the navigation of the stream. *Gerrish v. Brown*, 51 Me. 256, 81 Am. Dec. 569.

The fact that a boom in a river embraced a portion of the water capable of being navigated by large vessels does not necessarily constitute it a nuisance which may be abated by force. The court
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far less than it must have cost him if they had passed beyond the boom, cannot, in a court of equity, be heard to say that the boom was constructed and maintained in violation of law, and was a public nuisance, interfering with steamboat navigation, and therefore that he should not be required to pay a just and reasonable compensation for the catching and preserving of his said ties in said boom.

3. **If a boom is erected and maintained on a navigable stream** in violation of law, and is therefore a public nuisance, an individual has no cause of complaint aside from that of the common public, unless he suffer a special and peculiar damage therefrom, distinct and apart from the common injury.

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says the need of boom facilities to make the floatage of the river of value should be considered in any rules laid down as to the public use of the stream. To take away the boom privilege would be to strike a fatal blow to the principal commerce of the stream. *The City of Erie v. Canfield*, 27 Mich. 479, affirming *Canfield v. The City of Erie*, 1 Mich. N. P. 105.

Rafts of logs may be moored to the shore for a reasonable time and in a reasonable place and manner. *Hayward v. Knapp*, 28 Minn. 480.

But in New York it has been held that logs cannot be stored in a public stream. *Moore v. Jackson*, 2 Abb. N. C. 211.

Those desiring to have the benefit of the boom law, which depends upon usage, must comply with its conditions by providing an opening in the boom and assorting and passing through the logs of other persons descending the river, as fast as can reasonably be done. *Lowber v. Wells*, 13 How. Pr. 454.

Until prohibited by statute riparian owners may maintain booms in waters which are floatable for logs so long as they do not violate any public law or obstruct the navigation of the river by any method in which it may be used, or infringe upon the rights of other riparian owners. *Stevens Point Boom Co. v. Reilly*, 44 Wis. 285, 46 Wis. 237.

Boom must not block up stream.

The boom must not be allowed to prevent the use of the stream by other persons.

In the absence of statutory authority there is no right to blockade a navigable stream by booms. *Enos v. Hamilton*, 24 Wis. 658.

If a river is a public highway all impediments to its use, such as booms, are nuisances. But if it can be used only for certain purposes the riparian owner is bound only to abstain from obstructing its use for such purpose. *Morgan v. King*, 18 Barb. 277.

Usage can give loggers no right to block a navigable stream by putting a boom across it so that vessels cannot pass through. *Gifford v. McArthur*, 55 Mich. 535.

A log-driving company has no right to throw a boom across the river and use it for the storing of logs for a season in such a way as to prevent the use of the river by other persons wishing to drive logs therein. *McPheters v. Moose River Log Driving Co.* 78 Me. 329.

A boom cannot be maintained which completely closes the stream. *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237.

A boom across a stream is a nuisance if at times it interferes with the use of the stream by those who have a right to navigate it, although the principal use of the stream may be for floating logs and the

A PPEAL by defendant from a decree of the Circuit Court for Wood County in favor of plaintiff in a proceeding brought to enforce payment for services rendered by plaintiff in catching in his boom certain logs belonging to defendant and for materials furnished by plaintiff to defendant. *Affirmed in part.*

The facts are stated in the opinion.

Mr. J. G. McCluer, for appellant:

If Miller obstructed this stream by this boom in violation of the law of the state of West Virginia, then surely he cannot compel Hare, or anyone else, to pay him for some service that he pretends to have rendered them when he is in the very act of the violation of the laws of the state of West Virginia.

Rogers v. Cole River Boom & D. Co. 89 W. Va. 278; *Page v. Mille Lacs Lumber Co.* 58 Minn. 492.

As to the violation of law by this obstruction

boom may greatly facilitate the logging business. *Cincinnati Cooperage Co. v. Com.* 11 Ky. L. Rep. 629.

And some judges have refused to recognize any private right to maintain booms.

Owners of property on the banks of a navigable river have no right to construct booms or piers in it without authority of the legislature. *Leigh v. Holt*, 5 Biss. 338.

Liability for injury caused by boom.

The owner of the boom will be liable for injuries caused by his negligent or wrongful use of it.

The owner of a boom has no right to use it in such a way that by reason of the logs kept there, and their jamming, the water is raised in the stream so as to flood riparian lands higher up the stream. *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 308.

A booming company is not liable for injuries to riparian owners by a proper and reasonable use of the river for floating logs, but it is liable if by wilful or negligent management it creates or enlarges jams in the stream and thereby overflows its banks to their injury. *White River Log & B. Co. v. Nelson*, 45 Mich. 578.

But the mere fact of the existence of a boom in the river will not justify the finding that it was the cause of an ice jam which caused injury to abutting owners, but evidence of that fact must be presented. *Shaw v. Susquehanna Boom Co.* 125 Pa. 324.

A boom company will be liable for needlessly or wilfully obstructing a navigable stream to the hindrance and consequent injury of persons driving their own logs. *Watts v. Titabawassee Boom Co.* 52 Mich. 208.

A pier erected in the Mississippi river as part of a boom for logs without authority except such as may arise from his ownership of the adjacent shore, is an unlawful structure, and the owner will be liable for the sinking of a boat which runs against it in the dark. *Atlee v. Northwestern Union Packet Co.* 88 U. S. 21 Wall. 889, 23 L. ed. 619.

Compensation must be made to the abutting owner before a boom can be maintained the effect of which is to raise the water and cast it, together with dirt and sticks, upon his land. *Weaver v. Mississippi & R. River Boom Co.* 28 Minn. 584; *McKenzie v. Mississippi & R. River Boom Co.* 29 Minn. 288.

A person who has properly constructed a boom is not liable for the flowage of land by an extraordinary freshet which he could not reasonably have provided against, although the injury is to some extent aggravated by the presence of the boom. *Borchardt v. Wausau Boom Co.* 54 Wis. 107, 41 Am. Rep. 12.

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of this stream and liability for prosecution by the United States government or under the laws of the state of West Virginia, see

United States v. Burns, 54 Fed. Rep. 851.

Mr. V. B. Archer, for appellee:

The boom law has been, by this court, held constitutional.

State v. Elk Island Boom Co. 41 W. Va. 796.

Every presumption is made in favor of the correctness of the decision of the commissioner in chancery. If the testimony is conflicting, the court rarely interferes with his finding on the facts, provided he makes no error at law affecting the result.

Hartman v. Evans, 38 W. Va. 670.

McWhorter, J., delivered the opinion of the court:

D. M. Miller filed in the clerk's office of the circuit court of Wood county, on the 24th day

And it has been held that if to catch logs coming down a river the owner throws a boom across the stream, he will be liable for the injury thereby caused to the owner of a steamboat which is prevented by the boom from reaching its destination. *Grandell v. Mooney*, 28 U. C. C. P. 212.

Boom on property of third person.

The right of rafting logs down a stream does not include the right of booming them for safe keeping on private property. *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435.

It will be a trespass by a person running logs in a river to attach a boom to the land of a riparian owner if there is no necessity for so doing, but if the act is necessary in order to enable him to exercise his right of navigation no action will lie against him for doing so. *Welse v. Smith*, 3 Or. 445.

A boom cannot be maintained in the public waters of a bay in such a way as to cut off access to a wharf. *Union Mill Co. v. Shores*, 66 Wis. 176.

But the legislature may give a boom company an absolute right to construct booms for a certain distance along the river which will exclude the right of riparian owners. *Cohn v. Wausau Boom Co.* 47 Wis. 314.

See, however, note on right of riparian owner to access to navigable water, post, —.

Right to recover for injury to boom.

The right to maintain the boom includes the right of recovery against a third person who injures it.

A person who has boomed his logs along the side of a stream in such a way as not to interfere with the navigation of the stream may recover in case a third person runs his logs down the stream in an unreasonable manner and by so doing breaks the boom and causes the loss of the logs. *Auger v. Cook*, 32 U. C. Q. B. 537.

The owner of a storage boom may recover from the owner of a tug which through negligent management strikes and breaks the boom and permits the logs to escape. *John Spry Lumber Co. v. The C. H. Green*, 76 Mich. 320.

The owner of logs is not guilty of a nuisance in booming them in a slough leading off from a navigable river which at times is dry, although at times of high water there is water enough there to admit of the passage of steamboats and the owner can recover for the negligence of a steamboat owner in running against the boom and releasing the logs. *Castner v. The Dr. Franklin*, 1 Minn. 73.

But one who uses a government boom for the purpose of running logs into a private boom in such a way as to interfere with the passage of a steamboat will not be entitled to recover for the

of June, 1893, his affidavit for an attachment against the estate of John A. Hare, on the ground of nonresidence of the defendant, claiming that he was justly entitled to receive from the defendant in the suit which was about to be instituted in the said court the sum of \$800, as set out in said affidavit; and at the same time filed his bond, with security, in the penalty of \$1,600, and caused orders of attachment to be issued from said clerk's office to the sheriffs of the counties of Wood and Wirt, respectively. The former was levied by the sheriff of Wood county, June 26, 1893, on one barge of ties, containing 2,000 ties. The latter was on the same day levied by a constable of Wirt county on one boat load of ties. Defendant afterwards, on the 8th of July, gave bond and took possession of the property so levied upon.

At the July rules plaintiff filed his bill, al-

leging that he was the owner of a certain boom near the mouth of Hughes river, in Wirt county, West Virginia, and used for the purpose of catching timber and railroad ties which might be drifting in said river; that said river is one of the large tributaries of the Little Kanawha, and as such a part of the Little Kanawha river; that there was no boom in use for the catching of timber drifting in said Hughes river below the point where plaintiff's boom was located in said river, and no means, by boom or otherwise, below his boom for the preservation of logs, trees, railroad ties, etc.; that in the fall of 1892 and the spring of 1893 he caught in the said boom railroad ties which were drifting in said Hughes river belonging to the defendant, John A. Hare, to the number of 9,500 ties; that he preserved said ties in said boom and notified the defendant, John A. Hare, that his ties had been caught, and demanded from

injury in case the steamer fouls and breaks the boom, causing the logs to escape and be lost. *Brace v. Union Forwarding Co.* 32 U. C. Q. B. 43.

Private right of action against boom owner.

One who seeks to abate as a nuisance a boom across a navigable river to intercept saw logs floated down in time of high water must prove that the obstruction is unreasonable. *Brown v. Kentfield*, 50 Cal. 129.

When booms have been acquiesced in by the public the owner of one cannot maintain an action against the owner of another to have it removed and to recover damages for injuries caused by its maintenance. *Leigh v. Holt*, 5 Biss. 333.

A person cannot maintain an action for the obstruction of a river by a boom and logs if he was engaged in the operations by which the logs were placed there. *McGinnis v. Carrier*, 39 Mich. 111.

After long acquiescence in an addition to a boom the shore owner cannot be heard to say that the company building it had no authority to do so. *Powers's Appeal*, 125 Pa. 175.

The mere fact that a boom prevents a riparian owner from shipping fuel from above the boom to his brickyard below it does not give him a private right of action for the obstruction. *Swanson v. Mississippi & R. River Boom Co.* 42 Minn. 532, 7 L. R. A. 673.

But that case was overruled in a later one where it was held that the maintenance of a boom in such a way as to interfere with the floating of logs by other persons down the river is a nuisance which will give the person injured a right of action. *Page v. Millie Lacs Lumber Co.* 53 Minn. 499.

A mill owner cannot recover for injuries to his dam from logs coming down the river because of a sudden rise, on the ground that a boom which had been opened to pass logs through during the day was not closed at night, if he saw that it had not been closed and knew of the probability of the rise of water, but took no precautions to see that the boom was closed. *Lilley v. Fletcher*, 81 Ala. 234.

One who knowing of obstructions in a stream drives his logs upon them without allowing time for their removal cannot recover for loss occasioned in attempting to pass the obstructions. *Harold v. Jones*, 36 Ala. 274, 3 L. R. A. 406.

But in *Sullivan v. Jernigan*, 21 Fla. 284, it was held that the knowledge of a person about to start his logs that there was a boom across the river did not show him to be guilty of contributory negligence in not waiting for the obstruction to be removed, since his right to navigate was superior to that of the other person to obstruct the stream.

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Charter power.

In *Mississippi & R. River Boom Co. v. Prince*, 34 Minn. 79, it appeared that the boom company was created for the purpose of maintaining booms to assist the passage of logs down the river.

In a number of cases corporations have been authorized or required by charter to construct booms. *Underwood Lumber Co. v. Pelican Boom Co.* 76 Wis. 76; *Black River Flooding-Dam Assn. v. Ketchum*, 54 Wis. 312; *Black River Improv. Co. v. La Crosse Boom & Transp. Co.* 54 Wis. 659, 41 Am. Rep. 66; *Nelson v. St. Croix Boom Corp.* 52 Wis. 647; *Brown v. Susquehanna Boom Co.* 109 Pa. 57, 58 Am. Rep. 706; *Rollins v. Clay*, 33 Me. 132; *Weld v. Proprietors of Side-Booms*, 6 Me. 36; *Proprietors of Side-Booms v. Weld*, 6 Me. 105.

In *West Branch Boom Co. v. Pennsylvania Joint Lumber & L. Co.* 121 Pa. 143, the boom was to extend only one-half way across the river, and to admit the safe passage of the commerce carried on upon it.

A proviso in the charter that the boom shall not extend more than half across the stream, and that the navigation of the stream shall not be impeded, will not prevent the maintenance of a sheer boom which, when necessary to stop the running of the logs and guide them into the boom, may be extended all the way across the stream. *Susquehanna Boom Co. v. West Branch Boom Co.* cited in 121 Pa. 141.

But in *West Branch Boom Co. v. Dodge*, 81 Pa. 255, it was said that the boom company could not stop the lumber which was destined to go below its boom, even though thereby it would be prevented from stopping its own lumber.

Where the charter of a boom company requires payment for damages caused by the exercise of powers granted, payment must be made in case the boom causes the flooding of lands lying on the bank of the stream above it. *Bald Eagle Boom Co. v. Sanderson*, 81* Pa. 402.

Charter power to make, lay, and maintain side booms in suitable and convenient places in a certain river will not authorize the grantee to enter the close of another person without his consent, or to place logs there for their safe keeping. *Perry v. Wilson*, 7 Mass. 363.

A franchise to construct a boom and detain only logs of those who wish them to be detained will confer no right if it is impossible to construct such a boom so as not to interfere with logs which the owner does not wish detained. *Mason v. West Branch Boom Co.* 3 Wall. Jr. 252.

A general statute imposing a penalty for obstructing a navigable river does not apply to a boom company whose charter gives it the right to maintain a boom in a river navigable only for the

him payment of the compensation prescribed by statute in relation to drift property, and that defendant wholly refused to pay plaintiff the amount which he was entitled to for catching and preserving them; that he is entitled to receive from the said Hare the sum of 6 cents for each and every tie caught and preserved by him; that the defendant had recently taken possession of his said ties without plaintiff's consent, and proceeded to load the same in barges; and that, at the time of the institution of this suit, he was shipping the same to market, without paying plaintiff the amount due him for catching the same, and without settling with plaintiff, although he had often been requested so to do; and alleging the non-

residence of the defendant, and that he had no property within the knowledge of the plaintiff save and except the property attached in this case, unless it was some cross-ties which are still on the waters of the Little Kanawha, but of the quantity or location thereof plaintiff was not advised and could not charge. Further alleging that the said ties were branded by the brand belonging to the said John A. Hare,—that is, the letters "J. H.;" that had it not been for his catching said ties, the same would have drifted out into the Little Kanawha, and ultimately into the Ohio river, and would have been lost or scattered along said river, by which defendant would have been damaged to a much greater

running of logs. *Edwards v. Wausau Boom Co.* 67 Wis. 453.

In some instances the general statutes of the state have authorized the construction of booms.

Under the Minnesota law of 1872 a corporation was authorized to maintain booms in the St. Louis river. *Osborne v. Knife Falls Boom Corp.* 32 Minn. 412, 50 Am. Rep. 590.

In *Duluth Lumber Co. v. St. Louis Boom & Improv. Co.* 17 Fed. Rep. 419, it appeared that the boom company was by statute required to construct such booms as were necessary to care for logs coming down the stream.

In *Lawler v. Baring Boom Co.* 56 Me. 443, a boom was erected and maintained under authority of the legislature, the property to be acquired by the right of eminent domain.

Under the Maine act of 1832, a boom company was given authority to erect and maintain a boom across the Stillwater branch of the Penobscot river. *Plummer v. Penobscot Lumbering Asso.* 67 Me. 393.

The public right to complain of the placing of booms in the streams of the state so far as the same are not unreasonable must be held to have been waived by the passing of laws for the formation of boom companies. *Atty. Gen. v. Ewart Boom Co.* 84 Mich. 462.

The Michigan statutes provide that boom companies may construct, use, and maintain all necessary booms for their business. *Hall v. Tittabawassee Boom Co.* 51 Mich. 377.

Under the Michigan statute for the organization of booming companies the company has the right, in the streams where it can lawfully do business, of constructing and maintaining all necessary booms for that purpose, but they must be constructed and used in such manner as to allow the free passage of commerce along the stream. *Coburn v. Muskegon Boom Co.* 72 Mich. 134.

Under the Ontario statutes log owners have a right to throw booms across streams for the purpose of facilitating the transportation of logs to market, and therefore, in the absence of negligence, the owner of a boom will not be liable to the owner of adjoining land from the fact that the boom breaks because of high water and the logs become jammed against a bridge, causing an overflow of water upon the land to its injury. *Langstaff v. McRae*, 22 Ont. Rep. 78.

The Nevada statutes authorize persons complying with their requirements to make and construct all proper and necessary booms along the stream of water for the driving of logs, provided they shall not interrupt the free navigation of the stream. *Mandlebaum v. Russell*, 4 Nev. 551.

The legislature may by general law confer on individuals rights in waterways which are not navigable except for small boats and for floating logs in opposition and paramount to the public right. *State v. Elk Island Boom Co.* 41 W. Va. 796.

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Boom companies organized under the Washington act of 1896 have no right to interfere with the navigation or use of the stream upon which they have constructed booms. *Carl v. West Aberdeen Land & I. Co.* 13 Wash. 616.

Acquisition of property by right of eminent domain.

Property of a private person may be taken under the power of eminent domain for the purpose of constructing a boom by an incorporated company for public use under the control of the legislature. *Patterson v. Mississippi & R. River Boom Co.* 3 Dill. 466.

The Fairfield boom company was given authority to take land under eminent domain, erect a boom, and maintain it perpetually. *Hall v. Benton*, 69 Me. 346.

By the act of 1899, the Bangor boom company was given power to acquire land and construct a boom. *Barrett v. Bangor*, 70 Me. 386.

Land for a boom may be taken under the right of eminent domain. *Cotton v. Mississippi & R. River Boom Co.* 22 Minn. 572.

Governmental control.

The question has arisen in some cases as to whether the general or local government has the authority to permit or abolish booms.

In *Queddy River Driving Boom Co. v. Davidson*, 10 Can. Sup. Ct. 222, it was held that the New Brunswick legislature could not authorize the obstruction of a tidal navigable river by the erection of booms therein. The power over the subject-matter was held to be in the dominion of Parliament.

In the absence of any action by Congress a state may authorize the construction of a boom in a small navigable river of the state where its presence would do more good than harm. *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Heerman v. Beef Slough Mfg. Boom L. D. & Transp. Co.* 8 Biss. 334; *United States v. Beef Slough Mfg. Co.* 8 Biss. 421.

Where a river forms a boundary between two states each may, in the absence of legislation by Congress, authorize the construction of booms within its own territory. *J. S. Keator Lumber Co. v. St. Croix Boom Corp.* 73 Wis. 62.

Under the United States act of 1890, providing for the removal of obstructions to navigable rivers, there is no authority for the removal of a boom from a small river which at the time of its construction prior to the passage of the act was fully authorized by the state, and which is necessary to the use of the river for the floating of logs, the value of the logs being much greater than that of other products likely to be transported on the river, and the obstruction to navigation caused by the boom not being complete. *United States v. Beilingham Bay Boom Co.* 72 Fed. Rep. 583. Affirmed 48 U. S. App. 443, 81 Fed. Rep. 658.

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extent than the value fixed by the statute for catching and preserving the ties; that he had preserved said ties in his boom at his own cost and expense; that the said ties filled plaintiff's boom, and, by reason of the plaintiff's preserving the ties of defendant, he was totally unable to take care of his own ties, which were too numerous to preserve after said boom was filled with the ties of said defendant, and plaintiff was put to great cost and expense in securing his own ties, which drifted out into the Little Kanawha and Ohio rivers, which would not have been the case had plaintiff not caught and preserved the ties of said defendant,—all of which the said defendant well knew at the time he took possession of the ties from plaintiff's boom, and refused to pay plaintiff the compensation fixed by statute; that he filed an affidavit, and caused an order of attachment to be issued from the clerk's office of the said court of Wood county, and by virtue of said attachment the sheriff of Wood county had levied upon and attached a barge of ties, containing about 200, as the property of said Hare, which was then in possession of the sheriff; and that a copy of said order of attachment was also sent to the sheriff or any constable of Wirt county, which was levied also upon a lot of ties in Wirt county, and the same were in the possession of the officer levying it; and he filed as exhibits the affidavit and order for the attachment. And further charging that the defendant was indebted to him in the sum of \$230 for a lot of rope which plaintiff furnished to said defendant to be used by him in securing the timber, ties, and logs, in Hughes river, one coil of which rope said defendant used, and one coil was delivered by plaintiff at the barn of Col. Enoch, near Greenville, and defendant notified that said rope was there subject to his orders upon payment of the cost thereof, and that said defendant had failed to pay for said rope, and that the plaintiff was justly entitled to recover the value thereof; and charging that he was justly entitled to recover from the defendant, for catching and securing the railroad ties, the sum of \$570, and for the rope furnished to the said defendant the sum of \$280, making in all the sum of \$800; that he was remediless in the premises, save in a court of equity, where matters of the kind are properly cognizable; and prayed that he might have a decree against the defendant for the sum of \$800, and for the sale of said cross-ties attached in the counties of Wood and Wirt, and out of the proceeds that the costs might be paid, and expenses of levying upon and attaching said cross-ties, and preserving the same in the hands of the sheriff, and for the payment of his claim and interest, and for general relief.

Defendant filed a general demurrer to the bill, and, without waiving his demurrer, filed his answer, denying that the Hughes river is any part of the Little Kanawha river, and averring that it is a separate and distinct river, and so recognized in the history and geographical surveys and delineations on the maps of the state of West Virginia, etc.; and admitting the truth of the allegation that in the fall of 1892 and spring of 1893 there was no boom in use for the catching of timber drifting in said Hughes river below the point where the plain-

tiff retained the respondent's railroad ties in said Hughes river; and charging that no boom could be maintained in said Hughes river during the year 1892 and 1893, at any point in said Hughes river, or in said Little Kanawha river, because the same was not allowed by the laws of the state of West Virginia; and denying that the plaintiff was or could be the owner of any boom near the mouth of Hughes river, in Wirt county, West Virginia, for catching timber and railroad ties which might be drifting in said Hughes river; and denying that plaintiff caught in any boom any railroad cross-ties belonging to respondent and drifting in said Hughes river near the mouth of the Little Kanawha or elsewhere; and denying that the plaintiff had any right to catch, in any boom in said Hughes river, any cross-ties or timber or property, belonging to respondent, drifting in said Hughes river, at any point, in any boom; and denying that plaintiff was entitled to receive from him anything for illegally obstructing the floating and passage of any of his railroad cross-ties or timber down said Hughes river; and especially denying that the plaintiff was entitled to receive or recover from respondent 6 cents for each and every tie caught and preserved by him in any such boom that may have been so attempted to have been maintained by plaintiff in Hughes river illegally; and charging that plaintiff did not preserve respondent's ties, but threw the same out of the boom when found by the plaintiff, and denying that he was indebted to the plaintiff in any such sum as \$230 for rope furnished to respondent by plaintiff, but that it is true that respondent did receive and use one coil of rope, worth, including freight, \$77; and denying that there was any coil, delivered by plaintiff at the barn of Col. Enoch, near Greenville," or, at least, if it was placed there, it was not delivered to respondent; and denying that respondent was notified that said rope was there subject to his order, upon payment of the costs thereof, and denying any liability to pay for any rope so delivered at Col. Enoch's, or that plaintiff was entitled to recover anything on account of same against him; alleging that, in the spring of 1893, respondent and Miller were running and drifting cross-ties in said Hughes river, and plaintiff proposed to respondent that he (plaintiff) would get a lot of rope, and put some rafts across the Little Kanawha below the mouth of Hughes river, to catch plaintiff's and respondent's property jointly, as it should come out of Hughes river; that at the time said river had been lately frozen over and the ice had broken up, and the object was to hold the ice and the stuff that was in it; that in addition to plaintiff and respondent, the Parkersburg Mill Company and William Richardson, all of whom had property, or were interested in property, that floated in said Hughes river, or bound up in said ice, were to bear their share of the expense of putting in three rafts; that to such proposition respondent acceded, but that plaintiff failed to and did not put in such rafts, and did not stop any such property of respondent, and then afterwards set up a claim that respondent should pay for the coil of rope which plaintiff had gotten, but not used, but respondent had nothing to do with getting

such rope, and denying that he was in any way liable to pay anything therefor; and averring that, by reason of the failure of the plaintiff to place and secure such rafts across said Little Kanawha river, respondent lost railroad ties that floated out with the ice into the Little Kanawha and Ohio rivers to a large amount, at least the sum of \$5,000, which sum of \$5,000 respondent had a right to and claims, and also seeks and asks to recoup and have set off against the plaintiff's claim set up in said bill for said rope as well as for catching said cross-ties; and averring that the \$77 had been settled and adjusted and by accord satisfied prior to the institution of this suit; denying that plaintiff was justly entitled to recover from defendant for catching and securing said railroad ties the sum of \$570, and for the rope furnished the sum of \$230, making in all the sum of \$800, as charged in said bill, or that he was indebted to the plaintiff in any sum whatever, but charging that, upon a just and fair settlement, plaintiff was indebted to respondent, because that about the 29th of April, 1893, respondent caught 2,500 railroad cross-ties drifting in Hughes river belonging to plaintiff, and secured same, and cared for and preserved them, and delivered them to plaintiff, for which respondent was entitled to recover a fair and reasonable compensation, as provided by law; that he preserved and cared for same from about April 29 to about July 1, 1893, and that a reasonable compensation therefor should be fixed and ascertained by the court; and further charging that, during the fall of 1892 and spring of 1893, the plaintiff undertook to establish a boom in said Hughes river, as he calls it, and went on and placed obstructions in said river, and kept the same there during the fall of 1892, and up to the time of the bringing of this suit and the filing of the answer; that said Hughes river, at the point where the plaintiff was attempting to maintain said boom and obstruction, was and is a navigable river and was and is used a great deal then and now by the citizens of West Virginia, and people and public doing timber business thereon, for the transportation, floating, driving, drifting of timber, cross-ties, etc., along and upon the waters of said Hughes river, as they had a right then and now to do without hindrance; that at the point where said boom was so established, and for at least a distance of about a mile above that in said Hughes river, the said river is and was then navigable for steamboats and other crafts, rafts, etc., at all times when said Little Kanawha is and was navigable for such crafts, rafts, boats, etc., and at all times except during ordinary low water; that said obstruction so called a "boom" by said plaintiff was then and is now without any legal authority or right whatsoever, and is in violation of law and the rights of this respondent, and of the citizens of the United States, of the public in general, and especially of the citizens of the state of West Virginia, and then and now constituted a nuisance under the law; and said boom was by plaintiff so constructed that there was no provision for timber, cross-ties, or property of respondent or anybody else to pass through or beyond said obstruction or boom so placed there by plaintiff, and in consequence it de-

tained the cross-ties and property of this respondent to a large amount; that respondent, through his agents and employees, went and took possession of his cross-ties so wrongfully detained by plaintiff, and loaded them into barges, and about the month of June, and just prior to the institution of this suit, moved the barges into which respondent's said cross-ties were so loaded; that plaintiff took out an attachment against respondent before H. J. Fought, justice of the peace of Wirt county, claiming and swearing that he was entitled to recover from respondent \$800, but, before the same could be tried, plaintiff dismissed that action, and then brought this suit, and swore he was entitled to recover \$800, and denying the plaintiff's right to recover anything, or his right to issue any writ of attachment; that respondent has given bond and taken possession of his property, and is entitled to recover from the plaintiff a reasonable compensation for catching, securing, preserving, and delivering to plaintiff said 2,500 ties, and to decree therefor, together with his costs in this suit, and praying for affirmative and for general relief; to which answer plaintiff replied generally.

On the 29th of August, 1895, the cause was heard upon process executed, affidavit and attachment issued and levied upon the bill filed, and proceedings had at rules, the demurrer and answer of defendant, general replication to the answer, the issue on demurrer, and the depositions of all the witnesses, taken both for plaintiff and defendant; whereupon the court overruled the demurrer, and found that the plaintiff was entitled to a reasonable compensation for catching and preserving defendant's ties, and sustained the attachment issued in the cause, but held that, before a final decree could be executed in the cause, it should be referred to one of the commissioners of the court to take, state, and report an account between the plaintiff and defendant. The cause was accordingly referred to W. W. Jackson, commissioner, with directions, after first giving reasonable notice to the parties, to make, state, and report an account between plaintiff and defendant, as follows: "First, as to the amount the defendant is indebted to the plaintiff on account of the lines or ropes mentioned in the bill, alleged to have been purchased by the plaintiff for the use of the defendant, the plaintiff, and the Parkersburg Mill Company, if any, the costs of said ropes, and the amount to be charged to the defendant; second, the number of railroad ties, belonging to the defendant, collected in plaintiff's boom, and received by the defendant, and what would be a just compensation for catching and preserving said railroad ties, and the amount to which the plaintiff would be entitled for such service; third, the amount of payments or offsets to which the defendant may be entitled, under the pleadings in this cause, if any."

On the 19th of November, 1895, Commissioner Jackson filed his report in the cause, in substance as follows: "Your commissioner reports that the evidence submitted to him by plaintiff and defendant was very conflicting, and that a large amount of such evidence was irrelevant, and totally foreign to the matters under consideration. Your commissioner reports that no evidence was produced before

him except the depositions already filed in the case." In response to the first inquiry, he says: "Your commissioner finds that the defendant is indebted to the plaintiff on account of the lines or ropes mentioned in the bill, alleged to have been purchased by the plaintiff for the use of the defendant, in the sum of \$230. Your commissioner has been unable to report exactly the cost of the ropes purchased for the use of the defendant, the plaintiff, and the Parkersburg Mill Company, but, on the testimony of S. L. Gould, fixes the cost price of said ropes at \$797.80. Of this rope the mill company took two fifths, leaving the remaining three fifths to be divided equally, as ascertained by the commissioner, between the plaintiff and the defendant, both plaintiff and defendant being liable for the payment of one half of said three-fifths part set aside to them. While this would exceed the amount claimed in the plaintiff's bill, owing to the uncertainty of the evidence, your commissioner has taken the amount as set out in the plaintiff's bill, and fixed the liability of the defendant to the plaintiff on account of said ropes as \$230." And to the second inquiry: "As to the number of railroad ties belonging to the defendant collected in plaintiff's boom and received by the defendant, the testimony is extremely conflicting, and the witnesses, all with the exception of the defendant, give estimates in guesses as to the amount, no person seeming to have actually counted the number of ties so collected. The defendant testifies that there were 6,700 ties in the boom, and that prior to that rise he had loaded 3,000 ties out of Miller's boom, making 9,700 in all. Your commissioner finds that the amount of ties claimed in the plaintiff's bill to have been caught for the defendant was 9,500. Your commissioner, therefore, fixes the number of ties collected in the plaintiff's boom, and received by the defendant, at 9,500. Upon the question of a just compensation for catching and preserving said railroad ties, and the amount to which the plaintiff would be entitled for such services, your commissioner reports that the evidence varies from one half a cent to six cents a tie, but that the amount of six cents per tie seems, from the evidence, to have been paid almost if not exclusively upon the Little Kanawha river, the evidence showing that the amount paid upon the Hughes river, when caught in booms, ranged from one half a cent to three cents. Your commissioner, after carefully considering the evidence has reached the conclusion that a just compensation for catching and preserving said railroad ties would be two and a half cents for each tie, making a total of \$237 due from the defendant to the plaintiff on account of catching and preserving said railroad ties." And to the third inquiry he says: "Under this head your commissioner reports that, after a careful consideration of the evidence, he is of the opinion that the defendant is entitled to no set-off or payment against the plaintiff's claim. . . . Your commissioner further reports that there is due, as ascertained by him, from the defendant, John A. Hare, to the plaintiff, D. M. Miller, on account of rope, \$230; on account of compensation for catching and preserving ties, \$237.50,—making a total of \$467.50 due from the defendant to the plaintiff."

The defendant, John A. Hare, excepted to the report: "First, because the same is not supported by the evidence before the commissioner and before the court; second, because said report is contrary to the evidence in the cause before said commissioner; third, because the commissioner has erred in allowing the plaintiff, D. M. Miller, \$230 for rope, when the evidence shows that no rope was ever delivered to the defendant, nor was any ever delivered at any place agreed upon between the plaintiff and defendant for delivery; fourth, because the commissioner erred in allowing the plaintiff two and a half cents (2½) per tie as just compensation for catching and preserving railroad ties in controversy, making a total of \$270.50 due from the defendant to the plaintiff on account of catching and preserving such railroad ties, and because plaintiff is not entitled to recover anything, as set up in the answer filed in this cause, and said finding is contrary to the weight of evidence; and, fifth, because of errors and insufficiencies appearing upon the face of said report."

And on the 2d of December, 1895, the cause was heard upon the papers formerly read, and the orders made therein, upon the order of reference and report of Commissioner Jackson made thereunder, and the exceptions taken by defendant to said report, and the exceptions set down for argument, and was argued by counsel; whereupon the court overruled the several exceptions of the said defendant to said report, and confirmed the report of Commissioner Jackson, and decreed that plaintiff recover from defendant, John A. Hare, \$472.27, the amount ascertained by the commissioner to be due from defendant to plaintiff, with interest from September 13, 1895, until paid, and the costs of suit, from which decree this appeal is taken.

The first assignment of error is the overruling of the demurrer to plaintiff's bill. The demurrer filed is a general demurrer to the whole bill, and sets out no grounds other than that "the same is not sufficient in law." The bill alleges indebtedness of the defendant to the plaintiff in the sum of \$230 for rope sold by plaintiff to defendant and furnished to him, and also in the sum of \$570 for catching and preserving certain ties of and for the defendant. In his brief the counsel for defendant argues that the demurrer should have been sustained by reason of the plain and wilful violation of the statute law of the state of West Virginia in maintaining a boom on a navigable stream by the plaintiff, where no such boom was permitted under the law, in which boom defendant's ties were unlawfully caught, and for which plaintiff has charged defendant, and seeks to recover from him such charges in this suit. The reasons assigned for sustaining the demurrer do not apply to the whole bill. The demurrer is too extensive and was properly overruled.

Second, that the court erred in overruling the exceptions to the report of Commissioner W. W. Jackson in the cause, certified as of September 28, 1895, because the same is not supported by the evidence before the commissioner and before the court, and for other reasons set forth in the exceptions to said report filed by John A. Hare, by his attorney, L. N. Tavenner. A care-

ful examination of the evidence shows that the third exception to Commissioner Jackson's report is well taken, as to the allowance to plaintiff, Miller, of \$280 for rope. This allowance should have been \$77, and not \$280. Defendant admits getting the half coil of rope at \$77, and the fact is proved also by other witnesses. It is true, it is shown by the testimony of B. S. Pope that the \$77 was credited to plaintiff, Miller, in his account with Pope & Sons, and charged to defendant, Hare; but it is also shown by the testimony of B. S. Pope that it was again credited back to Hare, and charged back to Miller, so that Hare has never paid it. The evidence fails to prove that defendant, Hare, ever purchased, or contracted to purchase, or received, or agreed to receive, any more of the rope than the half coil, for which he says himself he should pay to Miller \$77. There was considerable testimony taken concerning the purchase of the rope, and of interviews between plaintiff, Miller, and Hare, and between Miller and Pope, and representatives of the Parkersburg Mill Company, about its purchase. Miller says he and Hare were consulting about the matter of getting the line to hold the gorge, ice, timber, and ties, and save the stuff, when Hare says, "Let's go up and see Pope, and see what he thinks of it, and, if he is in favor of it, we will do so;" that they went to Pope's office, in the city of Parkersburg, "and there consulted about the matter between us three, and the agreement was made there to order ten coils—half coils—of two-inch line, and take them there, and if it was a favorable thaw, and we thought it could be held by erecting a boom below it, and putting them out, why we were to do it, each one paying for one third of the line,—the Parkersburg Mill Co., one third; myself, one third; and John A. Hare, one third." Hare in his testimony says emphatically there was no such contract, and he is corroborated by the testimony of Pope, who was the third party present when the contract was alleged to have been made.

Third assignment: "The court erred in confirming the said commissioner's report, and decreeing against the appellant, John A. Hare, the sum of \$472.27, with interest and costs of suit." This is correct to the extent of the difference between \$280 allowed in the report for rope, and \$77, the amount which should have been allowed.

Fourth assignment: "The court erred in not dismissing the plaintiff's bill after the proofs were in, showing that the plaintiff, D. M. Miller, had in his own wrong erected a boom across Hughes river, which was a navigable stream, and then being navigated by steamboats plying the waters of the Little Kanawha river; thereby not only obstructing navigation, but preventing, by his wrongful and illegal act, the ties and timber of the appellant from passing out of said stream into the Little Kanawha river, and at the same time obstructing and hindering navigation of said river, and preventing its free use by the public." A careful review of all the testimony shows that plaintiff, Miller, maintained a boom in Hughes river from 100 to 200 yards from its mouth, and that defendant, Hare, had a boom about a mile to a mile and a half above Mil-

ler's, on the same river. These booms were both constructed and maintained for the purpose of catching ties, timber, etc., to keep it from passing out into the Little Kanawha river, and thence into the Ohio; that there was no boom below that of plaintiff, Miller, to prevent free passage of any ties, timber, etc., which passed his boom, into the Little Kanawha river; that ties, etc., passing into the Little Kanawha were liable to be lost entirely to the owners, and, if caught on the Little Kanawha or Ohio river, the expense of recovering the same was much greater than if caught in the said booms. Defendant, Hare, in his testimony, says that "in January, 1893, the river broke up, and the ice destroyed Mr. Miller's sheer boom, and a portion of my side boom, and I took my sheer boom and what side boom I had and coupled it onto his [Miller's], and we used the boom jointly for a short time for catching our ties;" that Mr. Miller rebuilt his sheer boom, and witness Hare then moved his back to the place where he formerly had it; as he expressed it, "That is, what I had left of it," "about a mile, or a mile and a half, or something like that, above Mr. Miller's." The "wild rise," as witness Hare designated it, came in April, 1893, when plaintiff caught most of the ties of defendant, Hare, for which he has charged him in this suit. From Hare's testimony it appears that several thousand ties on this rise passed out into the Little Kanawha river, and Hare himself says that his recollection is that it cost 11 cents per tie to have such ties gathered up and delivered in boat. Several witnesses were examined as to the cost and proper amount to be paid for catching the ties, and it ranges all the way from one half cent per tie to six cents. William Richardson testifies very intelligently, and from large experience in the business, and he fixes a reasonable compensation at 3 cents per tie for catching and preserving defendant's ties as was done by plaintiff. So I conclude that the amount arrived at by the commissioner, to wit, 2½ cents per tie, was not unreasonable. And Hare admits that plaintiff caught and saved to him about 9,700 ties. The evidence further shows that the catching of plaintiff's ties by defendant in his boom above plaintiff's boom was of no advantage to plaintiff, but a disadvantage, and that defendant, as well as his agents and employees, was notified by plaintiff not to catch his ties. After acquiescing, and even assisting, as defendant did, in the maintenance of plaintiff's boom, and receiving the benefits thereof in the saving of large numbers of his ties, at an expense far less than it must have cost to save them if they had been permitted to pass out of Hughes river into the Little Kanawha, he cannot, in a court of equity, be heard to say that the boom was constructed and maintained in violation of law, and that the same was a public nuisance, interfering with steamboat navigation, and therefore he should not be required to pay a just and reasonable compensation for a valuable service rendered him. It is shown by the evidence that the boom of plaintiff was not a private nuisance, but of great value and benefit to individuals engaged in driving and running ties, timber, etc., in Hughes river, and that it was

especially so to defendant, Hare. In *Page v. Mills Lumber Co.* 53 Minn. 499, 501, cited by appellant, the court says "that a nuisance, such as an unreasonable or wanton obstruction of a navigable stream, a public highway, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom, distinct and apart from the common injury. . . . The public wrong inflicted upon all persons must be redressed by a public prosecution." If appellee's boom was erected and maintained, as claimed by appellant, in violation of law, and was therefore a public nuisance, the way to get rid of it was by a public prosecution, and appellant, Hare, had no cause of complaint as an individual, aside from that of the common public, unless he "suffered a special and peculiar damage therefrom distinct and apart from the common injury." *Aldrich v. Wetmore*, 52 Minn. 164; *Williams's Case*, 5 Coke, 72a; *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41. Not only is this not appellant's case, but it is shown that the boom was of peculiar benefit to him, not only saving him large expense, but from considerable probable loss. The appellant's ties were drifting on the Hughes river, and were secured by appellee, and taken from his possession by appellant without having paid the just compensation for catching and preserving the same, as provided in § 7, chap. 61, Code, to the person taking them up. Appellee is entitled to recover the same in this suit.

The decree is affirmed as to the amount allowed for catching and preserving the ties, and is reversed as to amount found for rope, which should be \$77; and, this court proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered, and decreed that plaintiff recover against the defendant the sum of \$317.30, with legal interest thereon from December 2, 1895, until paid, and his costs by him expended about his suit in the circuit court, including \$15, as allowed by law, and that he have execution therefor.

Florence SNYDER, Admr., etc., of Andrew C. Snyder, Deceased,

Plff. in Err.

(..... W. Va.)

*1. A declaration for tort arising from negligence may allege the mere negligence generally, without stating the particular facts going to prove negligence, but must specify with reasonable certainty the main or primary act of omission or commission doing the damage; and the allegation that the defendant did the particular act causing the damage furnishes the predi-

*Headnotes by BRANNON, J.

NOTE.—As to the presumption of negligence from the occurrence of accidents, see note to *Bar-nowski v. Helson* (Mich.) 15 L. R. A. 33.

As to liability for electric wires in highways, see note to *Denver Consol. Electric Co. v. Simpson* (Colo.) 81 L. R. A. 566; also *Atlantic Consol. Street* 89 L. R. A.

cate or basis of evidence of all such incidental facts and circumstances of omission and commission as fairly tend to establish the negligence of the primary act; and to plead them specially would be to plead mere evidence instead of facts.

2. Where a declaration based on negligence states a particular act as the cause of the damage, no evidence of other acts causing it can be given.

3. There must be reasonable evidence of negligence. But where a thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

(November 10, 1897.)

ERROR to the Circuit Court for Ohio County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Mr. W. P. Hubbard, for plaintiff in error:

The declaration seems insufficient. It must set forth the duty which has been neglected, and aver the neglect.

Poling v. Ohio River R. Co. 88 W. Va. 645, 24 L. R. A. 215; *Clarke v. Ohio River R. Co.* 89 W. Va. 732.

It was error to permit the plaintiff to give in evidence a supposed act of negligence which had not been averred in the declaration, to permit the jury to consider it, and, worst of all, to tell the jury that a recovery might be had on such a matter.

Hawker v. Baltimore & O. R. Co. 15 W. Va. 628, 36 Am. Rep. 825.

In this case, as in *Fisher v. West Virginia & P. R. Co.* 89 W. Va. 367, 23 L. R. A. 758, and (on second writ of error) 42 W. Va. 188, 33 L. R. A. 69, the proximate cause of the injury was plaintiff's "own obstinate and perverse conduct in refusing to obey the reasonable" warnings of bystanders; "in voluntarily subjecting himself to the influence of liquor, and in needlessly and negligently assuming the dangerous position."

Harris v. Minneapolis & St. L. R. Co. 87 Minn. 47; *Gerity v. Haley*, 29 W. Va. 98; *Butcher v. West Virginia & P. R. Co.* 87 W. Va. 180, 18 L. R. A. 519.

The fact that the defendant has been guilty of negligence followed by an accident does not make him liable for the resulting injury, unless that was occasioned by the negligence. The connection of cause and effect must be established. And the defendant's breach of duty, and not merely his act, must be the cause of the plaintiff's damage.

1 Shearm. & Redf. Neg. § 25; *Butcher v. West Virginia & P. R. Co.* 87 W. Va. 190, 18 L. R. A. 519; *Wabash, St. L. & P. R. Co. v.*

R. Co. v. Owings (Ga.) 33 L. R. A. 798; *Willey v. Boston Electric Light Co.* (Mass.) 37 L. R. A. 723; *Newark Electric Light & P. Co. v. Garden* (C. C. App. 3d C.) 37 L. R. A. 725; and *Trenton Pass. R. Co. v. Cooper* (N. J.) 38 L. R. A. 687.

Locke, 112 Ind. '404; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 259.

Messrs. John A. Howard and Melville D. Post, for defendant in error:

Where the plaintiff has shown a situation where one in the proper exercise of a right is injured by the action of another, the maxim *Res ipsa loquitur* applies and the presumption arises that the injurer was guilty of negligence.

Byrne v. Boadle, 2 Hurlst. & C. 721; *Scott v. London & St. K. Docks Co.* 8 Hurlst. & C. 594; *McMahon v. Davidson*, 12 Minn. 357; *Thomas v. Western U. Teleg. Co.* 100 Mass. 156; *Lyons v. Rosenthal*, 11 Hun. 46; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Cummings v. National Furnace Co.* 60 Wis. 608; *Mulcairns v. Janeville*, 67 Wis. 24; *Dixon v. Plums*, 98 Cal. 884, 20 L. R. A. 698; *Houston v. Brush*, 66 Vt. 381; *Rose v. Stephens*, 11 Fed. Rep. 438; *Shafer v. Lacock*, 168 Pa. 497, 29 L. R. A. 254.

Evidence that defendant electric-light company had its line constructed along a street; that a guy wire from one of its poles stretched across the sidewalk, and charged with electricity from another guy wire crossing the feed wire of a street-railway company, had become detached from a tree to which it had been fastened, and was hanging to the ground; and that plaintiff's son was killed by coming in contact with it while walking along the sidewalk, makes a prima facie case, and puts on defendant the burden of showing that it was not negligent.

Haynes v. Raleigh Gas Co. 114 N. C. 205, 26 L. R. A. 810; *Ahern v. Oregon Teleph. & Teleg. Co.* 24 Or. 276, 293, 22 L. R. A. 635, 640; *United Electric R. Co. v. Shelton*, 89 Tenn. 423; *Southwestern Teleph. & Teleph. Co. v. Robinson*, 2 U. S. App. 205, 1 C. C. A. 684, 16 L. R. A. 545, 50 Fed. Rep. 810; *Brush Electric Lighting Co. v. Kelley*, 126 Ind. 221, 10 L. R. A. 250; *Johnson v. Northwestern Teleph. Exch. Co.* 48 Minn. 433; *Uggle v. West End Street R. Co.* 160 Mass. 351.

If deceased did not have actual knowledge of the danger that threatened, and did not apprehend it, then he cannot be held guilty of contributory negligence, although his acts may have been contributory acts.

4 Am. & Eng. Enc. Law, § 16, p. 84.

To escape the responsibility of contributory negligence the plaintiff is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which he belongs.

Dimmey v. Wheeling & E. G. R. Co. 27 W. Va. 32, 55 Am. Rep. 292; *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 14; *Phillips v. Huntington*, 35 W. Va. 406; *Snoddy v. Huntington*, 37 W. Va. 116; *Moore v. Huntington*, 31 W. Va. 842; *Bowen v. Huntington*, 35 W. Va. 682.

Brannon, J., delivered the opinion of the court:

In an action on the case, Florence Snyder, administratrix of Andrew C. Snyder, recovered a judgment against the Wheeling Electrical Company for \$1,000, and the company obtained this writ of error.

One error alleged is the action of the circuit

89 L. R. A.

court in overruling a demurrer to the declaration. The specification of its defect is that it ought to, but does not, set forth the duty and aver the neglect; and citation is made of the language in the opinion in *Clarke v. Ohio River R. Co.* 39 W. Va. 732, that a declaration in tort "must have the requisite definiteness to inform the defendant of the nature of the cause of action and the particular act or omission constituting the tort," and reference is made to *Poling v. Ohio River R. Co.* 38 W. Va. 645, 24 L. R. A. 215, holding that a declaration for negligence "is good if it contains the substantial elements of a cause of action, the duty violated, the breach thereof properly averred with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the very right of the case can be given." I think these statements are good law. Hogg, Pleading & Forms, § 140, says that it is settled as a general rule that it is not necessary to state the particular acts which constitute negligence. This is so, but we must take care not to misapply this statement. The West Virginia cases cited to sustain the rule are cases against railroads for killing stock. If a declaration alleges that a railroad killed stock by negligently running a train over it, as in those cases, that would be sufficient, without more details of the circumstances of running over it; but I take it that it would not be enough simply to say that the company negligently killed a horse. You must aver the duty, and aver the existence or presence of negligence in its performance, and specify the act working damage, but need not detail all the evidential facts of negligence. You must tell the defendant, even under this general rule, that he negligently did a specific act doing harm. In other words, you may say that the defendant negligently did or did not do so and so, without detail as to the mere negligence, but you must state the acts that are the basis of liability. If the negligence cannot be otherwise charged, they must be given. As said in *Berna v. Gaston Gas Coal Co.* 27 W. Va. 285, 55 Am. Rep. 304, the object of a declaration is to give the facts constituting the cause of action, so they may be understood by the party who is to answer them, and by the jury and court who are to give verdict and judgment on them; and though, in an action for negligence, it is not necessary to state with particularity the acts of omission or commission, yet, lest too loose a practice shall grow under this rule, it may be well to state the warning given in *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 810, that "this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof." In that case it was held not enough to state that the railroad company was working its road with cars and conducted itself so negligently in its business that it inflicted severe bodily injuries, by reason of which the person died, without stating where the deceased was, or how injured. To avoid misunderstanding, it is important to add that the declaration need not state the particular facts that are not primary or main facts, but only are evidence of primary facts. When the necessary primary facts are given, then all other facts merely incidental that go to prove the primary facts may

be proved without specification in the declaration. *Davis v. Guarnieri*, 45 Ohio St. 470; *Ware v. Gay*, 11 Pick. 106; *McCaulley v. Davidson*, 10 Minn. 418 (Gil. 885) 422.

The declaration in this case states that the defendant operated an electric plant for the manufacture and sale of electricity, and had its wires over the streets of the city of Wheeling for the conveyance of electricity in dangerous currents, and that it was the duty of the defendant to exercise all possible care in putting up and operating its plant and wires, and constantly inspecting the wires and other appurtenances and appliances, and in seeing that they were strong, suitable, and safe, and that the wires and appurtenances were at all times safely secured, and to immediately attend to and repair broken or defective wires and appliances, and, when any of the wires were down upon the street, to cut off from them the current of electricity, that the lives and limbs of persons on the streets might not be endangered; yet the defendant carelessly and negligently suffered one of its wires at the corner of Market and Sixteenth streets to be so insufficiently secured that it came down, and lay on the street, and Snyder stepped upon it, received the electric current, fell prostrated by it, and continued to lie there, and receive the current into his body, and therefrom died. This declaration surely says that it was the duty of the defendant to safely secure the wires, and that, from being insufficiently secured, they came down into the street, and there wrought the injury. This one duty, breach, and injury save the declaration from demurrer. I think, too, the declaration may, by implication, be construed to say, what it should have positively averred, that the defendant failed to cut off the current from the wire when down, as it avers that the current entered Snyder's body, and he fell, and continued to receive it, which could not be so had the current been cut off. "A declaration will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendment." *Hogg, Pleading & Forms*, § 140. Those were the only two omissions of duty specified. None other could be proved, for, even where there may be allowable a general charge of negligence, yet, if the declaration does give certain specifications of negligence as sources of the injury, others cannot be proved. *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 629, 36 Am. Rep. 825. Therefore evidence was not admissible to prove want of or bad insulation of wires at the place of accident and elsewhere, and that wires came in contact with wet posts and that nobody was kept on duty to repair broken wires; that on a certain other occasion, when a wire was out of fix, someone telephoned from the plant that there was no one to fix the wires; that no instruments were kept to discover breaks; and at other places the wires were bare. It might seem that some of this evidence might come in under the allegation of insecure fastening, but it relates more to the condition of the wires, not to their fastening, and there is no allegation of defective wires. The declaration does assign certain duties as imposed on the company, among them the duty to attend to broken wires, and to inspect wires and appa-

ratus, and to see that all wires were strong, suitable, and safe; and, if this recital of duties had been followed up with averment that the insulation of the wires was defective, and in places the wires bare, coming in contact with wet poles, thus injuring and rendering them unsafe and liable to break, or even the general allegation that the wires were unsuitable, weak, and unsafe, in negation of the duty assigned in the recital, and that servants were not kept for inspection, and that careful repair was not made, and that no appliances were kept to announce at the plant fall of wires, and no means existed for discovery of their fall, this evidence would have been admissible. But what, in this declaration, gave the defendant warning of all this evidence? I think evidence of failure to inspect was admissible as evidence of insecurity of fastening and on principles above stated. It may be said that the evidence that no instrument was kept to tell of a fallen wire ought to come in under the allegation that it was the duty to cut off the current, and that the current continued to flow after the fall of the wire; but that would be going very far. None of this evidence could get in under this declaration but by a liberality too loose,—one ignoring the defendant's rights,—some of it not at all. I here allow the evidence that with certain means of ascertaining an accident the current could be shut off at once, under the charge that it was the duty to shut it off, and the allegation made by implication that it continued after the fall of the wire; and that is going pretty far. All this evidence, as a court can readily see, was calculated to and did wield a potent effect in the case, and the error of its admission cannot be looked over as harmless. It was an important factor in the trial.

From these considerations it comes that plaintiff's instruction No. 2 was bad as presenting a theory for recovery which, though made relevant by some evidence, yet there was no warrant for under the declaration. It said that if the defendant failed to have the most reliable and best appliances to discover broken wires, the company, in the absence of contributory negligence, was liable. I think No. 3 good under the charge of insecure fastening. I think No. 2 should have said "good, reliable, and efficient" means and appliances, instead of "best and most reliable." *Berns v. Gaston Gas Coal Co.* 27 W. Va. 286, 55 Am. Rep. 304, points 9, 10. An instruction for defendants (No. 4) told the jury that the only negligence charged in the declaration was in suffering wires to be so insufficiently secured as to fall, and therefore all evidence and argument as to other suggestions of negligence must be disregarded; yet plaintiff's instructions held the company liable for not only that, but for failure to have the best appliances for discovery of broken wires, and for failure to exercise the highest degree of care in the construction, inspection, and repair of wires and poles; and so the instructions were inconsistent,—one saying to the jury that the case involved only one basis of recovery, others giving several. Which would the jury follow? Likely those giving several. A good instruction does not cure a bad one, but it must be withdrawn. *McKelvey v. Chesapeake & O. R. Co.* 35 W. Va.

500. Inconsistency in instructions is error. *Parkersburg Industrial Co. v. Schulte*, 43 W. Va. —, 27 S. E. 255. I think, as Dr. Walden had examined the dead body of Snyder in his effort to resuscitate life, he could give his opinion as to the cause of his death. His opinion, however, should be confined to his knowledge based on that examination; but the court allowed him to state his opinion, not only on that, but also from what he could learn,—that is, hearsay. I think it is inadmissible to ask him whether there was any indication of death from any other cause than electricity, so as to negative any other death-producing cause.

I come next to an important question. Suppose there is no evidence of negligence on the part of the defendant, does the mere fact that the wire fell create a prima facie presumption of negligence, sufficient, in the absence of something appearing in the case to repel the presumption, to support the action? This involves the rule or principle of *res ipsa loquitur*,—the thing itself speaks. A wire charged with a deadly current of electricity falls from its proper place of elevation above the street to the surface of the street, and there, by contact with a man lawfully passing along the highway, kills him with its current. Are we to presume that its fall came from some negligence of the owner, unless the circumstances of the case or facts shown by him shall show that its fall is not attributable to his negligence, but from some defect which that reasonable care and prudence proper in the case of such deadly wire was unable to discover, or some accident beyond his control; in other words, from inevitable accident? I answer that the law raises a prima facie case of negligence. As stated in that great work, 16 Am. & Eng. Enc. Laws, p. 448: "As a rule negligence is not presumed. But there are cases where the maxim, *Res ipsa loquitur* is directly applicable, and from the thing done or omitted negligence or care is presumed." The rule cannot be better stated, in its generality, than as given in *Scott v. London & St. K. Docks Co.* (1865) 3 Hurlst. & C. 596: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." In those words it is approved in 1895 in *Shafer v. Lacock*, 168 Pa. 497, 29 L. R. A. 254, a case where two workmen were repairing a roof, having a fire pot, and from it a fire resulted, destroying the house. "When the physical facts of an accident themselves create a reasonable probability that it resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence of negligence, in conformity with the maxim, *Res ipsa loquitur*," is the apt language in which the principle is stated in *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75. One man is hurt from the works or property of another,

when, from the nature of the case, he would not likely have been hurt without negligence of that other. May he not ask of that other an explanation, or, on his failure to give it, then damages for his injury? Take the case where one, in passing along a street, is hurt by a barrel falling from a door above, or by a brick falling from a wall or scaffold, or by a falling shutter or wall, or the like. The mere occurrences in themselves import negligence. Especially take the cases where things of great danger are used in public highways, where multitudes constantly and lawfully pass, their very nature requiring the highest degree and constancy of care, and one is killed from it being out of place or defective, why may we not logically and fairly assume negligence, unless other plausible explanation appears? The latest work on Torts (2 Jaggard, Torts, p. 864) says: "A live wire, however, is exceedingly dangerous, so that proof of contact therewith, and consequent damages, makes it a complete case of prima facie negligence, and throws the burden on the defendant to show that such wire was in the street without fault on his part. Generally, companies using electricity on lines along a street are charged with the highest degree of care, having due reference to existing knowledge in the construction, inspection, and repair of their wires and poles, and in the use of devices to guard against harm." This doctrine needs no further discussion from me. It is well sustained by American and English authority. 16 Am. & Eng. Enc. Law, p. 449, and notes; 2 Jaggard, Torts, 938; Whart. Neg. § 421; Cooley, Torts, 799; Bigelow, Torts, 596; Shearm & Redf. Neg. § 60; full note *Huey v. Gahlenbeck* (Pa.) 6 Am. St. Rep. 793, —a building falling into street; *Mulcairns v. Janesville*, 67 Wis. 24,—wall of a cistern falling; *Dixon v. Plums*, 98 Cal. 384, 20 L. R. A. 698,—chisel falling from a scaffold; *Houston v. Brush*, 66 Vt. 331,—injury from being struck by a wheel from a tackle block, attached to a derrick; note in *Philadelphia, W. & B. R. Co. v. Anderson* (Md.) 20 Am. St. Rep. 493; *Thomas v. Western Union Teleg. Co.* 100 Mass. 156,—telegraph wire swinging over a street too low, so as to obstruct travel; *Clare v. National City Bank*, 1 Sweeny, 539,—injury from plank falling from one's premises; *Houser v. Cumberland & P. R. Co.* 80 Md. 146, 27 L. R. A. 154,—cross-tie falling from a moving car; *Uggle v. West End Street R. Co.* 160 Mass. 351; *Morris v. Strobel & W. Co.* 81 Hun, 1,—sign board falling in street. It is clear that this doctrine applies in cases where a passenger on a railroad, or other conveyance of a common carrier, is injured, there existing in such cases a presumption of negligence against the carrier, because there is an implied contract to safely convey; but it is not confined to such cases. 20 Am. St. Rep. 493; *Rose v. Stephens & C. Transp. Co.* 11 Fed. Rep. 438. There it is said that, though the presumption is more frequently applied in such cases, yet there is no foundation in authority or reason for such limitation, as the presumption originates from the nature of the act, not from the relation of the parties, and is indulged whenever, as a legiti-

mate inference, the occurrence is such as, in the ordinary course of things, does not take place when the proper care is exercised.

This doctrine has been applied to those using electricity in streets. *Western U. Teleg. Co. v. State, Nelson*, 82 Md. 293, 31 L. R. A. 572; *Haynes v. Raleigh Gas Co.* 114 N. C. 208, 26 L. R. A. 810. Public policy, from sheer necessity, must require of a person or corporation using the current of electricity in high tension along highways a very high, if not the highest, degree of care, and this high degree would seem all the more reasonable to justify this rule of presumptive negligence in such cases. The degree of care in the nature of the case being high, and there being little danger if such care be exercised, if accident happen there is afforded a probability of the absence of that care. This high degree of care is exacted of operators of electricity by the cases just cited, and by *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566; *Giraudi v. Electric Improv. Co.* 107 Cal. 120, 28 L. R. A. 596; *Ennis v. Gray*, 87 Hun. 355. *Croswell, Electricity*, § 249, says that the mere fact that an electric wire sags or falls, if unexplained, is sufficient proof prima facie of negligence. But juries must understand that this presumption is by no means final or conclusive. Uniformly careful, prudent management commensurate with the dangerous character of the works, adequate to the safety of the public, in the absence of specific neglect connected with the accident, will repel such presumption. We must not forget that misfortunes do occur from inevitable accident. A wire may have some defect which the most astute care will not discern. A wire originally good may come to be defective and break, when no human skill could detect its defect. Time and wear deteriorate man and all the means and instruments he uses to gain a living. Paralysis and failure may come upon him at any moment. Whether there is culpable blame is a question for a fair-minded jury under all the circumstances.

It follows from what I have said that the court properly refused to exclude the plaintiff's evidence, as it tended in an appreciable degree to sustain the case, so as to make it proper to go to a jury. So I may say as to the defense of contributory negligence. *Carrico v. West Virginia C. & P. R. Co.* 35 W. Va. 339, point 3; *Yeager v. Bluefield*, 40 W. Va. 484. And the defense waived the motion to exclude by going on with its evidence. *Robinson v. Welty*, 40 W. Va. 335; *Core v. Ohio River R. Co.* 38 W. Va. 456. And it follows from the views above given that the court did not err in refusing to give defendant's instruction No. 2, that the mere fact that Snyder was injured raised no presumption of negligence against the defendant. In an instruction in lieu of it the jury was told that the mere fact of injury raised no presumption of negligence, unless the proof establishing the injury showed circumstances from which some negligence or want of care may be attributed to the defendant. This was error against plaintiff, because it negatived the rule that the fall of the wire and injury afforded a prima facie case of negligence, 39 L. R. A.

and was beneficial to the defendant. Defendant asked instruction 9, saying that, if the wire where the accident occurred was defective, and the injury resulted from that defect, that raised no presumption of negligence, and the plaintiff could not recover unless he proved by a preponderance of evidence, in addition to these facts, that the defect occurred through the negligent act or default of the defendant. This instruction is bad. Granting a defect in the wire killing the deceased, a prima facie case for recovery is made. Defendant asked and was refused instruction No. 10: "Where an event takes place, the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences designated as purely accidental, and, there being no presumption of negligence in such cases, the party who asserts negligence cannot recover without showing enough to exclude the case from that class of accidental occurrences." In *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 412, cited to support the instruction, it is admitted, I think, that in cases where a presumption of negligence arises, the principle of this instruction does not apply. The instruction is bad as applied to this case, in view of the rule above stated of a presumption of negligence from this occurrence. Defendant was refused instruction No. 11: "Where the circumstances of an accident indicate that it may have been unavoidable notwithstanding reasonable and proper care, the plaintiff charging negligence cannot recover without showing that the defendant has violated a duty incumbent upon it from which the injury followed in natural sequence." I think this instruction proper, in view of the defendant's evidence as to good management, and evidence by witnesses on both sides that electric wires sometimes break from causes impossible to discover. Of course, though the prima facie presumption of negligence from the broken wire exists, yet it is subject to be met by any and all circumstances, features, and evidence in the case tending to give the misfortune a cause not springing from the company's fault, but purely from an accident, which no reasonable human care could prevent, a hidden defect in the wire, electrolysis rendering it suddenly weak, or whatever cause. This instruction presented the question to the jury on the whole breadth and aspect of the case, whether the misfortune came from unavoidable accident; and it seems to me that, when the circumstances do indicate unavoidable accident as the cause, it ought to be shown or appear that it was not. Why was not the defendant entitled to this instruction? I think instruction No. 12 asked by defendant was improperly refused. *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404. "(12) The defendant, in erecting and maintaining its wires, was only bound to anticipate such combinations of circumstances and accidents and injuries therefrom as it may reasonably forecast as likely to happen, taking into account its own past experience and the experience and practice of others in similar situations, together with what is inherently probable in the condition of the wires as they relate to the conduct of its business." As the

case is to be retried, I shall not discuss the merits on the evidence as to the liability or nonliability of the defendant, either with or without reference to contributory negligence, as the evidence may not be the same on a sec-

ond trial, and, if not, this court ought not to express an opinion on part of the evidence.

We will therefore reverse the judgment, grant a new trial, and remand.

KENTUCKY COURT OF APPEALS.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Appt.*,

v.

Benjamin F. JARBOE *et al.*

(.....Ky.....)

1. One insured under a policy entitling him to a paid-up policy in proportion to the premiums paid, after payment of three annual premiums, provided he surrenders the policy before making default or within six months after default in the payment of premiums, is entitled to a paid-up policy after making three payments, although the original policy is not surrendered or a demand made for the paid-up policy within the six months after default, if such demand is made during the lifetime of the insured.

2. The delivery of a life insurance policy which is void for failure to pay a premium is not a prerequisite to the institution of an action to obtain judgment for a paid-up policy in accordance with a provision of the policy, as such original policy is of no effect and can be of no value to any person.

(October 20, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Marion County in favor of plaintiffs in an action brought to compel the issuance of a paid-up insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Grubbs & Morancy, for appellant:

The court held in *Hexter v. United States L. Ins. Co.* 91 Ky. 356, that because Mrs. Hexter had not applied to the company within the twelve months after ceasing to pay premiums as provided in the policy she failed to perform the condition precedent stipulated for, and therefore had no claim whatever against the insurance company.

The court held in *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 427, 15 L. R. A. 449, that the six-months limit for applying for paid-up insurance was of the essence of the contract, and that because Barbour had not applied within the stipulated time he had no claim against the company.

Mery v. Phœnix Mut. L. Ins. Co. 14 Bush, 51, is radically different from the case at bar.

In *Johnson v. Southern Mut. L. Ins. Co.* 79 Ky. 404, it was plain that the court was evidently of the opinion that Johnson should have

applied for a paid-up insurance within the stipulated time, even though it was only thirty days.

Where the contract of insurance provides that after default in the payment of premiums the assured shall be entitled to paid-up insurance for a proportionate part of the whole sum assured, if he shall surrender the old policy for the new within a certain specified time, time is of the essence of the contract, and the assured can have no claim against the company unless he complies with the condition precedent, and makes his demand within the stipulated time.

It is not so important that the law should be rightly settled, as that it should remain stable after it is settled.

South v. Thomas, 7 T. B. Mon. 62; *Tribble v. Taul*, 7 T. B. Mon. 456; *Deposit Bank v. Daviess County*, 19 Ky. L. Rep. 265.

If it is expressly stipulated that the policy must be surrendered and receipted in full within a specified time after default in payment of a premium to entitle the assured to a paid-up policy, such a provision must be complied with, and the option must be exercised within the time designated, otherwise it is lost, for time is of the essence of the contract.

2 Joyce, Ins. § 1185; *Klein v. New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662; *Sheerer v. Manhattan L. Ins. Co.* 20 Fed. Rep. 886; *Knapp v. Homœopathic Mut. L. Ins. Co.* 117 U. S. 411, 29 L. ed. 960; *New York L. Ins. Co. v. Statham*, 98 U. S. 24, 28 L. ed. 789; *Universal L. Ins. Co. v. Whitehead*, 58 Miss. 226, 38 Am. Rep. 322; *McLaughlin v. Equitable L. Assur. Soc.* 88 Neb. 725; *Hudson v. Knickerbocker L. Ins. Co.* 28 N. J. Eq. 167; *People v. Widows' & Orphans' Ben. L. Ins. Co.* 15 Hun, 8; *Smith v. National L. Ins. Co.* 108 Pa. 177, 49 Am. Rep. 121; *Universal L. Ins. Co. v. Devore*, 83 Va. 267; *Phœnix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410; *Chase v. Phœnix Mut. L. Ins. Co.* 67 Me. 85; *Atty. Gen. v. Continental L. Ins. Co.* 98 N. Y. 70; *Williams v. Republic Ins. Co.* 19 Mich. 469; *Pitt v. Berkshire L. Ins. Co.* 100 Mass. 500; *Robert v. New England Mut. L. Ins. Co.* 1 Disney (Ohio) 355; *Coffey v. Universal L. Ins. Co.* 7 Fed. Rep. 801; *Moses v. Brooklyn L. Ins. Co.* 50 Ga. 196; *Thompson v. Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765; *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696, 28 L. ed. 866.

Guffy, J., delivered the opinion of the court:

This suit was instituted in the Marion circuit court by the appellees against the appellant, seeking to obtain judgment for a paid-up

NOTE.—For paid-up policies of insurance, see *Northwestern Mut. L. Ins. Co. v. Barbour* (Ky.) 15 L. R. A. 449, and note.
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insurance policy. It appears from the petition that a \$8,000 policy of life insurance was issued by appellant on the life of said Benjamin F. Jarboe, payable to his wife, appellee herein. Said policy was issued on what is known as the "twenty-year distribution plan," and on which said Jarboe was to pay only twenty annual payments. The annual premiums amounted to \$98.80 each. It is alleged that appellee paid the first three annual payments, the last of which was made January 2, 1891. It is alleged in the petition that plaintiff was unable to pay the premium falling due January 2, 1892. It is also alleged in the petition that, after the payment of three annual payments, appellees were entitled to a paid-up policy for the sum of \$450, and that before the filing of this suit the appellees demanded of Will R. Ruble, acting agent of appellant, a paid-up policy for said sum. Appellees averred that they were ready to deliver and surrender to appellant the policy aforesaid, and all their right, claim, and interest in the same, on the issuing and delivering to appellees a paid-up policy for the sum of \$450, and that appellant and its agents failed and refused to issue to appellees any paid-up policy, and failed and refused to deliver same, or to issue any paid-up policy, on their making the demand as above stated. It is alleged that said policy should be made payable to Hattie Jarboe, at the death of said Benjamin F. Jarboe. It was also claimed in the petition that there should be added to the sum of \$450 dividends thereon. The insurance policy was made part of the petition. One of the provisions reads as follows: "After three full annual payments have been paid upon this policy, the company will, upon the legal surrender thereof, before default in payment of any premiums, or within six months thereafter, issue a nonparticipating policy for paid-up insurance, payable as hereinafter provided, for the proportion of the amount of this policy which number of full years' premium paid bears to the total number required." Appellant demurred to the petition, which demurrer was overruled by the court. Thereupon appellant filed its answer, which may be taken as a traverse of all the material averments of the petition, except the fact of the issue of the policy as claimed, and the payment of three payments. Appellees' demurrer to the answer was sustained by the court, and, appellant failing to plead further, judgment was rendered, directing the appellant to issue and deliver to plaintiffs a nonparticipating paid-up policy for the sum of \$450, on the life of plaintiff Benjamin F. Jarboe, payable, at the death of said Benjamin F. Jarboe, to his wife, Hattie Jarboe, etc., and from that judgment this appeal is prosecuted.

The contention of appellant is that, inasmuch as the policy issued by it to the appellees was not surrendered before default in the payment of premium had occurred, or within six months thereafter, the right to the paid-up policy was forfeited, or the obligation of appellant to issue a paid-up policy had terminated, and cites *Hexter v. United States L. Ins. Co.* 91 Ky. 357, and *Northwestern Mut. L. Ins. Co. v. Barbour*, 92 Ky. 429, 15 L. R. A. 449, in support of its contention. It will be seen from an examination of the first-named case that the

policy was issued in 1887, and that nearly fifteen years thereafter, the assured in the meantime having died, suit was brought to recover upon the policy; hence the facts in the case at bar are essentially different from the case *supra*. In the case in 92 Ky. it will be seen that several notes were executed by the assured for the payment of premiums, and default made as to the payment of the notes; that no money was ever paid upon the policy either as premiums or interest on the notes given for the premiums after December 8, 1884; and when default was made, December 8, 1886, there was indebtedness for premiums of the prior date, and of interest about \$100, and within about three years thereafter the action was brought to recover. That case is unlike the case at bar. The case of *Montgomery v. Phoenix Mut. L. Ins. Co.* 14 Bush, 51, is a well-considered case, and in which, it seems to us, the question involved is practically the same involved in the case under consideration. The appellee in that case had issued a policy of insurance to Montgomery on his life, in the sum of \$10,000, payable in ten annual payments. Among other conditions the following condition was embraced in the policy: "It being understood and agreed that if, after the receipt by this company of not less than two or more annual premiums, this policy should cease in consequence of the nonpayment of premiums, then upon a surrender of the same, provided such surrender is made to the company within twelve months from the time of such ceasing, a new policy will be issued for the value acquired under the old one, subject to any notes that may have been received on account of premiums; that is to say, if payments for two years shall have been made, it will issue a policy for two tenths of the sum originally insured; if for three years, for three tenths; and in the same proportion for any number of payments, without subjecting the assured to any subsequent charge except the interest annually in advance on all premium notes remaining unpaid on this policy." It seems, after making five payments, assured made default, and failed to surrender the policy, or to demand a new one, within the time prescribed in the policy. The beneficiary in the policy, Mrs. Montgomery, brought suit to recover five tenths of the amount insured. The court below dismissed her petition, and she prosecuted an appeal to this court. The court, in discussing the question, said: "Three questions are presented for decision, which may be stated thus: (1) Did the failure to surrender, or to offer to surrender, the policy within twelve months after default in the payment of premiums, release the company from any further liability on the policy for any part of the sum insured? (2) Was the policy forfeited by the failure to pay the note for \$129.40 when due? (3) If the foregoing questions be answered in the negative, how much is the appellant entitled to recover?" The court further said: "Prior to September 5, 1872, the insured had paid four full annual premiums, and on that day had a right to demand a paid-up policy for \$4,000, not *ex gratia*, as appellee's counsel seem to intimate, but because it had been paid for. Each annual premium paid for carrying the policy for the current

year, and for \$1,000 of paid-up insurance, and at the end of four years a paid-up policy was as certainly paid for, at the contract price, as the four years of current insurance. If, as we assume for the present, the premium for the year commencing September 5, 1872, was not paid, the stipulation is that the company shall not be liable for the payment of the whole sum assured, but only for a part thereof proportionate to the annual payments made as above specified, and this policy shall cease and determine." We quote further from the case *supra*: "Time is not generally of the essence of contracts." 2 Story, Eq. Jur. § 776. It may be so when the contract is executory on both sides, or when the nature of the transaction or the stipulation of the parties shows it was so intended by them. But when the defendant has received the entire consideration for performance on his part, and has no other defense except that the plaintiff did not come within the stipulated time to demand performance, we are not acquainted with any authority or legal principle upon which such a defense can be upheld in a court of equity. If, for any reason, the defendant has become unable to perform his agreement, or performance would be more difficult or onerous at the time of the demand than it would have been at the time stipulated, there might be plausibility in such a defense, and a court of equity would no doubt either deny all relief to the plaintiff, or grant relief upon terms that would compensate the defendant for the additional burden resulting from the plaintiff's delay. But nothing of the kind is pretended in this case. The proposition upon which this branch of the company's defense rests in this, and nothing more. It is admitted that the assured paid for a paid-up policy for \$4,000, and that if the old policy had been surrendered at any time between September 5, 1872, and September 5, 1873, the company would have been bound to issue a new policy for that sum; and, because the old policy was not surrendered within that time, that the assured has lost the benefit of \$4,000 of paid-up insurance."

It will be seen from the policy in the case at bar that it was distinctly provided that, if the assured paid three annual payments, he was then entitled to a paid-up policy in proportion to the premiums paid, provided he surrendered the policy before he made default, or within six months after default in the payment of premiums. It is clear, under the contract, that the three payments not only continued the policy in force for the time being, but also paid, at the election of the assured, for a paid-up policy in proportion to the premiums paid. The contract has none of the elements of an offer to sell, but it is a clear case in which the assured has bought and paid for a certain thing. It has a stipulation, in effect, that he shall demand it within six months after his abandonment of the other benefits acquired under the same contract. The only defense presented in this case is the simple fact that the appellees had not, within six months after the failure to pay the premium due, surrendered the original policy, and demanded the issuing of the other. It is not pretended that it was any more difficult or expensive for the appellant to issue a paid-up policy when de-

manded than if it had been demanded at the end of the six months, nor can it be of any pecuniary consequence to defendant whether the forfeited policy was delivered up before the institution of this suit. The original policy, being dead and of no effect, could be of no value to any person. It seems clear to us that, under the principles announced in *Montgomery v. Phoenix Mut. L. Ins. Co.*, the appellees were entitled to recover in this action, and we adhere to the doctrine announced in that decision. To the extent, if any, that the principles announced in the decisions of *Northwestern Mut. L. Ins. Co. v. Barbour and Hexter v. United States L. Ins. Co.* conflict with the doctrine announced in *Montgomery v. Phoenix Mut. L. Ins. Co.*, they are overruled. See *Johnson v. Southern Mut. L. Ins. Co.* 79 Ky. 408, and *Southern Mut. L. Ins. Co. v. Montague*, 84 Ky. 653.

For the reasons indicated, the judgment is affirmed.

Rehearing denied.

W. R. MILWARD

v.

Annie E. SHIELDS.

(.....Ky.....)

A claim for funeral expenses of a mortgagor of land is not entitled to priority over the lien of the mortgage, under Stat. § 3893, providing that if the personal estate of a decedent is not sufficient to pay his liabilities the burial expenses shall be paid in full "before any pro rata distribution shall be made."

(October 20, 1897.)

A PPEAL by claimant from a judgment of the Circuit Court for Fayette County refusing to allow his claim for funeral expenses out of assets of the estate of Fielden Powell, deceased, as against the claim of a mortgagee. *Affirmed.*

The facts are stated in the opinion.

Messrs. Falconer & Falconer, for appellant:

There is no distinction between real and personal property, and the whole fund produced by the sale of the real property in this action must be distributed as legal assets of the deceased.

Muldoon v. Crawford, 14 Bush, 125.

The claim for funeral expenses has been adjudged prior and superior to any lien debts existing at the death of decedent.

Best v. Spooner, 4 Ky. L. Rep. 602.

"Funeral expenses" says Lord Coke, according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatsoever; if he has no goods then they should be allowed of the proceeds of his real property so to pay his debts and settle his estate.

3 Coke, Inst. p. 202.

NOTE.—As to liability of decedent's estate for funeral expenses in general, see note to *Fogg v. Holbrook* (Me.) 33 L. R. A. 660.

The law authorizes an executor to defray a certain expense attendant upon the burying of the deceased before he pays the costs of proving the will, and as the expense of proving a will is payable before debts owing by the testator, the law empowers the executor to pay a certain expense for the funeral before he discharges any debt owing by the deceased, even if it be a debt due to the Crown.

Ram, Assets, p. 258; *King v. Wade*, 5 Price, 621; 2 Bl. Com. 208; *Patterson v. Patterson*, 59 N. Y. 585, 17 Am. Rep. 384; *Parker v. Lewis*, 2 Dev. L. 21; *Trueman v. Tilden*, 6 N. H. 202; 2 Kent, Com. *416; Schouler, Exrs. & Admsrs. § 421.

Necessary funeral expenses are not a debt because they are not contracted until after the death of the party by his executor or administrator, as the case may be, or by some person interested in the burial of the deceased, and when so created, to the extent that they are reasonable, they become a charge against the estate and should be paid first before taxes or claims in favor of the state and before costs of administration or fees or commissions for settling the estate or any liens or encumbrances that may have been created by contract or by operation of law.

Wms. Exrs. 4th Am. ed. 829; 5 Am. & Eng. Enc. Law, p. 248; 7 Am. & Eng. Enc. Law, p. 197; Redf. Wills, pt. 2, p. 228.

Mr. C. T. Hanson for appellee.

Du Relle, J., delivered the opinion of the court:

The sole question for decision in this case is whether the lien of the mortgagee of real estate is superior to the claim of an undertaker for funeral expenses of the dead mortgagor. So far as we are informed, the question has never been decided by this court, and we have not been referred to any authority on the question, except the case of *Best v. Spooner*, 4 Ky. L. Rep. 602, in which the superior court divided, the majority holding that a claim for funeral expenses was superior to the lien of an attachment levied before decedent's death. The reasoning of the majority in that case is difficult to follow, if we concede to the decedent the power to dispose of his property, and give due regard to the obligation of contracts. It is not sought to assert a priority in favor of funeral expenses under the statute (Ky. Stat. § 3868), which provides that "if the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent, and the cost and charges of the administration of his estate, and the amount of the estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court of record to, and remaining in the hands of, a decedent, shall be paid in full before any *pro rata* distribution shall be made." Under the statute, funeral expenses and claims against the decedent in a fiduciary capacity are put upon the same footing, and no one has yet claimed that money due to a ward from the estate of a decedent has priority over an antecedent mortgage lien. The statute appears to us to apply entirely to assets for distribution in the hands of the personal representative, and was so conceded in the opinion of Judge Richards in the superior court; and, 39 L. R. A.

while the proceeds of realty—the personal estate being insufficient—are assets for the payment of debts, and subject to the rule of distribution laid down in the statute quoted (*Muldoon v. Crawford*, 14 Bush, 125), the proceeds of realty covered by prior lien are not assets in the hands of the personal representative for distribution. The statute, moreover, gives priority to funeral expenses over those debts only which come in for a *pro rata* distribution, and no *pro rata* distribution can be made to a mortgage creditor except upon the residue of his debt after he has exhausted the mortgaged property. As well said by Judge Reid in the dissenting opinion in the case referred to: "The statute has no reference to, nor any effect upon, bona fide liens secured to creditors of the decedent under the general law, such as liens by mortgage, or liens acquired—like attachment liens—by operation of law, but regulates priorities in reference only to unsecured liabilities, gives certain liabilities and expenses priority, and then puts all other debts and liabilities on equal footing. It leaves valid liens acquired on the decedent's estate where the rules of the general law leave them. Such liens have no validity by virtue of the statute in question, but exist independent of it. They overrule burial expenses, claims due the estate of a dead person, or of a ward, or of a person of unsound mind committed by a court of record to and remaining in the hands of a decedent, and the costs and charges of administration, except so far as the latter may necessarily be incurred in ascertaining the lien, and pursuing it to judgment, with a view to determine whether any assets, personal or real, may be left, after the encumbrance is satisfied, for distribution under the terms of the statute. Every lien may be considered exposed to this peril, but no more. If burial expenses are allowed to overreach a valid lien, acquired in good faith before the death of the decedent, so may what he owes as fiduciary to the estate of a dead person, of a ward, or of a lunatic, and the lien might be totally destroyed, if such claims had priority; and no matter how acquired in the lifetime of the decedent, they might be as worthless as the paper by which they are evidenced. The burial expenses and the other statutory priorities are placed on the same footing, and are of the same dignity, and are superior only to the general unsecured liabilities of the decedent. They cannot prevail against and consume liens created voluntarily by the decedent before he dies, or by the equally binding operation of law, but stand secure in their inherent force, by virtue of the general law governing them." But in this case, as in the case in 4 Ky. L. Rep. 602, it has been sought to justify the claim of priority for funeral expenses under the common law. The authorities quoted in support of the majority opinion do not sustain the doctrine there laid down. Each of the authorities quoted is in reference to the powers and duties of executors or administrators in the distribution of the assets among the general creditors. Ram, Assets, 258; *King v. Wade*, 5 Price, 621; Lomax, Exrs. 1, 283; 2 Bl. Com. 508; *Patterson v. Patterson*, 59 N. Y. 585, 17 Am. Rep. 384; *Trueman v. Tilden*, 6 N. H. 202; *Parker v. Lewis*, 2 Dev. L. 21; *Hancock v.*

Podmore, 1 Barn. & Ad. 260. In the case of *Parker v. Lewis*, 3 Dev. L. 21 (not 8 Dev., as cited), it was held that funeral expenses "form a charge upon the assets, independently of any promise by the executor or administrator, upon the ascertainment of the fact that they are of that description, and proper for the estate and degree of the deceased." In that case the question was not one of lien, but simply of priority in administration between the funeral expenses and a judgment debt in favor of the administrator. In *Trueman v. Tilden*, 6 N. H. 202, it was stated that "funeral expenses are a charge upon the estate of a deceased person," the word "estate" being used to mean "assets," its technical meaning when employed in reference to a personal representative. The sole question in that case was whether the administrator, by charging the amount of the funeral expenses in his administration account, had made himself personally liable. The citation from Sir Edward Coke (to be found in 3 Inst. 202) goes to the point only that proper funeral expenses are to be allowed of the goods of the deceased, before any debt or duty whatsoever. No case has been referred to, or authority cited,—and we are confident none can be found,—in which it was held, or the doctrine was laid down, that a claim for funeral

expenses, which is not a debt against the estate at all, but more properly a credit to the personal representative, is superior to the lien of a mortgage, whereby the decedent devoted so much as might be necessary of certain specified property to the payment of the mortgage debt. The decedent, up to the date of his death, had absolute control of his property. He could dispose of it by deed or mortgage, and, in the latter case, though he did not part with the legal title, he did part with the equity. To the extent that it was necessary, his estate in the property mortgaged was appropriated to the payment of the mortgage. Nor does the argument drawn *ex necessitate* appear to be meritorious. It is true that when a man dies he must be buried, but it is equally true that while he lives he must be fed and clothed, and when sick he should receive medical attention. It is *pro bono publico* that these things should be done. And, if a man have assets, these things should be paid for out of such assets; but, if not, the state provides poor houses, hospitals, and pauper burial. There is no reason why a claim for one of these things more than another should be permitted to override the contract rights of a mortgagee.

Wherefore the judgment of the Lower Court is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Thomas F. TRACY

v.

Joseph BANKER.

(.....Mass.....)

1. **Unincorporated associations of workmen**, although not manufacturers or vendors of goods, are within the protection of Stat. 1895, for the prevention of the use of counterfeit labels and stamps of "any person, association, or union."
2. **The illegality of some incident** or particular of the purposes of a trade union will not deprive the union of the protection of the law for what would otherwise be its rights in respect to the use of a union label.
3. **The fraudulent use of a trade-union label** before the passage of a statute giving such an unincorporated union a remedy for such use of its label does not give the wrongdoer any exemption from the statute.
4. **The use of real labels in a fraudulent way** is as unlawful, under Stat. 1895, chap. 462, as the use of counterfeit labels.

(February 8, 1898.)

REPORT by the Superior Court for Suffolk County for opinion of the Supreme Judicial Court of a suit brought to enjoin defendant from using a label alleged to belong to the cigar makers' union. *Decree for plaintiff.*

The facts are stated in the opinion.

NOTE.—For trademark or label of trade union, see *State v. Bishop* (Mo.) 29 L. R. A. 200, and *note*. 9 L. R. A.

Mr. William Schofield, for plaintiff:

The effect of the legislation in this state is like that of the trademark registration acts in England. It provides a new method of acquiring, or at least of proving, the right to a trademark, *viz.*, registration, and it enables persons or associations to acquire and put upon an equality with trademarks things which could not be exclusively appropriated by the common law.

Sebastian, Trademarks, 8d ed. pp. 96, 97; *Weener v. Brayton*, 152 Mass. 101, 8 L. R. A. 640.

Equitable remedies have been extended to this label in several jurisdictions, without the help of statutes.

People v. Fisher, 50 Hun, 552; *Bloets v. Simon*, 19 Abb. N. C. 88; *Strasser v. Moonelis*, 108 N. Y. 611; *Hetterman Bros. v. Powers*, 19 Ky. L. Rep. 1087, 89 L. R. A. 211.

The use of the union label by the defendant upon cigars made by him involves a false representation, against which those members of the union who are manufacturers of cigars have a right in equity to relief. This right rests simply upon the ground of fraud.

Chadwick v. Corvell, 151 Mass. 190, 6 L. R. A. 89; *Carson v. Ury*, 39 Fed. Rep. 777, 5 L. R. A. 614; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 709; *Reddaway v. Banham* [1896] A. C. 199.

The plaintiff brings this suit on behalf of and for the use of the union. This right is given by the statute, § 5, act of 1893. The case being here on report, and no question of pleading having been raised below, it may be

treated, if necessary, as a suit by one in behalf of all other members of the union who are manufacturers.

1 Dan. Ch. Pr. 6th Am. ed. 243, and note (a); *Schneider v. Williams*, 44 N. J. Eq. 391.

The defendant contends that he has a right to use the labels because he buys them and they are his property.

By the common law, even a valid trademark was not property.

Chadwick v. Covell, 151 Mass. 193, 6 L. R. A. 889; *Reddaway v. Banham* [1896] A. C. 199.

By the English trademarks acts the person who registers a trademark is proprietor. So, by the act of Congress of 1881 (21 Stat. at L. 502, chap. 188), the person who registers is described as owner. But the ownership is restricted, and not assignable except in special circumstances.

Sebastian, Trademarks, 3d ed. 186, 187; *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769.

This label states that the cigars upon which it is placed are made by members of the cigar makers' international union, and is probably not assignable in any event.

Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149.

If the label is, in any view of the law, assignable, the defendant bought with full knowledge that the copies sold to him were issued by the owner in trust and confidence. The statements printed upon them are such that he cannot use them honestly, and he will not be permitted to use them to effect a fraud.

Evans v. Von Laer, 32 Fed. Rep. 153; *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 388; *Wood v. Burgess*, L. R. 24 Q. B. Div. 162.

Mere delay, in order to be a defense in equity upon the merits, must amount to abandonment or an implication of a grant.

Sebastian, Trademarks, 3d ed. 224-228.

In this case the defendants' conduct is proved to be fraudulent and delay will have no effect even on the question of accounting and damages, except as to matters prior to suit.

Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526.

The objects of the organization, as set forth in its Constitution, disclose nothing unlawful under the rule applied to trades unions.

Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; *Bowen v. Matheson*, 14 Allen, 499; *Snow v. Wheeler*, 113 Mass. 179; Stat. 1888, chap. 134; 1890, chap. 380, and 1894, chap. 487; *Com. v. Chew, v. Carlisle*, Brightly (Pa.) 36; *Master Stevedores' Assn. v. Walsh*, 2 Daly, 1; *Macaulay Bros. v. Tierney*, 19 R. I. —, 37 L. R. A. 455.

The words, "an organization opposed to inferior rat-shop, coolie, prison, or filthy tenement-house workmanship," on the label in its original form, were criticised as indicating a purpose of coercion in *McVey v. Brendel*, 144 Pa. 285, 13 L. R. A. 377, and were upheld in *Cohn v. People*, 149 Ill. 486, 23 L. R. A. 821; and *State v. Hagen*, 6 Ind. App. 167. Those words are not on the label in its present form.

There is nothing to show that the plaintiff union, as a part of its plan or policy, has used unlawful means.

State v. Bishop, 128 Mo. 373, 29 L. R. A. 200; *Snow v. Wheeler*, 113 Mass. 179.

Mr. B. H. Greenwood, for defendant:

The act of 1895 cannot be invoked by any other than an actual merchant or manufacturer. And the plaintiff is neither one nor the other.

Acts of 1895, chap. 462; *Weener v. Brayton*, 152 Mass. 101, 8 L. R. A. 640.

If the plaintiff had any equitable rights, it lost them by lying by "for more than two years," with full knowledge of the facts, and permitting defendant to affix the labels to his cigars.

Phillips v. Rogers, 12 Met. 405; *Plymouth v. Russell Mills*, 7 Allen, 488; *Evans v. Bacon*, 99 Mass. 218.

Holmes, J., delivered the opinion of the court:

This is a bill in equity brought under Stat. 1895, chap. 462, § 3, by the officer of a voluntary association, as authorized by that section, to prevent the defendant from fraudulently using the association's trade-union label, and counterfeits of such label. The defenses requiring notice are that the statute protects only merchants or manufacturers, that the association is not of a kind that will be protected by the court, and laches.

The label is part of the well-known machinery of trades unions, and the use of it is found, if a finding be necessary, to be of value to the union and its members. It would not be traveling too far from the record, perhaps, if we should assume that the use of the label is in fact, as certainly it might be, of far more economic importance to the union than are many or most of the trademarks, strictly so called, which are protected by the courts. Nevertheless, technical difficulties, which would have been hard to escape from without some subtlety or a statute, prevented the plaintiff from recovering in a case like this.

Weener v. Brayton, 152 Mass. 101, 8 L. R. A. 640. See *State v. Bishop*, 128 Mo. 373, 381, 29 L. R. A. 200. That was in 1890. Just before the argument of that case there was an attempt at legislation on the subject. Stat. 1890, chap. 104. Three years later a statute was passed which certainly looks as if it had been intended, in part, to meet that decision. Stat. 1893, chap. 443. But this act was still somewhat under the influence of the notion that protection of the label was a protection of manufacture; and after an amendment by Stat. 1894, chap. 285, it was repealed by the act of 1895 which still is in force. It is true that the present statute is entitled "An Act to Protect Manufacturers from the Use of Counterfeit Labels and Stamps." But we can see no sufficient room for doubt that it protects the plaintiff. The 1st section extends to "any person, association, or union." That unincorporated associations or unions were contemplated is shown by § 3, already referred to, which allows suits to be prosecuted by the officers of such associations or unions. It is impossible to believe that, when the statute mentions unincorporated unions, it does not refer to trade unions. It authorizes such unions to adopt, as well as to record, a label.

Therefore it creates a right, if the court is unable to recognize one without its aid. If it applies to trade unions, it must be taken to apply to them as they ordinarily are; that is, as associations of workmen, not as manufacturers or vendors of goods. It contemplates that the labels will be applied to merchandise, as of course they must be, and as these labels are. But it carefully abstains from using a word which implies that the protection or wrongful use of labels is confined to manufacturers or vendors. The policy of the statute is shown by the above-cited amendment of 1894 to the earlier act, which had for its object to extend the liability to others besides the manufacturers.

If, as we think, the statute expressly creates or recognizes the right of trade unions to be protected in the use of labels for trade-union purposes, the suggestion that the association represented by the plaintiff is an unlawful association falls of itself. It is too late to make such a contention as to trade unions generally, even apart from the statute under which this suit is brought. But the general purposes of this union are similar, so far as we know, to the general purposes of other unions. The constitution, as a whole, is not illegal; and the association is not deprived of the protection of the law, for what otherwise would be its rights, if in some incident or particular the purposes which it expresses are unlawful,—which we do not imply. See *Cohn v. People*, 149 Ill. 486, 23 L. R. A. 821; *Carson v. Ury*, 89 Fed. Rep. 777, 5 L. R. A. 614; *State v. Hagen*, 6 Ind. App. 167, 173; *State v. Bishop*, 128 Mo. 873, 29 L. R. A. 200.

The plaintiff's association had a label registered under the earlier statute of 1893. The defendant has the boldness to urge that because he began his attempt to defraud the union in 1894, before the act of 1895 was passed, after having been permitted on his application to use the label for a time, therefore the plaintiff's union has no rights under the statute. We do not think the suggestion needs more than a statement.

The plaintiff has lost no rights through laches. *Nudd v. Powers*, 136 Mass. 273, 277, 278; *Menendez v. Holt*, 128 U. S. 514, 523, 524, 32 L. ed. 526, 528, 529.

Finally, as the plaintiff makes out his right, it is to be protected against one form of swindling as well as another,—against the use of real labels in a fraudulent way, as well as against the use of counterfeits,—if, indeed, the real labels, as used by the defendant after mutilation, are not counterfeits, within the statute.

Decree for plaintiff.

Howard S. FREEMAN

v.

Town of BOURNE.

(.....Mass.....)

1. The joint committee of towns which

NOTE.—As to the removal of a school teacher, see also *Marion v. Oakland Bd. of Edu. (Cal.)* 20 L. R. A. 197; *Gillan v. Normal Schools Bd. of Regents* 89 L. R. A.

united under Stat. 1893, chap. 344, to employ a superintendent of schools and obtain a contribution therefor from the commonwealth, has authority to dismiss the superintendent for sufficient cause, and its authority does not cease with obtaining the contribution and employing the superintendent.

2. A contract of employment of a school superintendent is deemed to be for a year unless there is something to show that it is for a less term.

3. There is an implied condition which authorizes the dismissal of a school superintendent if circumstances arise which render him no longer able or fit to perform the duties of his position.

4. The indictment of a school superintendent for adultery, and especially a verdict of guilty, will justify his dismissal, although the verdict is afterwards set aside and the prosecution dismissed, since not only good character, but good reputation, is essential to the greatest usefulness in his position.

(February 25, 1898.)

APPEAL by defendant from a judgment of the Superior Court for Bristol County in favor of plaintiff in an action brought to recover compensation for services rendered by plaintiff as superintendent of schools. *Affirmed.*

The towns of Sandwich, Bourne, and Mashpee united under the provisions of acts of 1892, chapter 344, for the purpose of employing a superintendent of schools. At a meeting of the school committee, held on August 12, 1893, Delbert G. Donnocker was chosen to serve for an unexpired term. Subsequently he was indicted in the state of Maine for the commission of crime. Thereupon the school committee declared the office vacant and elected plaintiff as superintendent. This action was brought to recover compensation due to him as such.

Further facts appear in the opinion. *Messrs. Charles F. Chamberlayne and Hiram P. Harriman*, for appellant.

Where a statute is designed to ingraft upon an established system of statutory regulation a minor incident, a mere detail, no ground exists for extending, by implication, the powers conferred by the language. The necessity for such construction no longer exists, and the innovation will be limited in the operation to the meaning of its language, construed in the light of the mischief to be remedied.

Sutherland, Stat. Constr. § 407; *Sedgw. Stat. Constr.* pp. 198, 202; *Brown v. Pendergast*, 7 Allen, 427.

The history of this and prior legislation shows that the law of 1888 relating to the election of school superintendents was intended to remedy a slight inadequacy in one particular in the working of the elaborate and long-established school system of the state,—which it in no way seeks further to disturb.

The act of 1888 simply offers financial inducements to small towns to accept previous provisions of law. It is not necessary, therefore, to construe it beyond its language in or-

(Wis.) 24 L. R. A. 336; *Thompson v. Gibbs (Tenn.)* 34 L. R. A. 548.

der to leave a perfectly available, practical, and complete system of school education.

The primary liability to support schools is still upon the towns.

Stat. 1826, chap. 143; Rev. Stat. chap. 28, § 1; Gen. Stat. chap. 38, § 1; Pub. Stat. chap. 44, § 21.

And this duty continues to be intrusted, under the broadest powers, most liberally construed, to the school committees of each town who "shall have the general charge and superintendence of all the public schools in the town."

Pub. Stat. chap. 44, § 21.

The school committee can engage teachers and fix their salaries, even in excess of the city or town appropriation.

Batchelder v. Salem, 4 Cush. 599; *Charles-town v. Gardner*, 98 Mass. 587; Pub. Stat. chap. 44, § 28.

They may dismiss teachers with or without cause.

Knowles v. Boston, 12 Gray, 339; *Wood v. Medfield*, 123 Mass. 545; Pub. Stat. chap. 44, § 30.

When the town so requires them, they are to choose a superintendent of schools, fix his compensation, and he is then to be under their "direction and control."

Pub. Stat. chap. 44, § 43.

And even where the authority to employ is revoked, the contract is still good against the town for the entire period of employment.

Kimball v. Salem, 111 Mass. 87.

The act bears, not only from its history, but upon its face, proof of the obvious limitations imposed upon its operation by the narrowness of its scope. The joint committee meets once a year, in April, a date apparently selected because the employment of the superintendent is "for one year" (Stat. 1888, chap. 431, § 3), under circumstances where the number of schools, the school appropriations, and "the average public school attendance" in each town is of importance (Stat. 1888, chap. 431, §§ 1, 3); the official record of which is computed, like the records of taxation, made important by § 1 of the same act, from May 1 of each year.

Pub. Stat. chap. 46, §§ 3, 5.

So far as appears, there is no reason for the joint committee coming together again for a year.

Messrs. Alfred S. Hayes, Arthur E. Burr, and Benjamin A. Lockhart, for appellee:

The joint committee had the power to discharge Donnocker.

The power to appoint necessarily includes the power to remove.

Story, Const. §§ 1537 *et seq.*; Pom. Const. §§ 647 *et seq.*; Miller, Const. pp. 161 *et seq.*; Black, Constitutional Law, p. 105; *Ex parte Hennen*, 88 U. S. 13 Pet. 280, 10 L. ed. 138; *Com. v. Lehman*, v. *Sutherland*, 3 Serg. & R. 145; *Blake v. United States*, 103 U. S. 227, 231, 26 L. ed. 462, 464; *Gildersleeve v. New York Bd. of Edu.* 17 Abb. Pr. 201.

If he was not actually a teacher, he was in control of the teachers, in a more responsible position than that of the teacher, and one more potent for evil. The committee not only had the right to discharge him, they were compelled to by all the principles of law and 39 L. R. A.

equity. His influence must of necessity be detrimental to the schools. It would be a perversion of all principle to say that the committee, because it had once elected him, must retain him notwithstanding his unfitness and his manifestly injurious influence. Public policy required his dismissal.

See *People, Murphy, v. New York Bd. of Edu.* 8 Hun, 181.

The several towns were bound by the vote of a majority of the joint committee, such as appears in this case, and the school committee of the defendant town, and the town itself, had no power to revoke the authority given by the statute to a majority of the joint committee to act as agent for the town.

Ang. & A. Priv. Corp. § 500; *Kingsbury v. Centre School Dist.* 12 Met. 99.

Allen, J., delivered the opinion of the court:

The plaintiff's right to recover is denied by the defendant on the following grounds: (1) That, if the power to dismiss a superintendent of schools existed, it was not in the joint committee, but in the municipality; that the joint committee, after the annual convention, had no authority except to do the things which were necessary in order to secure the contribution of money from the commonwealth, and that, after that, the relations of the superintendent were directly with the town. (2) That there is, indeed, no power anywhere to dismiss a superintendent. (3) That the superintendent could only be dismissed for cause, and that no sufficient or legal cause of dismissal is disclosed.

We will consider these objections in their order.

By virtue of Stat. 1892, chap. 344, the towns of Sandwich, Bourne, and Mashpee united for the purpose of the employment of a superintendent of schools, in accordance with the provisions of Stat. 1888, chap. 431, which authorized certain small towns to unite for this purpose, and to obtain a contribution from the commonwealth. Before these statutes were passed, two or more towns were authorized to form a district for this purpose, but without any provision for obtaining money from the commonwealth. Pub. Stat. chap. 44, §§ 44, 45. It is expressly provided by Stat. 1888, chap. 431, § 2, that, "when such a union has been effected, the school committees of the towns comprising the union shall form a joint committee, and for the purposes of this act said joint committee shall be held to be the agents of each town comprising the union." They are to meet annually in joint convention, in the month of April, and choose a superintendent of schools, determine the relative amount of service to be performed by him in each town, fix his salary, and apportion the amount thereof to be paid by the several towns. The scheme necessarily implies that a superintendent can be employed or discharged only by the joint committee. The union is formed for the purpose of securing better service than the towns acting separately could obtain. For the purposes of the statute, the joint committee became the agents of each town, and their acts within the scope of their authority are binding upon each town. Sepa-

rate action by the school committee of a single town would defeat the purposes of the union. It follows from this that the authority of the joint committee does not cease with obtaining the contribution from the commonwealth. That contribution contemplates the maintaining of a superintendent of schools for an entire year. Suppose the superintendent chosen in April dies shortly afterwards, or resigns, or goes away, or becomes insane, or otherwise totally incapacitated, so that there is no performance or attempt at performance of the duties of the position; someone must be appointed in his place, or else the money of the commonwealth will have been obtained on a consideration which has failed. In such case it is quite clear that the joint committee must act to fill the vacancy. Donnocker himself was chosen in this manner to fill a vacancy. The school committees of the towns cannot act separately. Whatever action is taken in respect to the employment of a superintendent must be by the joint committee, and, if there is any power of dismissal, it rests with the same body. *Ex parte Hennen*, 88 U. S. 18 Pet. 280, 10 L. ed. 188.

We come, then, to the questions whether there is any power to dismiss a superintendent of schools so chosen, and whether a sufficient and legal cause of dismissal in this case is disclosed. We may assume, at the outset, that the choice was for one year. *Chase v. Lowell*, 7 Gray, 88; *Kimball v. Salem*, 111 Mass. 87. Nevertheless, the tenure of an officer so chosen or employed is not like that of an officer whose term of office is fixed by law. His tenure depends upon the terms of his employment, and, by construction, the contract of his employment is deemed to be for a year, unless there is something to show that it is for a less term. But, in the selection and employment of an officer of this character, there is an implied condition which authorizes his dismissal, if circumstances arise which render him no longer able or fit to perform the duties of his position. The case of total incapacity has already been referred to. But there may be reasons, not amounting to total incapacity, which nevertheless furnish a practical disqualification, such, for example, as gross and habitual neglect of duty or habitual intoxication. The power to dismiss officers who are employed for fixed terms, in case of misbehavior or other supervening unfitness, was recognized in *Chase v. Lowell*, 7 Gray, 88, and it has always been held to exist in the case of clergymen settled for life. *Avery v. Tyringham*, 8 Mass. 160-177, 3 Am. Dec. 105; *Thompson v. Catholic Cong. Soc.* 5 Pick. 469; *Peckham v. North Parish in Haverhill*, 16 Pick. 274-288; *Sheldon v. Congregational Parish in Easton*, 24 Pick. 281, 286, 288.

In the present case the superintendent, who
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had been chosen by the joint committee, was afterwards indicted in Maine for adultery. The indictment was returned at a term beginning on the 1st Tuesday of September, 1893, which was on September 5, and on October 3 of the same year a verdict of guilty was returned upon his trial. This verdict was afterwards set aside, for some reason not shown in the agreed statement of facts, and at two subsequent trials the jury disagreed. A nol. pros. was afterwards entered. The votes of the joint committee declaring the office of superintendent vacant, and choosing his successor, were on October 2 and 9, 1893. A subsequent vote of ratification of the above vote was passed October 28 of the same year. The existence of this charge against the superintendent was known to the joint committee, and it is agreed that "there was no other reason for discharging him from the position as superintendent of schools than the fact of the existence of the charges contained in said indictment and the trials thereupon." A comparison of the above dates shows that the first vote of the joint committee was on October 2, and that the verdict in the first trial was on October 8. There can, however, be no doubt that the existence of the indictment alone would, at least, put him under just suspicion of having committed the offense therein charged. The joint committee did not act upon mere rumors more or less current in the community. Schools will suffer if those who conduct them are open to general and well-grounded suspicion of this kind. It needs no extended argument to show that not merely good character, but good reputation, is essential to the greatest usefulness in such a position as that of superintendent of schools. In *Chaddock v. Briggs*, 18 Mass. 248-254, 7 Am. Dec. 187, it is said in respect to a clergyman: "Even a reputation for immorality, although not supported by full proof, might, in some cases, be a sufficient ground for removal." Where a superintendent of schools is under indictment for adultery, it is competent for the joint committee to declare that he has become unsuitable and unfit to continue in that position, without assuming for themselves to determine the question of his guilt or innocence. They are not bound to form a judgment upon that matter. That question is in the hands of the courts, and the determination of it by a final conviction or acquittal may be long postponed, and, indeed, as in the present case, may never be reached. The pendency of the indictment, and especially the verdict of guilty, before their final votes, were sufficient to warrant them in declaring his office vacant, and in choosing his successor. No question is raised as to the regularity of their proceedings in matter of form.

Judgment for plaintiff affirmed.

NEBRASKA SUPREME COURT.

STATE of Nebraska, *ex rel.* DOUGLAS COUNTY,

v.

John F. CORNELL.

(.....Neb.....)

- *1. The legislature may authorize taxation for a public purpose, but a tax imposed for an object in its nature essentially or strictly private is invalid.
2. It is for the legislature in the first instance to decide what is and what is not a public purpose, but its determination of the question is not conclusive upon the courts.
3. A tax law will not be declared invalid on the ground that the tax is not for the benefit of the public, unless it was imposed for the furtherance of an object or enterprise in which the public has palpably no interest.
4. Chapter 24, Laws 1897, authorizing counties to participate in interstate expositions, to issue bonds for such purpose, and to provide for the levy of tax for their payment, does not contravene the Constitution, on the ground that the object of the statute is to advance individual interest merely, and not to promote the public welfare.
5. An appropriation of the money arising from the sale of the bonds issued under said act, for the erection of suitable buildings, and maintaining the same, and a county exhibit at the Trans-Mississippi & International Exposition to be held in the city of Omaha in 1898, is for a public purpose or use, and not in violation of the Constitution.
6. It is a well-settled rule of construction that special provisions in a law relating to a particular subject-matter will prevail over general provisions in other statutes, so far as there is a conflict.
7. An affirmative vote of two thirds of all of those cast on the proposition is sufficient to carry bonds issued under chap. 24, Laws 1897, for the purpose of making a county exhibit at an interstate exposition.

(February 2, 1898.)

APPPLICATION for a writ of mandamus to compel defendants to register certain bonds which had been issued by the relator. *Granted.*

The facts are stated in the opinion.

Messrs. Howard H. Baldrige, H. L. Day, and Montgomery & Hall, for relator:

The taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself.

State, Atchison & N. R. Co., v. Lancaster County Comrs. 4 Neb. 540.

What is a public purpose is not always easy of determination, but when determined it constitutes the boundary of the power of taxation,

for there is no power to levy a tax for a purpose essentially private.

1 Dill. Mun. Corp. 3d ed. § 508; Cooley, Taxn. p. 67.

Unless it is plain that the community taxed has palpably no interest in the matter,—that a burden is imposed for the benefit of others, and that it would be so pronounced at first blush,—then the tax is a valid one and will be upheld.

Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; *Cheaney v. Hooser*, 9 B. Mon. 345; Cooley, Taxn. p. 70; *Brodhead v. Milwaukee*, 19 Wis. 625, 83 Am. Dec. 711.

The right to tax depends on the ultimate use, purpose, and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it.

Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

The fund raised is to be expended by the regular officers of Douglas county, and it is immaterial that as an incident of such expenditure such private corporation or some private individual will be benefited.

Hallenbeck v. Hahn, 2 Neb. 410.

Whether the county will benefit by such expenditure is not a question to be raised here, because not germane to the issue.

Cooley, Const. Lim. 5th ed. 285.

Even though the county shall not be benefited, but shall suffer a detriment, it does not follow that the tax will be invalid.

Hallenbeck v. Hahn, 2 Neb. 410; 15 Am. & Eng. Enc. Law, p. 1242, and cases cited.

The legislature may authorize a town or other municipality to levy taxes therein for public purposes not strictly of a municipal character, but from which the public have received or will receive some direct advantage; or where the tax is to be expended in defraying the expenses of the government or in promoting the peace, good order, and welfare of society.

State, McCurdy, v. Tappan, 29 Wis. 687, 9 Am. Rep. 622; *Retell v. Annapolis*, 81 Md. 1; *Lund v. Chippewa County*, 93 Wis. 640, 34 L. R. A. 181; *Marks v. Purdue University*, 37 Ind. 155, 56 Ind. 288; *Merrick v. Amherst*, 12 Allen, 500; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Gordon v. Cornes*, 47 N. Y. 608; *Hanscom v. Lowell*, 165 Mass. 419; *Wilkinson v. Cheatham*, 43 Ga. 258; *Hill v. East Hampton*, 140 Mass. 881; *Hubbard v. Taunton*, 140 Mass. 487; *Re House Roll No. 284*, 81 Neb. 505; *State v. Nelson County*, 1 N. D. 88; *State, Griffith, v. Osawakee*, 14 Kan. 822, 19 Am. Rep. 99; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 89.

The legislative body of the state is the one to determine whether or not the enterprise is a public one, and it has determined it affirmatively by the enactment of the act allowing the issuance of the bonds.

Wheeler v. Plattsmouth, 7 Neb. 277; *Turner*

NOTE.—For county expenditure for exhibit at fair or exposition, see also *Daggett v. Colgan* (Cal.) 14 L. R. A. 474; *Norman v. Kentucky Bd. of Managers of World's Columbian Exposition* (Ky.) 13 L. R. A. 558; *Shelby County v. Tennessee Centennial Exposition Co.* (Tenn.) 33 L. R. A. 717.

v. *Althaus*, 6 Neb. 54; *Alfalfa Irrig. Dist. Directors v. Collins*, 46 Neb. 420; *Citizens' Sav. & L. Asso. v. Topeka*, 87 U. S. 20 Wall. 664, 23 L. ed. 461; *Cooley*, Const. Lim. 5th ed. 155; *People, Detroit & H. R. Co. v. Salem Twp. Bd.*, 20 Mich. 452, 4 Am. Rep. 400; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 168; *Schenley v. Allegheny*, 25 Pa. 180; *Weisner v. Douglas*, 64 N. Y. 99, 21 Am. Rep. 586; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

An appropriation of state or county money for participation in such an enterprise as the Trans-Mississippi & International Exposition is a perfectly legal and constitutional appropriation.

Daggett v. Colgan, 92 Cal. 58, 14 L. R. A. 474; *Norman v. Kentucky Bd. of Managers of Worlds' Columbian Exposition*, 98 Ky. 587, 18 L. R. A. 556; *Shelby County v. Tennessee Centennial Exposition Co.* 96 Tenn. 653, 38 L. R. A. 717.

A special provision relating to a particular subject must govern in respect to that subject against the general provisions in other parts of that law or in other statutes.

McCann v. Lennan, 2 Neb. 289; *Albertson v. State*, 9 Neb. 437; *Richardson County v. Miles*, 14 Neb. 811; *Richards v. Clay County Comrs.* 40 Neb. 51; *Merrick v. Kennedy*, 46 Neb. 264; *Van Horn v. State*, *Abbott*, 46 Neb. 79; *State, Hamilton County Comrs., v. Whittemore*, 12 Neb. 252; *State, Hamilton County Comrs., v. Ream*, 16 Neb. 681; *Stricklett v. State*, 31 Neb. 674; *People, Drake, v. Mahaney*, 13 Mich. 481; *Smails v. White*, 4 Neb. 353; *State, Farmers' Mut. Ins. Co., v. Moore*, 48 Neb. 870; *State v. Arnold*, 81 Neb. 75; *Riggs v. Miller*, 84 Neb. 666; *Burton v. State*, 107 Ala. 109; *Little Rock v. Quindley*, 61 Ark. 622; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313; *Warren v. Crosby*, 24 Or. 558; *Northern Counties Investment Trust v. Sears*, 30 Or. 888, 35 L. R. A. 188; *Snyder v. Compton*, 87 Tex. 374; *Baum v. Raphael*, 57 Cal. 361.

Messrs. C. J. Smythe, Attorney General, and *Ed. P. Smith* for respondent.

Norval, J., delivered the opinion of the court:

This was an original application to this court for a peremptory writ of mandamus, on the relation of Douglas county, to compel the respondent, as auditor of public accounts, to register in his office 100 certain coupon bonds of said county, aggregating \$100,000, voted for the purpose of raising money to enable it to participate in the Trans-Mississippi & International Exposition, to be held in the city of Omaha during the year 1898. In 1897 the legislature of this state passed an act entitled "An Act to Authorize Counties to Participate in Interstate Expositions, to Issue Bonds for Such Purpose, and to Provide for a Tax for the Payment of Such Bonds." Sess. Laws 1897, chap. 24, p. 192. The first three sections of said law are here reproduced:

"Sec. 1. Whenever one thousand (1,000) voters of any county in the state of Nebraska having over 100,000 population shall petition the board of county commissioners or the board of supervisors to that end, any such county shall be and hereby is authorized to issue the

bonds of such county, to become due twenty (20) years from the date thereof, and to bear interest at the rate not to exceed five (5) per cent per annum, to provide for the expenses of promoting the interests of such county by participating in any interstate exposition held in the state of Nebraska and making at such exposition a county exhibit, improving or beautifying the grounds, and erecting or aiding in the erection of a suitable building or buildings therefor, and maintaining the same during such exposition, to an amount to be determined by the board of county commissioners or board of supervisors, not exceeding one hundred thousand dollars (\$100,000): provided, the board of county commissioners or board of supervisors shall first submit the question of the issuing of such bonds to a vote of the legal voters of such county at a general or special election, such question to be submitted entire after notice to such voters published in any newspaper of general circulation in such county for four (4) weeks next prior to such election; and provided, that such interstate exposition shall first have been recognized by the Congress of the United States by an appropriation of a sum not less than one hundred thousand dollars (\$100,000).

"Sec. 2. The proposition when submitted shall contain a statement of the amount necessary to be raised each year for the payment of the interest of said bonds, and for the payment of the principal thereof at maturity.

"Sec. 3. If two thirds (2/3) of the votes cast on such proposition at any such election be in favor thereof, the said bonds shall be authorized and the proper officers of the county shall thereupon issue said bonds and the same shall be and continue a subsisting debt against such county until they are paid."

Section 4 of said act provides for the levying of a sufficient tax by the proper county officers upon all of the taxable property of the county to pay the principal and interest upon said bonds as the same become due and payable.

The relator shows that the proposition to issue the bonds in question was submitted to the electors of the county, and the same was adopted by them in strict conformity to the provisions of the said legislative enactment. The respondent has declined to register the bonds for the reason their legality is questioned; but he has not, by answer or otherwise, advised the court of the particular grounds upon which their validity is assailed, nor has he submitted any authorities in opposition to the issuance of the writ. Counsel for relator, in the briefs and at the bar, have argued two propositions, to which attention will be given, namely: First. Whether the bonds were voted for a lawful object or purpose. Second. Did the proposition to issue them receive the requisite affirmative vote of the electors of the county?

The following principles are too well established by the authorities to require discussion at this time: First. The legislature may authorize taxation for a public purpose, but a tax imposed for an object in its nature essentially private is void. 1 Dill. Mun. Corp. § 508; *Cooley, Taxn.* 2d ed. pp. 55, 108; 25 Am. & Eng. Enc. Law, p. 87, and the numer-

ous cases cited in note 2 on said page. Second. It is for the legislature, in the first instance, to decide whether the object for which a tax is to be used or raised is a public purpose, but its determination of the question is not conclusive. *Ibid.* Third. To justify a court in declaring a tax invalid on the ground that it was not imposed for the benefit of the public, the absence of a public interest in the purpose for which the money is raised by taxation must be so clear and palpable as to be immediately perceptible to every mind. *Turner v. Althaus*, 6 Neb. 54; *Alfalfa Irrig. Dist. Directors v. Collins*, 46 Neb. 411; *Brodhead v. Milwaukee*, 19 Wis. 658; *Sharpless v. Philadelphia*, 21 Pa. 150, 59 Am. Dec. 759; *People, Board of Water Comrs., v. East Saginaw*, 33 Mich. 164; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147; *Weisner v. Douglas*, 84 N. Y. 91, 21 Am. Rep. 586; *Citizens' Sav. & L. Assn. v. Topeka*, 87 U. S. 20 Wall. 664, 22 L. ed. 461. In the last case it was said: "It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest, instead of public use; and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." The language of Folger, J., in his opinion in *Weisner v. Douglas*, 84 N. Y. 99, 21 Am. Rep. 586, deserves to be reproduced here: "It is a general rule that the legitimate object of raising money by taxation is for public purposes and the proper needs of government, general and local, state and municipal. When we come to ask, in any case, what is a public purpose, the answer is not always ready, not easily to be found. It is to be conceded that no pinched or meager sense may be put upon the words, and that if the purpose designated by the legislature lies so near the border line that it may be doubtful on which side of it it is domiciled, the courts may not set their judgment against that of the lawmakers." In *Alfalfa Irrig. Dist. Directors v. Collins*, 46 Neb. 420, occurs this language: "While all agree that the legislature cannot, without the consent of the owner, appropriate private property to purposes which in no way subserve public interests, the rule is quite as firmly settled that the courts will not interfere by declaring acts invalid simply because they may differ with the lawmaking power respecting the wisdom or necessity thereof. For if, by any reasonable construction, a designated use may be held to be public in a constitutional sense, the 89 L. R. A.

will of the legislature should prevail over any mere doubt of the court."

In the light of the principles already stated, is the legislation under which the bonds in question were voted illegal, on the ground that it authorized the imposing of burdens upon the public, by way of taxation, in aid of a private enterprise, and not in furtherance of an object which is public in its character? The answer must be in the negative. The statute under review does not attempt or purport to authorize the issuance or donation of the bonds to private individuals, or the corporation under whose auspices the exposition is to be held; nor does the act contemplate that the money derived from the sale of the bonds shall be devoted to promote the interest of a few; but the intention of the law was to enable any county availing itself of its provisions to raise the means with which to meet the expenses of erecting a suitable building or buildings, and maintaining the same, and an exhibit of the resources of the county at the Trans-Mississippi & International Exposition, to be held in the city of Omaha in 1898. The proceeds of the bonds are to be disbursed for the purpose mentioned in the law by Douglas county, through its officers and agents. We cannot determine judicially that such an object is purely private, and not public in its character, especially in view of the legislation and adjudication in this state now to be mentioned. The legislature in 1891 appropriated \$50,000 "to provide for a presentation of the products, resources, and possibilities of the state of Nebraska at the World's Columbian Exposition." Laws 1891, chap. 57. An additional appropriation of \$35,000 was subsequently made for the same purpose. Laws 1893, chap. 41. Both of those amounts were paid by the state treasurer, and the money was expended without anyone challenging the legality of the appropriations on the ground that they were not made for the public good. Our legislature appropriated \$100,000 at the last session for the purpose of defraying the expenses of the state in making a proper exhibit of its resources and products at the said Trans-Mississippi & International Exposition. Laws 1897, chap. 88, p. 869. Section 8, art. 1, chap. 2, Comp. Stat. provides that \$2,000 shall be paid annually out of the state treasury to the state board of agriculture to be used in payment of premiums awarded by said board at the state fair. And § 10 of the same article and chapter authorizes the payment to the state horticultural society of \$1,000 annually for the use and benefit of said society. The legislature has each session made the appropriations required by said sections for the purposes therein indicated, and the same have been paid without a suggestion from any source that the money was not devoted to a public use. Section 16 of the same article and chapter authorizes a county, under certain restrictions, to appropriate and pay to the county agricultural society not exceeding \$100 for every 1,000 inhabitants in the county, "to be expended by such society in fitting up such fair grounds, but for no other purpose." This section has never been assailed as being invalid, although it has remained upon the statute books for nearly twenty years. Section 12 of article 1 of said chapter 2 authorizes

the payment by county boards, to agricultural societies complying with the provisions thereof, of a sum equal to 8 cents for each inhabitant in the county from the county general fund. In *State, Custer County Agri. Soc. & Live Stock Exchange, v. Robinson*, 35 Neb. 401, it was ruled that this section authorized the appropriation of money for a public purpose, and the expenditure was permissible under the Constitution. That case is not distinguishable in principle from the one at bar.

The adjudication of other courts fully sustains the same doctrine. The city of Philadelphia appropriated \$50,000 to meet the official contingent expenses incidental to the Centennial Exposition. It was held that this appropriation was valid. *Tutham v. Philadelphia*, 11 Phila. 276. An appropriation by a town, made in pursuance of a statute to celebrate the centennial anniversary of its incorporation, has been upheld. *Hill v. Easthampton*, 140 Mass. 881. Likewise an appropriation of money by a city for the celebration of holidays is held to be for a public purpose. *Hubbard v. Taunton*, 140 Mass. 467. The legislature of California made an appropriation of \$300,000 for the purpose of making a state exhibit at the World's Fair Columbian Exposition. The supreme court of that state, in *Daggett v. Colgan*, 92 Cal. 53, 14 L. R. A. 474, held the appropriation was for public use, and was constitutional. In *Norman v. Kentucky Bd. of Managers of World's Columbian Exposition*, 93 Ky. 537, 18 L. R. A. 556, it was decided that an appropriation of \$100,000 to enable the state to participate in the World's Fair at Chicago was a valid exercise of legislative power, under a Constitution which provided, "Taxes shall be levied and collected for public purposes only." The legislature of the state of Tennessee, in 1895, passed an act authorizing the several counties of the state to appropriate money to provide for an exhibit of the resources at the Tennessee Centennial Exposition to be held at Nashville. The county of Shelby, in that state, appropriated \$25,000 in pursuance of said act; but the proper county officer refused to issue a warrant against said appropriation, claiming that the act was invalid. On an application for a writ of mandamus, the supreme court, in *Shelby County v. Tennessee Centennial Exposition Co.* 96 Tenn. 653, 33 L. R. A. 717, overruled the contention, saying: "To our minds it is entirely clear that an exhibition of the resources of Shelby county at the approaching State Centennial Exposition is a county purpose. In view of the fact that the event to be celebrated is one of no less note and importance than the birth of a great state into the American Union, and of the further fact that the exposition is reasonably expected to attract great and favorable attention throughout the country, and be participated in and largely attended by intelligent and enterprising citizens of numerous other states, at least, it is beyond plausible debate that such an exhibition is well calculated to advance the material interests and promote the general welfare of the people of the county making it. It will incite industry, thrift, development, and worthy emulation in different avenues of commerce, agriculture, manufacture, art, and education within the county," 39 L. R. A.

thereby tending to the permanent betterment and prosperity of her whole people. In short it will encourage progress, and progress will insure increased intelligence, wealth, and happiness for her people individually and collectively. Undenially, that which promotes such an object and facilitates such a result in any county is, to that county, a county purpose in the truest sense."

No case in conflict with the foregoing has come under the observation of the writer. Decisions, however, are to be found in the books, holding the appropriation of moneys for celebrations of public events to be invalid; but such decisions turn on the question of statutory authority, rather than on the right of the legislature to confer such power. See *Hood v. Lynn*, 1 Allen, 103; *Tash v. Adams*, 10 Cush. 252; *New London v. Brainard*, 22 Conn. 552. In *Hayes v. Douglas County*, 92 Wis. 429, 81 L. R. A. 213, it was ruled that a county tax levied for the purpose of defraying the expenses of placing blocks of stone from the county in the Wisconsin State Building at the Columbian World's Fair was unauthorized and void. The ground for this holding does not appear in the report of the case, as the only reference to the subject in the body of the opinion is in the language following: "The Columbian Fair stone tax was altogether unauthorized and void." We presume that the power to impose the tax in that case was not conferred by statute. Upon principle and authority, we are constrained to hold that the bonds were voted for a public purpose, one for which the money of the county may be lawfully devoted.

Attention will now be given to the question whether the proposition to issue these bonds received the requisite number of affirmative votes. Sections 27 to 30, inclusive, art. 1, chap. 18, Comp. Stat., relates generally to the submission of questions to a vote of the electors of the county. Said § 30 declares that "if it appears that two thirds of the votes cast are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected." This section has been construed as requiring, to adopt a proposition involving the issuance of bonds, an affirmative vote of two thirds of the electors participating at the election at which the same is submitted. *Stale, Mann, v. Anderson*, 28 Neb. 517; *Stenberg v. State, Keller*, 50 Neb. 127. So that, if the provisions of said § 30 apply to the bonds in question, they failed to carry, since they did not receive two thirds of the votes cast at the election, although more than two thirds of those voting on the proposition were in favor of the bond. It is very evident that said § 30 cannot be invoked here, because it is embraced in the statute which provides generally for the submission of questions to a vote of the county, and must give way to any special act upon the same subject. The law under which the bonds in controversy were voted relates specifically to the subject of issuing bonds to enable counties to participate in

interstate expositions, and the provision therein as to the vote necessary to carry that class of bonds governs and controls, for the obvious reason that it is a special law in relation to a particular subject. This principle has been recognized by a long line of decisions in this state. *McCann v. McLennan*, 2 Neb. 286; *People, Gers, v. Gosper*, 8 Neb. 810; *Albertson v. State*, 9 Neb. 439; *Richardson County v. Miles*, 14 Neb. 811; *Fenton v. Yule*, 27 Neb. 758; *State, Seward County, v. Benton*, 83 Neb.

828; *State, Gage County, v. Benton*, 83 Neb. 884; *Richard v. Clayton County Comrs.* 40 Neb. 51; *Merrick v. Kennedy*, 46 Neb. 264; *Van Horn v. State, Abbott*, 46 Neb. 62; *State, Farmers' Mut. Ins. Co., v. Moore*, 48 Neb. 870.

It follows that these bonds were carried by the requisite vote, and, no valid objection having been urged against their registration, a *peremptory writ of mandamus is ordered, as prayed.*

OREGON SUPREME COURT.

Anna FINSETH, *Respt.*,

CITY & SUBURBAN RAILWAY COMPANY, *Appt.*

(.....Or.....)

1. **A street-railway company which, to facilitate its own business,** constructs a platform along a street temporarily submerged during a freshet, for the accommodation of its passengers, is required to make such walk reasonably safe, but not to make it "as reasonably safe as possible."
2. **A street-railway company which constructs a walk over a street** temporarily submerged by a freshet, for the use of passengers in going from one car to another, is not, as matter of law, required to provide a light for such walk at night.

(December 7, 1897.)

A PPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by *Moore, Ch. J.*:

This is an action by Anna Finseth against the City & Suburban Railway Company to recover damages sustained in consequence of an injury received while crossing over a roadway alleged to have been negligently constructed by defendant. The facts are: That in June, 1894, defendant was the owner of and operated an electric street railway in the city of Portland, the line of its road extending across the Willamette river upon Morrison street bridge, the east approach to which, for a distance of about 500 feet, in consequence of an unprecedented rise in the river, was covered with water to the depth of about 4 feet, thereby obstructing travel on electric cars, but, to accommodate its passengers, defendant erected upon the north side of East Morrison street a temporary sidewalk, consisting of two lines of planks each 12 inches wide, laid about 12 inches apart, and resting upon railroad ties placed one upon another at right angles with the planks, in such manner as to form pliers, situated about 8 feet apart, and of sufficient height to be above the water; the whole structure being weighted down and held in place

by iron rails. That on the 11th of said month plaintiff purchased from defendant a ticket, and at about 10 o'clock at night entered one of its cars at the west end of Morrison street Bridge, in crossing which she surrendered her ticket, and received from the conductor in lieu thereof a transfer check, which entitled her to ride on another car of the company from the east side of said submerged district to the intersection of East Twenty-First and Clinton streets, and having arrived at the east end of said bridge she alighted from the car, and attempted to pass over the structure in question, which was used by defendant's passengers and the public, but, the night being dark, and the passageway poorly lighted, and having no guard or railing, her foot slipped between the planks, and, falling thereon, she sustained the injury of which she complains. The issues having been joined, a trial was had, resulting in plaintiff's obtaining a judgment for the sum of \$500, from which defendant appeals.

Messrs. Dolph, Mallory, & Simon, for appellant:

While carriers of passengers are bound to exercise a high degree of care for the protection of those coming under their care, they are not so bound in respect to the public in general, and when the relation of passenger and carrier ceases, the carrier is only bound to exercise ordinary care to prevent injury, such as is required of any individual.

Upon stepping from defendant's car at the west side of the submerged portion of East Morrison street, plaintiff ceased to be a passenger.

Creamer v. West End Street R. Co. 156 Mass. 320, 16 L. R. A. 490; *Bigelow v. West End Street R. Co.* 161 Mass. 398; 2 Wood, Railway Law, p. 1038; *Thomp. Carr.* § 9, p. 446; *Booth, Street Railways*, p. 445.

The bridge was erected on the site of the sidewalk, and was used by the public in general, it being the only means of passage over the flooded portion of the street to and from the Morrison street bridge. There were no restrictions as to its use; all persons passing that way used it; hundreds of people passed over it daily. This general use by the public made it a public highway. No formal acceptance by the city was necessary; it was enough that the public traveled over it.

People v. Davidson, 76 Cal. 166; *Elliott, Roads & Streets*, pp. 22, 23; *Heacock v. Sherman*, 14 Wend. 58; *State v. Campton*, 2 N. H. 513; *Savilebury v. Ithaca*, 94 N. Y. 27; *Requa v. Rochester*, 45 N. Y. 129.

NOTE.—As to the measure of care which a carrier must exercise for the purpose of keeping its platforms and approaches safe, see note to *Johns v. Charlotte, C. & A. R. Co.* (S. C.) 20 L. R. A. 520. 39 L. R. A.

To create a liability for negligence, the result for which the actor is responsible must be one that he might reasonably have foreseen.

2 Thomp. Neg. § 2, p. 1085; Shearm. & Redf. Neg. § 789; *Crocheron v. North Shore Staten Island Ferry Co.* 56 N. Y. 656; Pollock, Torts, pp. 36, 37; 16 Am. & Eng. Enc. Law, p. 437; *Henry v. Southern P. R. Co.* 50 Cal. 176; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1.

Absolute safety is not attainable.

Titus v. Bradford, B. & K. R. Co. 136 Pa. 618; *Northern C. R. Co. v. Huson*, 101 Pa. 1, 47 Am. Rep. 690; *Lafflin v. Buffalo & S. W. R. Co.* 106 N. Y. 138, 60 Am. Rep. 433; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; Whart. Neg. §§ 16, 74, 77.

It is error to give instructions which assume facts not in evidence.

Latahaw v. Territory, 1 Or. 140; *Bailey v. Davis*, 19 Or. 217; *People v. Ah Too*, 2 Idaho, 47; *Doyle v. People*, 147 Ill. 894; *Kelly v. Fleming*, 118 N. C. 133; *Beach v. Netherland*, 98 Ga. 233; *Kansas Incest. Co. v. Carter*, 160 Mass. 421; *French v. Ware*, 65 Vt. 338; *Ratigan v. State*, 33 Tex. Crim. Rep. 301; *Galveston, H. & S. A. R. Co. v. Waldo* (Tex. Civ. App.) 26 S. W. 1004; *Locke v. Priestly Express Wagon & Stage Co.* 71 Mich. 263; *Jackson v. State*, 88 Ga. 784; *Frost v. Ainslie Lumber Co.* 3 Wash. 241; *Swift v. Tatner*, 89 Ga. 680; *Texas Land & Loan Co. v. Watson*, 3 Tex. Civ. App. 233; *Sloan v. Coburn*, 26 Neb. 607, 4 L. R. A. 470; *Territory v. Evans*, 2 Idaho, 391; *Rock Island v. Cuiwely*, 126 Ill. 408; *Kidd v. State*, 83 Ala. 58; *Hirshberg v. Strauss*, 64 Cal. 272.

Messrs. Flegel & Stanislawsky and McGinn, Sears, & Simon, for respondent:

Defendant constructed the walk as an approach or means by which its passengers could get from one of its cars to another, and invited its passengers to use it for that purpose, and it was bound to construct a walk and keep it reasonably safe for that purpose at the different times of day when it was used by the defendant's passengers.

Skottowe v. Oregon Short Line R. Co. 23 Or. 430, 16 L. R. A. 598.

Moore, Ch. J., delivered the opinion of the court:

The important question for consideration is the duty, if any, which the defendant owed to the plaintiff at the time of the accident. The measure of care demanded of a common carrier must always be in proportion to the degree of danger to which passengers are subjected by the means adopted for their transportation or accommodation; and, notwithstanding a person, for some purposes, may be deemed a passenger before he enters or after he leaves a car, the carrier does not owe him, under such circumstances, that degree of care which it is incumbent upon the company to exercise when he is seated within its car, and has surrendered himself to an observance of its rules. The negligent operation of an electric car may cause the death of, or inflict great bodily injury upon, a passenger, and for this reason the law of humanity wisely demands that a carrier while not an insurer, must exercise, in the management of such dangerous agencies, the highest degree of care, in protecting its passen-

89 L. R. A.

gers from harm which could be prevented by reasonable foresight. *Moreland v. Boston & P. R. Co.* 141 Mass. 31. A street-car company lays its tracks chiefly upon, and operates its cars in, the public streets of a town or city, and, unless prohibited by municipal ordinance may stop at any place along its line to permit passengers to enter its cars or depart therefrom. In the very nature of things, such a carrier can have no stations, for to permit it to erect and maintain them would amount to a needless obstruction of the public highway; and hence, when operating its cars within the limits of a city or town, it must receive its passengers from, and discharge them in, a public street; and, as was said in *Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490: "The street is in no sense a passenger station, for the safety of which a street-railway company is responsible. When a passenger steps from a car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger; and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk." A street-car company, having no stations, owes no duty to the public or to its passengers to erect or maintain a passageway from its stopping places in the street to the sidewalk; and when it discharges its passengers in the highway its contract has been fully performed, and the relation of carrier and passenger thereupon ceases. *Smith v. City R. Co.* 29 Or. 539. The tickets it issues do not prescribe at what point on its line the passenger may enter or leave its cars, but a person having obtained a ticket or paid his fare to the conductor could probably commence a journey at any stopping place, and ride in its car to any point within the terminal of its line; but if he leaves the car, for any purpose, without having obtained a transfer check, the contract for transportation would be fully performed by the carrier. If, however, the passenger obtains such evidence of his right to resume the journey, there must be, of necessity, an interruption of the relation of carrier and passenger from the moment he leaves one car until he enters another; but would this interruption relieve the carrier from liability to a person injured while going from one car to another over a passageway erected by it for the accommodation of such persons, and to facilitate its business? The answer to this question must depend upon the duty, if any, which a carrier owes to those persons whom it invites to use such portage, for negligence in all cases must be predicated upon a breach of duty. The defendant was not obliged to construct a passageway across the submerged street, but, having done so, it thereby invited its passengers to travel over the same, and tacitly represented to them that it was reasonably safe for that purpose; and, such being the case, did it owe to them any duty to maintain or light the way because it was laid upon a public street? The walk having been erected to serve a temporary purpose only, we think it cannot be said that, because it had been used by the public for a short time, the municipality thereby adopted and accepted it as a part of its system of highways; for when the water receded the sidewalk

constructed by the city would be used, and the passageway so erected by defendant, which theretofore had been used as a part of the highway, must necessarily become a nuisance. If plaintiff, without any fault upon her part, had sustained the injury complained of in the manner indicated, after the water had fallen, there is but little doubt that defendant would have been liable therefor, if, in consequence of its neglect, the passageway became unsafe; for no person has the right to do an act which renders the use of the street hazardous, or less secure than it was left by the municipal authorities. Whoever does so by placing unauthorized obstructions thereon becomes a nuisance, and is liable to any person who, using due care, sustains any special injury therefrom. 2 Dill. Mun. Corp. § 1082. But while the freshet continued the walk in question could not be considered a nuisance, or even an obstruction, for it was the only means by which the public was enabled to use the street, and without it travel would have been suspended. Defendant having constructed the way to facilitate its business, and to accommodate persons who might be induced to patronize its cars, owed to such persons at least the duty of keeping it, as long as it might be used for that purpose, in a reasonably safe condition, and having invited plaintiff to pass over the same, it is liable for any neglect in that respect; but it owed no greater duty, and is not chargeable with a higher degree of care and diligence, by being a common carrier, than is expected of a private individual under similar conditions. *Gulf, C. & S. F. R. Co. v. Warlick* (Ind. Ter.) 35 S. W. 285.

With this understanding of the rule, it becomes necessary to examine that portion of the judge's charge to which defendant excepts. The jury were instructed as follows: "(1) If the defendant in this case undertook to transport passengers for hire over its road from the west side to points on the east side of the Willamette river, in this city, and for that purpose undertook to provide and construct a walk or elevated passageway over that part of East Morrison street where its tracks and the street where obstructed by the flood, so that such passengers could use the same for the purpose of passing from one car of the defendant to another over such obstruction, it was its duty to construct such walk or passageway in a manner as reasonably safe as possible, taking into consideration the condition of this part of the flooded district, and to keep it in such reasonably safe condition as long as it was under its control, and continued to be used for passage of passengers from one car of the defendant to another; and if you believe from the testimony that the defendant undertook to and did construct this walk for such purpose, but failed and neglected to construct it in a reasonably safe condition, taking all the circumstances into consideration, or failed and neglected to keep it in such reasonably safe condition during the time it was being used for defendant's passengers, and under its control, and that, by reason of such failure and negligence and unsafe condition of such walk, the plaintiff while passing over said walk from a car of the defendant on the west, in which she had been riding as a passenger, to a car on the east

of such walk, upon which she was to continue her passage to her place of destination, fell, and was injured thereby, without any fault or negligence on her part, then it is your duty to find in favor of the plaintiff." It will be observed that the jury were told that it was incumbent upon defendant to construct the passageway in a manner as reasonably safe as possible, etc. This, in our judgment, carries the liability too far. Defendant was required to make the walk reasonably safe, it must be admitted; but when this degree of care is so qualified as to render the walk as reasonably safe as possible, it thrusts upon a carrier a duty never hitherto demanded, and, if it were to prevail, would tend to render a carrier liable in all cases, for, after an accident occurs, and the cause of it is ascertained, it would not be difficult to procure witnesses to say that, in their opinion, it was possible to have guarded against its occurrence and thus have prevented the injury.

The court also gave the following instruction: "(3) In this case, if the walk was so constructed that it would be dangerous for defendant's passengers to use it in passing over the same from one car of the defendant to another in the darkness, or during the night-time without a light, then it was the duty of the defendant to have provided a light during such darkness; and if it failed and neglected to do this, and for this reason the plaintiff, while attempting to cross over said walk as such passenger fell and was injured thereby without any negligence or fault on her part, then your verdict should be in her favor." If the walk was so constructed that it was dangerous for defendant's passengers to use the same after night it could doubtless have rendered the way safe by other means than by lighting it. In *Vicksburg & M. R. Co. v. Howe*, 52 Miss. 202, the track being obstructed by a wrecked freight train, a passenger, on a dark and rainy night, was obliged to walk around the obstruction to another train, and in doing so fell from some planks laid over a ditch, and sustained the injury complained of. There was no light there nor was any person stationed at that point to warn the passengers of danger, and it was held that the failure to place a light at the crossing of the ditch, or to give any warning of the danger, or to take some means to guard passengers against injury from the extra hazard to which they were exposed in crossing, was such negligence as rendered the company liable for any injury sustained by passengers in crossing. In that case the crossing was temporary, and other means than a light were considered adequate protection against the danger incident to the transfer. The defendant having undertaken to provide a passageway for the convenience of its passengers and those intending to patronize its cars, it was required to select substantial materials, and construct the way with a view to safety, considering the nature of the temporary use for which it was designed; and, so long as defendant continued to use the passageway to facilitate its business, it was in duty bound to maintain it in like condition, and for any neglect in this respect it would be liable to a person sustaining injury thereby whom it invited to pass over the same. The passenger, however,

is charged with notice of the temporary character of the structure, in view of which necessity compels him to use common prudence in its use, falling in which it would constitute such contributory negligence as would preclude a recovery. It was the duty of the defendant to render the passageway reasonably safe for the accommodation of its passengers, but what constitutes due and reasonable care cannot ordinarily be defined as a matter of law, but it must depend upon the circumstances of each individual case. *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96. It is for the jury to say, from a consideration of all the circumstances

of the case, whether the passageway was reasonably safe, in view of the temporary purpose it was designed to serve, and whether the carrier had supplied such means for its use after night as an ordinarily prudent person would have furnished to render it reasonably safe in the darkness under like conditions.

In the case at bar we think the means indicated by the court as a protection against the danger are too limited, and that it was for the jury, and not the court, to say what means should have been adopted for that purpose.

These instructions being erroneous, *the judgment is reversed*, and a new trial ordered.

LOUISIANA SUPREME COURT.

STATE of Louisiana

v.

H. S. KARSTENDIEK *et al.*, *Appls.*

(49 La. Ann. 1621.)

***1. The affidavit was explicit enough,** and the defendants without right to a bill of particulars.

*Headnote by BREAUX, J.

NOTE.—*Municipal power as to nuisances affecting public morals, decency, peace, and good order.*

I. Nuisances affecting public morals and decency.

- a. *In general.*
- b. *Houses of ill fame, etc.*
- c. *Gambling.*
- d. *Bowling alleys.*
- e. *Drunkenness.*

II. Nuisances affecting public peace and good order.

- a. *In general.*
- b. *Intoxicating liquors.*
- c. *Public amusements.*

The general principles of the law relating to the power of municipal corporations to define, prevent, and abate nuisances are treated of in *note to Grossman v. Oakland* (Or.) 36 L. R. A. 593.

The question of the power of municipalities over nuisances affecting buildings and other structures will be found in *note to Evansville v. Miller* (Ind.) 38 L. R. A. 161.

The subject of municipal power over nuisances affecting highways and water comprises the *note* to the cases of *Hagerstown v. Witmer* (Md.) — L. R. A. —, and *State v. Clarke* (Conn.) — L. R. A. —.

The *note to Ex parte Lacey* (Cal.) 38 L. R. A. 640, forms the subject of the power of such authorities over nuisances affecting safety, health, and personal comfort arising from a particular trade or business.

The question of prescription in cases of nuisances will form the subject of a later note, as will also the question of the power of municipal authorities to ask relief in equity.

The question of the power of such authorities over nuisances relating to public safety and health in general will be found in *note to Harrington v. Providence* (R. I.) 38 L. R. A. 305.

Nuisances arising from smoke and smoking will be found treated of in *note to St. Louis v. Heltzberg Pkg. & Provision Co.* (Mo.) *post*, 551, wherein the question of municipal power over them as public nuisances is discussed.

In many cases ordinances have been passed and upheld under charters giving the public authorities the power to make and pass ordinances for the

2. The body of the statute contains one object, and the title covers its provisions.

3. The state was plaintiff, and not the society organized under the statute. The alleged wrongs of the latter were not before the court for determination.

4. The municipality had power to pass the ordinance assailed.

5. The ordinance does not interfere or obstruct the right of ownership.

government and the good order of the city, and for the suppression of vice and intemperance and the prevention of crime, and to prevent and restrain the keeping of houses of ill fame and other disorderly places, but such ordinances have not expressly declared the keeping of such places to be nuisances, and they have been dealt with under the general provisions contained in the charters for public welfare, peace, and good order of the citizens, and so, in many cases, they have been expressly dealt with by state statute; but inasmuch as the question of municipal control over them as nuisances has not arisen in this class of cases, they are not treated of in the present note, which is exclusively confined to the consideration of such places and the question of municipal control over them as nuisances.

I. Nuisances affecting public morals and decency.

a. *In general.*

Generally it may be stated that the power of a municipality to pass a by-law or an ordinance which establishes a rule interfering with the rights of individuals or the public must emanate from the creating body, and clear authority must be found for it in the legislative enactment out of which the corporation exercises its functions of government. *State, Breninger, v. Belvidere*, 44 N. J. L. 350, 351. In which case an ordinance forbidding the keeping of a billiard table for hire was held unconstitutional as not being within the powers conferred by the charter, although it was not shown to have been specifically declared a nuisance, the charter giving the council power to make and enforce ordinances and by-laws suppressing gambling houses, and such other by-laws and ordinances for the peace and good order of the town as are deemed expedient, so long as not repugnant to the Constitution or laws of the state or of the United States.

Any place of public resort in which illegal practices are habitually carried on is a public nuisance. *McClellan v. State*, 49 N. J. L. 471, 472; *State v. Williams*, 30 N. J. L. 102.

The keeping of a disorderly house is a nuisance at common law. *State v. Bailey*, 21 N. H. 343; *Rex v. Higginson*, 2 Burr. 1232.

6. Whether the defendants were culpable *vel non* is not a question of itself reviewable on appeal.

(December 13, 1897.)

A PPEAL by defendants from a judgment of the Recorder's Court of the City of New

In Rathbone's Case, 1 N. Y. City Hall Rec. 26, the keeping of a disorderly house was looked upon as a nuisance.

In *Willis v. Warren*, 1 Hilt. 590, the public exhibition of obscene pictures was regarded as a common nuisance, and they were ordered to be destroyed upon publication being proved by the public authorities.

In *People v. Baldwin*, 1 Wheel. Crim. Cas. 279, it was held that a theater was a disorderly house on account of the manner in which it was conducted by indecent exposures.

Any place of public resort, whether an inn, a dwelling house, a storehouse, or any other building or garden, is a public nuisance in which illegal practices are habitually carried on, or when it becomes an habitual resort for thieves, drunkards, prostitutes, or other idle, vicious, and disorderly persons who may gather together there for the purpose of gratifying their own depraved appetites, or to make it a rendezvous where plans may be concocted for depredation upon society and disturbing either its peace or its rights of property. *State v. Williams*, 30 N. J. L. 102, 103.

Such collections of persons can have no other effect than to debauch and deprave the public morals, although they may be quiet and orderly places so far as mere noise and confusion are concerned; and, though the most scrupulous cleanliness may be observed, and they may be magnificent in ornament and luxurious in provisions for mere sensual gratification, they are indelible nuisances at common law because they are *nocturni*, nuisances,—that is, injurious to the public health, public quiet, and public morals. *State v. Williams*, 30 N. J. L. 102, 104.

It is both the right and duty of municipal corporations to make and enforce regulations for the observance of public decency, as well as for the preservation of good order, peace, and health, and such powers are necessarily incident to the objects of their being, and are involved in the very idea of police regulations. *Braddy v. Milledgeville*, 74 Ga. 516, 519, 58 Am. Rep. 443, in which case a city ordinance against street walking was upheld, such practice being inhibited by the common law as tending to lewdness, and therefore a nuisance.

An ordinance making it unlawful for any person to commit any indecent, immodest, lewd, and filthy act, or utter any lewd, lascivious, or filthy words, or use any scandalous, obscene, indecent, or profane language in the presence of any other person or persons, or the making of any immodest, obscene, or insulting motions or gestures to or about any other person publicly in a hamlet, and providing for the punishment thereof, passed under § 1653, Ohio Rev. Stat., subd. 2, 3, was upheld in *Billington v. Hoverman*, 7 Ohio Dec. 358, in which case the defendant was guilty of lewd and lascivious behavior in the streets.

In *Mantle v. Jordan* [1897] 1 Q. B. 243, 66 L. J. Q. B. N. S. 224, 75 L. T. N. S. 552, defendant was charged with violating a by-law of the county council made pursuant to the English local government act of 1888, § 16, which enacted that no person should, in any house, building, garden, land, or other place, abutting on, or near to, a street or public place, make use of any violent, abusive, profane, indecent, or obscene language, gesture, or conduct, to the annoyance of any person in such street or public place. The court held that such by-law was

Orleans imposing a penalty for the violation of a city ordinance against cruelty to animals. *Affirmed.*

The facts are stated in the opinion.

Mr. George J. Untereiner, for appellants:

Act 19 of 1888 contains more than one object,

made for "good rule and government," and "for prevention and suppression of nuisances" within the meaning of § 23 of the English municipal corporations act of 1882, and therefore was valid under § 16 of the above act of 1888, and that therefore the defendant ought to have been convicted.

Under the charter and ordinances of the city of Augusta the mayor of that city has power summarily to punish persons of bad character found within the city limits, and such authority is the exercise of police power to prevent the disturbing of the public peace and the maintenance of a nuisance and the obstruction of the public highways. *Shafer v. Mumma*, 17 Md. 331, 336, 79 Am. Dec. 656.

So, under a charter giving power to prevent and remove nuisances, the city has power to declare the showing or exhibiting certain horses in a town to be a nuisance, and to inflict a penalty for the violation of such ordinance. *Nolin v. Franklin*, 4 Yerg. 163.

In *Grand Rapids v. Williams* (Mich.) 36 L. R. A. 137, an ordinance relative to disorderly persons, providing that all persons who should be engaged in any illegal or improper diversion, or should use any insulting, indecent, or immoral language, or should be guilty of any indecent, insulting, or immoral conduct or behavior in any public street or elsewhere in the city, should be deemed a disorderly person, was applied to one in the habit of peering into the windows of an occupied lighted residence at the hours of night when the inmates were retiring, such a party being guilty of indecent or insulting conduct or behavior within the meaning of such ordinance.

And a city ordinance which provides, *inter alia*, that the keeping or controlling of any house or building within the corporate limits of the city, where loud or unusual noises are permitted, or where persons are permitted to congregate and engage in the use of profane or vulgar language to the disturbance of others, is a common nuisance, is valid under § 456 of the Iowa Code. *Centerville v. Miller*, 57 Iowa, 56 and 225.

A pantomime exhibiting a bridal couple in their chamber on the night of the marriage, followed by the departure of the groom, in whose absence the bride undresses, being careful, however, not to expose much of her person, and retires to bed, after which the groom returns and knocks at the door, and, on being bidden to enter, the curtain falls,—is a public nuisance, and within the statute against offenses against common decency. *People v. Doris*, 14 App. Div. 117.

b. House of ill fame, etc.

Generally it may be stated that houses of ill fame are nuisances at common law, and punishable thereby, as well as under the statutes of the different states relating thereto, and therefore there is no doubt but that they are proper subjects of municipal control under the general police power vested in municipal corporations for the protection of the public morals, decency, peace, and good order, and the general welfare of the inhabitants. In many cases, however, the city authorities, in passing ordinances relating thereto, have not expressly declared them to be public nuisances neither have they ordered their abatement or suppression specifically as such; and as this note is strictly confined to the question of municipal control over them as nuisances, cases not so dealing with them will not be found discussed herein.

and is therefore violative of art. 29 of the Constitution of Louisiana.

State v. Baum, 33 La. Ann. 981; *Moore v. Police Jury*, 32 La. Ann. 1013.

Act 19 of 1888, which pretends to authorize the passage of ordinance 3384, is a permissive statute, and violative of art. 235 of the Consti-

tution of Louisiana, because it permits a corporation to conduct its business in such a manner as to infringe the equal rights of all citizens of this state.

State v. Kuntz, 47 La. Ann. 107; *State v. Mahner*, 43 La. Ann. 496; *State v. Dulaney*, 43 La. Ann. 500; *Yick Wo v. Hopkins*, 118 U. S.

In *Childress v. Nashville*, 3 Sneed, 347, 357, it is said that a bawdy house is a common nuisance because it not only tends to corrupt the morals of an open profession of prostitution, but it likewise endangers the public peace and good order by drawing together profligate and disorderly persons, and therefore an ordinance forbidding the keeping, within the corporate limits, of such houses, or the wilfully permitting any such house to be kept, was a valid exercise of the power given to the corporations under the charter to regulate or prohibit and suppress all such houses, and also under the general power of such corporations relating to police regulations.

A house of ill fame is a constant menace to the public peace and good order of the community in which it exists, and is a nuisance and its keeping a misdemeanor at common law, and therefore its suppression and punishment are proper subjects of police regulations. *Rogers v. People*, 9 Colo. 450, 50 Am. Rep. 143, 147.

It would be contrary to the act to assert that houses of ill fame in the midst of a city are not dangerous and revolting nuisances which may be suppressed by the local authorities. *People v. Hanrahan*, 75 Mich. 621, 4 L. R. A. 751.

A city has power, under the provisions of its charter which gave it power to abate nuisances and to pass ordinances relating thereto, to pass a by-law making a bawdy house a public nuisance, and punishing the owner, where the same is used with his knowledge as a house of ill fame, or where the same is, to his knowledge, reputed to be such, by fine, such places being nuisances at common law. *McAlister v. Clark*, 33 Conn. 91.

In *Owensboro v. Simms*, 17 Ky. L. Rep. 1898, a city ordinance suppressing houses of ill fame was upheld, the incorporating act conferring upon the authorities full power, not only for the general health, comfort, and convenience of the inhabitants, but also for the morals and safety of the public.

An ordinance to prevent nuisances, and to provide for the security of public decency, was upheld in *Municipality No. 1 v. Wilson*, 5 La. Ann. 747, wherein the defendant was charged, and condemned to pay, a fine for keeping a disorderly house contrary to the provisions of such ordinance.

An ordinance making it illegal, and prohibiting persons from entering houses of ill fame, or being found there, was upheld under § 456 of the Iowa Code, under which the city was clothed with authority to repress and restrain disorderly houses, although the act was not declared to be a nuisance. *State v. Botkin*, 71 Iowa, 87, 60 Am. Rep. 780.

And in the case of *Centerville v. Miller*, 57 Iowa, 225, the court upheld a city ordinance providing for the punishment by fine of the keeper of a disorderly house, the same being within the powers conferred upon such corporations under the general corporation law of the state.

And under the general powers given to such corporations, a city ordinance for the suppression and prohibition of the keeping of houses of ill fame will be upheld, the maintenance of sanitary regulations and good order being the main inducement for the incorporation of towns and cities, such offenses directly affecting the welfare of the city, even though such act be of a criminal nature under the general laws of the state. *Wong v. Astoria*, 13 Or. 538, 542.

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So, a city ordinance passed for the prevention of houses of ill fame falls within the powers conferred upon the city authorities by their charter, under which they have power to make by-laws, rules, and regulations for preserving the peace, order, and good government of the city. *State, Burton, v. Williams*, 118 U. S. 288, 290.

And under a state statute giving power to restrain, prohibit, and suppress houses of ill fame, and other like places, and all kinds of public indecencies, city authorities have power to prohibit by ordinance persons from becoming inmates of such places. *Perry v. State*, 37 Neb. 623.

Section 4914 of the Tennessee Code declares that houses of ill fame kept for the purpose of prostitution and lewdness, gambling houses, or houses where drunkenness, quarreling, fighting, or breaches of the peace are carried on, or permitted to the disturbance of others, are nuisances, and, under § 4915, upon conviction the court may order the nuisance to be abated by the sheriff at the expense of the defendant.

Again, where the power to suppress disorderly houses and houses of ill fame is expressly granted by statute, it carries with it by a necessary implication the right and power to adopt all such lawful means or methods as may be found necessary to effect the end in view, such house being a common nuisance, as not only tending to corrupt the public morals, but endangering the public peace and the good order. *Childress v. Nashville*, 3 Sneed, 347, 356.

So, an ordinance prohibiting the letting of property for such purposes is declared valid upon the same grounds. *Childress v. Nashville*, 3 Sneed, 347, 356.

And a city ordinance declaring houses of ill fame conducted in an indecent manner to be nuisances, and providing for the abatement of the same by compelling the party to abandon the premises, is valid, such ordinance being for the good order of the community. *Shreveport v. Roos*, 35 La. Ann. 1010.

In *Chariton v. Barber*, 54 Iowa, 860, 37 Am. Rep. 209, § 452 of the Iowa Code, empowering municipal corporations to pass ordinances not inconsistent with the laws of the state, for carrying into effect, or discharging, the powers and duties conferred by that chapter, and such as should be deemed necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporation and the inhabitants thereof, and to enforce the same by fine or imprisonment, it was held that the city had no authority to pass an ordinance making the keeping a house of ill fame a misdemeanor, and punishing the same with fine or imprisonment; neither was such power conferred by § 456 of the Code, which gives the city power to suppress such houses and to authorize the destruction of all instruments or devices used and found in nine or ten pin alleys and billiard tables.

In this case, however, the above sections of the Code did not specifically give the city power to suppress or abate nuisances, neither were such resorts declared nuisances thereby.

In the subsequent case, however, of *Centerville v. Miller*, 57 Iowa, 56, it was held that § 456 of the Iowa Code, giving the city power to prevent riots, noise, disturbance, or disorderly assemblages, to suppress and restrain disorderly houses, houses

356, 30 L. ed. 220, and authorities therein cited; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636.

Act 19 of 1888 is violative of art. 1 of the Constitution, because it does not protect liberty or property, but is oppressive and a usurpation of power.

State v. Kuntz, 47 La. Ann. 107; *State v.*

of ill fame, billiard tables, nine or ten pin alleys or tables and bowling alleys, and to authorize the destruction of all instruments and devices used for the purpose of gaming, authorized the city to declare by ordinance the keeping or controlling of any house or building within the corporate limits, where lewd or unusual noises were permitted, or where persons were permitted to congregate and use profane or vulgar language to the disturbance of others, to be a common nuisance.

Under a power given to the city authorities "to abate or prevent nuisances," or to pass "such ordinances by laws, rules, and regulations for the better government of the city as they deem necessary," such authorities having no power to enact a law declaring that, not only suffering or allowing prostitution, but permitting single acts in a house or room, should constitute the owner or occupant of the house or room the keeper of a house of ill fame, neither have they a right to define that to be a house of ill fame which is not so. *State v. Webber*, 107 N. C. 962, 964.

And even if the power to suppress houses of ill fame is given to municipal authorities in express terms, such authorities cannot even then usurp the authority to enact that persons not guilty of the nuisance under the established principles of law shall be deemed guilty of keeping such houses. *State v. Webber*, 107 N. C. 962, 966.

Yet, under a general power to suppress nuisances, such as houses of ill fame, an ordinance which forbids owners from renting their houses to others for such purposes, or with a knowledge that they are to be so used, is valid, but such general rule does not empower a city to declare that a given house is kept for such purposes, or to define and declare what is a house of ill fame. *State v. Webber*, 107 N. C. 962, 966.

But the power to prevent nuisances does not directly or by implication carry with it the authority to hold the owner of a building, who never himself visits it, responsible for the nuisance of keeping a house of ill fame, committed by his tenant without his knowledge or consent; and such a by-law is not only unauthorized, but unreasonable. *State v. Webber*, 107 N. C. 962, 966.

So, where under an act conferring upon the common council of a city full power and authority to make all such by-laws and ordinances as they deem expedient for preventing and suppressing disorderly houses and houses of ill fame, the common council adopt an ordinance directing that any person keeping such a house shall, on conviction, be punished by fine and imprisonment; and further, that any such house or building so occupied shall be deemed a common nuisance which the common council shall abate by ordering such house or building to be pulled down and removed at the expense of the owner, proprietor, or occupant thereof at the discretion of such council,—such ordinance, in so far as it relates to the pulling down and destruction of such house, is not within the provisions of the charter, the power of the city being limited to the suppression of the nuisance itself, the law of necessity alone justifying the common council in resorting to the destruction of the property in order to abate the nuisance. *Welch v. Stowell*, 2 Dougl. (Mich.) 332.

And under the provisions of a city charter providing for the removal and abatement of nuisances, carrying out and enforcing sanitary regu-

Mahner, 43 La. Ann. 496; *State v. Dulaney*, 43 La. Ann. 500; *Civil Rights Cases*, 109 U. S. 11, 27 L. ed. 639; *State, Walker v. Judge of Session "A,"* 39 La. Ann. 139; *Tiedeman*, Pol. Power, p. 4; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, and citations in the above cases.

Because they are not sanitary or police regu-

lations for the apprehension of disorderly persons, vagrants, or prostitutes and their associates, and for the regulation of the liquor traffic, and giving the city council jurisdiction 2 miles beyond the city limits, an ordinance providing that any person visiting a house of ill fame within the city or within 1 mile thereof shall be guilty of a violation of the provisions of such act, exceeds the powers given to the common council of the city by the provisions of the charter, such power being conferred upon the council with respect to the visiting of such houses outside of the city limits. *Robb v. Indianapolis*, 38 Ind. 49, 52.

c. Gambling.

In *Hill v. Pierson*, 45 Neb. 503, it was held that a place kept for gambling purposes was a public nuisance.

So, an ordinance passed for the suppression of gaming houses is valid, it being highly proper that this aggravated nuisance should be subject to the control of and restraints imposed by the ordinances of these local governments peculiarly afflicted by the evil. *Greenwood v. State*, 6 Baxt. 507, 574, 32 Am. Rep. 539.

Under an amended charter giving the common council power to make all such laws as they conceive requisite for the regulation of the morals and police of the town, and for the prevention and removal of nuisances, the observance of such laws to be enforced by penalties and forfeitures to be levied upon the goods and chattels of the offender, such council have power to prohibit the keeping of a faro table. *McLaughlin v. Stephens*, 2 Cranch, C. C. 145.

In *Burnett v. Berry* [1896] 1 Q. B. 641, under § 23 of the English municipal corporations act of 1882, which empowers the city council of a borough to make by-laws "for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable by virtue of any act in force throughout the borough," a by-law prohibiting any person from frequenting and using any street or any other public place within the borough for the purpose of bookmaking or betting is valid.

In *State v. Populus*, 49 La. Ann. 1006, an ordinance relating to the keeping of lotteries by directing a search warrant to issue against the persons continuing or keeping the same was upheld as being within the power delegated to municipalities by the Louisiana Statutes of 1894, which declared the same to be public nuisances, and was not affected by the Laws of 1896, act No. 45, the brevity of delegated power contained in the latter act being amplified sufficiently to sustain the ordinance by prior legislation relating to lotteries.

But a statute giving the police power to seize and destroy gaming tables without notice to the owner or a judicial investigation or determination of the case is not constitutional, even though it is contended that such table constituted a nuisance at common law, and therefore may be destroyed without notice. *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420.

Under § 14 of the Iowa Laws of 1856, chap. 15, providing the city council with authority to make ordinances to secure the inhabitants against fire, against violations of law and the public peace, to suppress riots, gambling, and drunkenness, indecent and disorderly conduct, to punish lewd behav-

lations, and is therefore *ultra vires* null and void, and of no legal effect.

People v. Gillson, 109 N. Y. 889; *Civil Rights Cases*, 109 U. S. 11, 27 L. ed. 839; *Mugler v. Kansas*, 128 U. S. 661, 31 L. ed. 210; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, and authorities there cited.

for in public places, to suppress disorderly houses, and generally to provide for the safety, prosperity, and good order of the city,—the city has no power to pass an ordinance declaring the setting up and keeping of any gambling device a misdemeanor, and punishing the same as such. *Mount Pleasant v. Breeze*, 11 Iowa, 399.

d. Bowling alleys.

A bowling alley is not of itself a nuisance, since it may either remain unused, or it may be used only as a place of innocent amusement; its injurious character depends upon the improper use alone. But the legislature may determine that an instrument which tends to facilitate vicious practices is of itself an evil which ought to be prohibited. *State v. Noyes*, 30 N. H. 279.

An ordinance which prohibits noisy amusements, and prevents immorality, will be upheld. *Ex parte Smith*, 38 Cal. 702.

If the town authorities adopt a statute making bowling alleys a nuisance such statute has a binding effect upon such town, and therefore such alleys, when situated within a certain distance from a dwelling house, become a nuisance, within the meaning of such statute, which may be abated by the public authorities. *State v. Noyes*, 30 N. H. 279.

So, if, by the general terms of a village charter, the trustees are authorized to make by-laws relative to slaughterhouses and nuisances generally, and, pursuant to such authority, they pass a by-law declaring the keeping of a ten-pin alley for gain to be a nuisance, such ordinance is valid, even though the owner thereof has printed rules posted therein relative to the game, and forbidding, abating, and prohibiting the use of the alley by minors or boys, such an enterprise having no useful end. *Tanner v. Albion*, 5 Hill, 121, 40 Am. Dec. 387.

e. Drunkenness.

In Missouri drunkenness is not, *per se*, the subject of legislative prohibition. *St. Joseph v. Harris*, 50 Mo. App. 122, 127.

Drunkenness cannot be made the subject of municipal regulation, except where its existence in the individual is at a place, or under circumstances or conditions, when it annoys or disturbs others; and therefore any sweeping regulation interdicting under penalty drunkenness generally, or any case other than those specified in the exception above mentioned, would be an invasion of the "inalienable rights of the citizen." *St. Joseph v. Harris*, 50 Mo. App. 122, 127. To the same effect, *St. Louis v. Fitz*, 53 Mo. 532.

In *Grand Rapids v. Newton* (Mich.) 35 L. R. A. 223, an ordinance which prohibited "drunkards, intoxicated persons, tipplers, gamblers, persons having the reputation or name of being prostitutes, or other disorderly persons, from congregating, assembling, visiting, or remaining," and forbidding the keeper of any tavern or house, or any saloon, cellar, shop, office, or other residence or place of business, to allow such act, was held unreasonable and beyond the power of the council to enact, as it was not limited in its application to places of business which required police regulation, nor to assemblages of immoral persons, and did not make knowledge of the reputation of the person so visiting such place an ingredient of the offense. In this case, however, the act was not declared a nuisance. 39 L. R. A.

Because they violate art. 6 of the Constitution of this state, in this, that they deprive persons of liberty and property without due process of law.

Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789;

II. Nuisances affecting public peace and good order.

a. In general.

Under a city charter which gives the common council power and authority "to define and prevent disorderly conduct, to prevent all disorderly assemblages, all disturbing noise, all drunkenness in public places, and to punish vagrants, beggars, and disorderly persons as defined by law," the common council have power to define what disorderly conduct is, and also who shall be considered disorderly persons. *People v. Miller*, 38 Hun, 32.

A house of ill fame, or a disorderly house, is a nuisance affecting the public peace and good order of the community, and as such may be abated by such lawful means or methods as may be necessary to accomplish the end in view. *Childress v. Nashville*, 8 Sneed, 347, 356.

Under the police power persons disturbing the public peace, persons guilty of a nuisance, or obstructing the public highways, and like offenses, may be summarily arrested and fined, without any infraction of that part of the Constitution which apportions the administration of the judicial power strictly as such. *Shafer v. Mumma*, 17 Md. 381, 386, 79 Am. Dec. 656.

The English statutes, 16 Vict. chap. 35, which provides for the most stringent provisions respecting licensing, *inter alia*, of runners and other persons soliciting visitors to resort to taverns or public places and acting as guides to the objects of curiosity in the vicinity thereof, and also gives power to a municipal council of the township to make by-laws to prohibit the same without a license, was held not to authorize the passing of a by-law to prevent a nuisance which was not in itself unlawful, the court stating that the absolute prohibition of any particular occupation not in itself unlawful, and only a nuisance from its abuse, could not be held to come fairly within the general power to make by-laws for the peace, welfare, and good government of a town,—especially when authority was given over particular matters by the same statutes, and some in reference to matters of so nearly a similar character as almost to warrant the application of the maxim *Expressio unius est exclusio alterius*. *Davis v. Clifton*, 8 U. C. C. P. 238.

An ordinance prohibiting the utterance of profane language, words, or epithets in the hearing of two or more persons was upheld in *Ex parte Delaney*, 48 Cal. 478, as being within the authority conferred upon the municipality by the 3d subdivision of §1 of Cal. Stat. 1868, p. 540, which gave power to prohibit and suppress or exclude from certain limits houses of ill fame, prostitution, and gambling, and to prohibit and suppress or exclude from certain limits, or regulate, all occupations, houses, places, pastimes, amusements, exhibitions, and practices which were against good morals, contrary to public order and decency, or dangerous to the public safety. In this case, however, the act was not specifically declared a nuisance.

Public picnics and open-air dances within the limits of the village cannot be declared nuisances by a village ordinance, such not being nuisances in themselves. *Des Plaines v. Poyer*, 123 Ill. 348, affirming 22 Ill. App. 674.

And a city ordinance which provides that the working of convicts upon the streets of the city is a nuisance, inasmuch as it is calculated to produce riots, endanger the lives of the inhabitants,

State v. Goodwill, 83 W. Va. 179, 6 L. R. A. 621; *Godcharles v. Wigeman*, 118 Pa. 481; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 825; *Bruceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Cooley*, Const. Lim. 5th ed. p. 434.

Because they are in violation of the law of

the land, are without public utility, and they unwarrantably restrict and interfere with defendant in the use and enjoyment of his capital, and the use of his lawful licensed business. See authorities cited above.

Because the state, not having the authority to pass the act in question, could not delegate

and disturb the peace and good order of the city, is invalid in so far as it declares such act to be a nuisance. *Ward v. Little Rock*, 41 Ark. 526, 48 Am. Rep. 46, 47.

b. Intoxicating liquors.

In many cases ordinances restraining or prohibiting the sale of intoxicating liquors within the town or city limits have been held valid as passed for the preservation of good order, decorum, and decency within the city limits, and for the public welfare; but as these cases do not pass upon the question of the maintenance of such places, or the restriction or prohibition of them as nuisances, they are omitted from the present note, which is limited to the consideration of intoxicating liquors and their abatement as nuisances by the municipal authorities. So, in many cases the subject has been governed by state statutes, and though such statutes may declare the offense a nuisance, yet, inasmuch as the question of municipal control over such nuisances has not arisen in these cases, which have been prosecutions at the instance of the state for violation of the state laws, they are purposely omitted from the present discussion.

The legislature, in the exercise of its power to regulate the police of the state, may prohibit the sale of intoxicating liquors throughout the state, or in specified localities, and so may cities and towns by their by-laws made pursuant to their charters, such power being part of the great fundamental principles that enter into and compel the necessity of government for the protection of the people against crime, immorality, vice, and even nuisances. *Dingman v. People*, 51 Ill. 277, 280.

A state has power to declare that any place kept and maintained for the illegal manufacture and sale of intoxicating liquors shall be deemed a common nuisance, and be abated, and at the same time to provide for the indictment and trial of the offender. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 306.

So, a city may, under its charter, declare the sale of intoxicating liquors a nuisance. *Block v. Jacksonville*, 38 Ill. 301, 303; *Goddard v. Jacksonville*, 15 Ill. 588, 60 Am. Dec. 773; *Byers v. Olney*, 16 Ill. 35; *Jacksonville v. Holland*, 19 Ill. 271; *Pekin v. Smelzel*, 21 Ill. 464, 74 Am. Dec. 105; *Couterville v. Gillen*, 72 Ill. 599, 601; *Bennett v. People*, 80 Ill. 394.

It is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly; and whether the law is politic, or expedient, or necessary, is not a question with which the courts have anything to do, such question being between the people and those to whom they delegate the temporary power of making laws; and therefore a law which makes the selling of intoxicating liquors a nuisance is within these principles. *Bepley v. State*, 4 Ind. 265, 68 Am. Dec. 628; *McLaughlin v. State*, 45 Ind. 338, 341.

It is competent for the legislature, as a means of carrying into effect a law to prohibit the unlawful sale of intoxicating liquors, to declare the keeping of such liquors for the purposes of sale in any place within any city or town unlawful, and to declare the liquor thus kept liable to seizure and forfeiture as, quasi, a nuisance, under a proper and well-guarded system of regulation. *Fisher v. McGirr*, 1 Gray, 1, 23, 61 Am. Dec. 381.

In passing upon the validity of an ordinance 89 L. R. A.

prohibiting the sale of spirituous and other intoxicating liquors, the court, in *East St. Louis v. Wehrung*, 50 Ill. 23, 31, stated that in creating municipal corporations it was designed to aid the government in the preservation of good order, and to protect more effectually persons in the particular community from injuries and annoyances that could not be so readily guarded against by the general laws of the state; and that in conferring the power upon the corporate body it was with the intention that it should be exercised by the body created and in the mode prescribed, and any departure from such authority, or any attempt by the body to transfer its powers to others, was unwarranted. In that case, however, it did not appear that the ordinance specifically declared intoxicating liquors to be a nuisance.

An ordinance declaring the sale of liquors in the town to be a nuisance, and imposing a fine, will be upheld as valid, upon the ground that, although liquors are property and their sale is as much secured as that of any other property, yet the sale for use as a common beverage and tipping is hurtful and injurious to the public morals, good order, and well being of the society. *Goddard v. Jacksonville*, 15 Ill. 588, 60 Am. Dec. 773; *Byers v. Olney*, 16 Ill. 35.

In *Jacksonville v. Holland*, 19 Ill. 271, the court upheld an ordinance of the town declaring groceries for the sale of intoxicating drinks nuisances.

In an action to recover the penalty incurred for the violation of an ordinance declaring the sale of spirituous liquors a nuisance, it was held that the same was in the nature of a tort, in which one or more of the attending parties might be sued, for the reason that torts were joint and several, and so, of those who are active in maintaining a nuisance, one or more are liable to the penalty. *Jacksonville v. Holland*, 19 Ill. 271.

So, in *Gardner v. People*, 20 Ill. 490, the ordinance declared spirituous and other intoxicating liquors a nuisance, and provided a penalty, but the question in that case turned upon the point as to whether or not the authority given to the town to pass ordinances in relation to such liquors, and declaring the same nuisances, had the effect of repealing the general law of the state, the court holding that it did not.

In *Harbaugh v. Monmouth*, 74 Ill. 367, 369, the court looked upon the decision in the prior case of *Goddard v. Jacksonville*, 15 Ill. 588, which had been followed and affirmed in numerous other decisions, as fully settling the law upon the subject that under a charter giving the city power to make regulations to insure the general health of the inhabitants, and to declare what should be a nuisance, and to prevent and remove the same, and to license, tax, restrain, prohibit, and suppress tipping houses and other disorderly houses, a city had power to declare the sale of intoxicating liquors to be a nuisance.

In *Dennehy v. Chicago*, 120 Ill. 631, 636, it is said that police regulations prohibiting the sale of liquors are sustained upon the ground that they are established for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances.

So, the validity of an ordinance relating to the sale of intoxicating liquors was upheld in *Pekin v. Smelzel*, 21 Ill. 464, 469, 74 Am. Dec. 105, but the ordinance did not declare it to be a nuisance al-

to the city of New Orleans any power and authority to pass an ordinance which in itself could not make a misdemeanor.

It is manifest from a perusal of the ordinance and laws on which the affidavit is based, that the legislature and city council never intended that its provisions should apply to cases such as the one at bar.

though the court approved of the decision in the prior case of *Goddard v. Jacksonville*, 15 Ill. 589, 60 Am. Dec. 773.

In *State, Vance, v. Crawford*, 28 Kan. 726, 42 Am. Rep. 182, 186, wherein the state statute declared that saloons were public nuisances and provided for their abatement, the court stated that every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance.

Under an act incorporating a town and giving the authorities power to make laws "to restrain and prohibit every species of gambling, drunkenness, etc., and to grant licenses to the retailers of spirits and liquors, and to regulate and restrain them when deemed a nuisance, etc., and, in general, to pass such laws not contrary to the Constitution of the state, and the laws thereof, which the corporation shall deem expedient and necessary, it is enough if the retailing of spirits is deemed a nuisance, and that the corporate powers are to determine whether retailing is a nuisance, so as to warrant the exercise of the extraordinary and high power of restraining it. *Marion v. Chandler*, 6 Ala. 899, 902.

And such act confers upon the corporation the power of prohibiting the retailing of spirits within its limits without first paying a license. *Marion v. Chandler*, 6 Ala. 899, 902.

Ordinances passed by the public authorities pursuant to the power given them under the act of incorporation and state laws regulating the sale of intoxicating liquors are regarded as police regulations established by the legislature for the suppression and prevention of intemperance, pauperism, and crime, and for the abatement of nuisances; and license fees recovered therefor are not regarded as an exercise of the taxing power, as pursuits which are pernicious or detrimental to public morals may be prohibited altogether, or licensed for a compensation to the public. *State, Troll, v. Hudson*, 78 Mo. 302, 304.

So, an ordinance which declares the sale of intoxicating liquors to be a nuisance, and imposes a fine for a violation thereof, will be upheld as valid. *Goddard v. Jacksonville*, 15 Ill. 588, 60 Am. Dec. 773.

In the above case the general law under which the town was incorporated empowered it to establish and execute such ordinances in writing, not inconsistent with the laws or the Constitution of the state, as it should deem necessary to prevent and remove nuisances; and a later act further empowered it to declare what should be considered as nuisances within the limits of the corporation, and to provide for the abatement and removal thereof; and both acts were re-enacted in a later state statute. The court stated that the objection that the ordinance was an invasion and infringement of private rights and private property was fully answered by the maxim as applicable in that class of police powers, *Sic utere tuo, ut alienum non ledas*. *Goddard v. Jacksonville*, 15 Ill. 588, 60 Am. Dec. 773.

In *Byers v. Olney*, 16 Ill. 35, the court approved of the ruling in the above case of *Goddard v. Jacksonville*, 15 Ill. 588, 60 Am. Dec. 773, although in that case the ordinance did not specifically declare the selling of intoxicating liquors to be a nuisance.

So, a city ordinance which prohibits the sale of spirituous and intoxicating liquors within the

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Act 19 of 1888 is not invalid under article 29 of the Constitution. It has a unity of object, and its details are germane.

State v. Lacombe, 12 La. Ann. 195; *Clark v. Board of Health*, 30 La. Ann. 1351; *State, Southern Bank, v. Pillsbury*, 31 La. Ann. 1;

corporate limits or within one mile of the city, and adjudges the same a nuisance, is valid and binding, the corporate authorities of a town having authority to declare the sale of intoxicating liquors a nuisance. *Harbaugh v. Monmouth*, 74 Ill. 367, 369.

And a city ordinance prohibiting the sale of intoxicating liquors, and providing that any person violating the same shall be guilty of a nuisance, and upon conviction shall be fined, properly defines the offense, and prescribes the punishment, although such portion of it as calls it a nuisance may be rejected as surplusage. *Carthage v. Buckner*, 4 Ill. App. 317, 322.

Again, a city ordinance prohibiting the sale of intoxicating liquors as a nuisance in any refreshment saloon or restaurant within the city, but not prohibiting the use or keeping thereof elsewhere, merely selecting the place of a certain class and prohibiting its use in such places, is not unreasonable, and is a valid exercise of its police power. *State v. Clark*, 28 N. H. 178, 61 Am. Dec. 611.

Under an ordinance providing that persons keeping notorious, disorderly, and riotous houses for the resort of idle and drunken persons shall, on conviction, be liable to fine, and also the forfeiture of his or their license to keep the same, to be withdrawn by the intendant, and shall be debarred of the privilege of again obtaining a license to keep such a house or bar, until he produces satisfactory assurances and sufficient securities against committing a like offense. The revocation of the license does not preclude the continuance of the business, as it provides that upon certain contingencies it may be continued, and such proviso is not in restraint of trade as it is a mere regulation thereof to keep it in proper bounds, the city council being charged with the police regulations of the city, the preservation of order, and the comfort and happiness of its inhabitants, and such ordinance is enacted to suppress in a summary manner such quasi nuisances; and the court will therefore refuse to interfere with such municipal regulations, it not appearing that the city council have transcended their powers or violated their functions. *Towns v. Tallahassee*, 11 Fla. 130, 134.

Section 456 of the Iowa Code enumerates certain powers of the incorporation, such as the prevention of riots, noise, disturbances, disorderly assemblages, etc., and provides that such incorporations shall have power "to preserve peace and order therein," and § 482 empowers municipal corporations to make and publish such ordinances, not inconsistent with the laws of the state, as shall seem necessary and proper to provide for the safety, preserve the health, promote prosperity, improve the morals, order, comfort, and convenience of such corporation and the inhabitants thereof.

Under the above sections it has been held that an ordinance declaring any person found in a state of intoxication in the town guilty of a misdemeanor and liable to be taken by the marshal, without warrant, before the mayor if in a fit condition for trial, and if not in such condition to be taken to jail until in such condition, and imposing a penalty, was within the authority conferred by the Code, the council determining that such person, in depriving himself of his reason by intoxication, has done an act derogative to the peace and order of the

State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224; *State v. Henderson*, 32 La. Ann. 780; *New Orleans Taxpayers' Assn. v. New Orleans*, 33 La. Ann. 570; *State v. Taylor*, 34 La. Ann. 961; *State v. Dubois*, 39 La. Ann. 676; *Louisiana Bd. of Trustees of American Printing House for Blind v. Dupuy*, 37 La. Ann. 188; *Edwards v. Police Jury*, 39 La. Ann. 859; *Conery v. New Orleans Waterworks Co.* 41 La. Ann. 924; *Lucky v. Police Jury*, 46 La. Ann. 686; *State v. Breeden*, 47 La. Ann. 374.

If act 19 of 1888 be invalid, the city had a right under the charter of 1882, act 20, §§ 7, 8, to adopt the ordinance of November 15, 1888, enforced in the instant case.

Third Municipality v. Blanc, 1 La. Ann.

incorporation, and the comfort and convenience of the inhabitants. *Bloomfield v. Trimble*, 54 Iowa, 209, 37 Am. Rep. 212. In this case, however, no specific power to abate nuisances was given by the charter, neither was drunkenness specially declared to be a nuisance, although the terms of the charter were broad enough to embrace subjects of municipal control which were not expressly or particularly mentioned in the sections of the Code conferring powers upon cities and towns.

But, although the question of the power of a municipal corporation to abate a public nuisance was not directly involved in the case of *McCrowell v. Bristol*, 5 Lea, 685, 688 (the direct question being the liability for not abating a saloon as a nuisance), yet the court said that, as the keeping of a saloon was authorized and regulated by law for which a tax was paid to the state and county, and also to the corporate authorities when the business was to be carried on within a town, such business was not a nuisance *per se*, and that if it was so at all it became so by the manner in which it was kept, and that although the power to abate nuisance of a certain character was conceded, yet the power of a town or city government to abate a nuisance consisting in the disorderly manner in which a drinking saloon was kept, was not so clear.

So, an ordinance regulating the license of dram-shops and the grocery business, and providing that upon any violation of the same the town council shall revoke such license, and the town constable shall immediately close up the premises, such ordinance, in so far that it authorizes the closing up of such saloon or grocery business by force, without in the first place having the same judicially declared a nuisance ordered to be abated, is unconstitutional. *Baldwin v. Smith*, 32 Ill. 162.

And where by ordinance intoxicating liquors, kept within the town limits for sale or to be given away to be drunk within such limits, are declared a nuisance, and the police officers are directed to abate the same by removing them beyond such limits, such liquors cannot be taken away until it has been judicially determined that the ordinance has been violated. *Darst v. People*, 51 Ill. 293, 2 Am. Rep. 301.

Again, although the town has power under its charter to declare the sale of spirits or beer within its limits to be a nuisance, and can punish it as such, yet the charter gives it no extraterritorial power in regard to nuisances, and therefore such ordinance, in so far as it related or applied to 3 miles beyond the corporate limits, is void. *Strauss v. Pontiac*, 40 Ill. 301, 303.

The charter in the above case authorized the town to declare what shall be nuisances, and to prevent and remove the same, and to prohibit tipping houses and dram shops in the town or within 5 miles thereof, and to forbid any person from keeping in the town, or within 3 miles thereof, of spirits or beer for the purposes of traffic under the penalty of a fine, and gave power to make all ordinances necessary to carry into effect the execution of such powers. It was held that the city had no authority to pass an ordinance forbidding the sale of spirits or beer outside the corporate limits and within 3 miles thereof, as the town could not give its ordinance an extraterritorial effect except so far as it might be clearly authorized so to do by 39 L. R. A.

the legislature, the section of the charter, giving the town power to legislate and to prohibit tipping houses and dram shops within 5 miles, not embracing the power to prohibit the sale for exportation or for domestic use of beer, the act not prohibiting the keeping of spirits or beer for the purposes of traffic within 3 miles of the town, although conferring upon the town power to enact an ordinance upon the subject. *Strauss v. Pontiac*, 40 Ill. 301, 302.

A similar decision was rendered in *Ashton v. Ellsworth*, 48 Ill. 299, although it did not appear that the act was specifically declared to be a nuisance.

A charter empowering the city council to declare the selling, giving away, or the keeping on hand for sale of any spirituous or intoxicating liquors, ale, beer, or any kind of fermented liquors within the city a nuisance, must be construed so as to mean that the liquors must be kept to sell within the city, and as not intended to prohibit the possession of liquors within the city designed for sale elsewhere; and therefore an ordinance making it an offense for any person within the city to have in his, her, or their possession any intoxicating liquors exceeds the power conferred, no right being given by the charter to make the possession of such liquors within the city, without any intention of selling therein, an offense. *Sullivan v. Oneida*, 61 Ill. 242, 245.

Under the charter in the above case, it was held that an ordinance authorizing the search and seizure of liquors were kept in the city whether there was an intention to sell them or ship them and sell elsewhere or not, it was held that such ordinance was *ultra vires* and void as interfering with the commerce between the states, it might be with foreign commerce; and that, even as confining its operation to the ordinary traffic between the city and the neighboring towns and cities, it was also unjust and illegal. *Sullivan v. Oneida*, 61 Ill. 242, 245.

Under an ordinance which prohibits the retailing of intoxicating liquors, but gives power to the city council to license, regulate, and tax such sales, and to declare the keeping of the same on hand to be a nuisance, and providing for its summary abatement and suppression by means of a search of the premises and the seizure and sale of the liquors there found, the court stated that if the article so found was so great a nuisance as to require such summary proceedings for its suppression, the sale of it by the officer under the seizure should also be considered a nuisance which ought to be suppressed, and that therefore such ordinance was objectionable. *Sullivan v. Oneida*, 61 Ill. 242, 247.

In *Sullivan v. Stephenson*, 62 Ill. 230, the court upheld the decision in the above case of *Sullivan v. Oneida*, 61 Ill. 242, 247, the ordinance passed upon being the same as in the previous case.

So, an ordinance prohibiting the playing or making a noise upon any musical instrument in any drinking saloon or beer cellar after midnight, and also prohibiting any female from being in any public drinking saloon after such hour, was upheld in *Ex parte Smith*, 38 Cal. 702, although the city ordinance did not specifically declare such acts to be nuisances nor prohibit them as such.

Spirituous liquors are not of themselves a common nuisance, but the act of keeping them for sale by statute creates a nuisance; but it is not lawfu

385; *State v. Matile*, 48 La. Ann. 728; *Monroe v. Hardy*, 46 La. Ann. 1283; *Opelousas Bd. of Police v. Giron*, 46 La. Ann. 1864; *State v. Dubarry*, 46 La. Ann. 33; *State v. Dupaquier*, 43 La. Ann. 587, 26 L. R. A. 162; *State v. Sarvadat*, 46 La. Ann. 700, 24 L. R. A. 584; *State v. Stone*, 46 La. Ann. 148.

The act of 1888 does not violate article 235 of the Constitution.

The ordinance of November 15, 1888, does not violate article 1 of the Constitution.

Municipality No. 1 v. Wilson, 5 La. Ann. 747; *Nolin v. Franklin*, 4 Yerg. 163; *Com. v. Abrahams*, 156 Mass. 57; 1 Dill. Mun. Corp. §§ 368, 375, 376, 698.

The ordinance is not *ultra vires* of the city.

It does not interfere with any right of property in animals. The defendants have been found guilty, as matter of fact, of cruelty to animals in a public street. The facts will not be inquired into on appeal.

Third Municipality v. Blanc, 1 La. Ann. 385.

Breaux, J., delivered the opinion of the court:

One of the defendants appeals from a judgment condemning him to pay a fine of \$25, and the other appeals from a judgment condemning him to pay a fine of \$2.50. The charge upon which the judgment was rendered was that of cruelty to animals, in violation of an ordinance of the city council. The case comes before us on questions of law and such facts as may be needful to their decision.

The first point urged by the appellants was that the recorder erred in not granting defendants' motion for a bill of particulars. It appears that the affidavit was made in good faith, and that it was reasonable, and that the law had been substantially complied with. It could have been amended at any time during the hearing, in case of insufficiency or defect. It was not amended, and on the trial it did not become apparent that an amendment or a bill of particulars was needful. Substantially the defendants must have known the offense for which they were tried.

After this motion had been overruled, and

for any person to destroy them by way of abating the common nuisance. *Brown v. Perkins*, 12 Gray, 89, 100.

As to the power of a municipality to order the destruction of intoxicating liquors, see *Wallace v. Richmond* (Va.) 36 L. R. A. 554.

c. Public amusements.

It has been said that a house or place kept by the owner with a view to profit, for the practice of public amusements not in themselves prohibited by law, cannot be held to be a nuisance unless such consequence attaches from the mode in which it is kept. *State v. Hall*, 32 N. J. L. 158, 164.

Public picnics and open-air dances, within the limits of a village, cannot be declared nuisances by a village ordinance, such not being nuisances in themselves. *Des Plaines v. Poyer*, 123 Ill. 348, affirming 22 Ill. App. 574.

So, the Ferris Wheel, erected for the purpose of amusement, is not a public nuisance abatable by the city authorities, it not being a nuisance *per se*. *Ferris Wheel Co. v. Chicago*, 27 Chicago Legal News, 399.

39 L. R. A.

the defendants had taken their bills of exception, they made the defense that act No. 19 of 1888, and the ordinance under which they were prosecuted, violate article 29 of the Constitution. With reference to the act, it is argued that it contains three objects. Two of these objects, it is asserted, are not necessary or incident to the main object. The act assailed by the defendants as being unconstitutional is entitled "An Act Relative to Societies for the Prevention of Cruelty to Animals; Their Organization, Their Officers, Members, and Agents, and the Fines Collected in Prosecutions Instituted by Them and the Duties of Municipal Corporations with Respect Thereto." The plaintiff seeks to support the act on the ground that the object is to prevent cruelty to animals in streets and other places of the municipal corporations; that under the title of the act it was germane to that part of the statute relating to the organization of societies for the prevention of cruelty to animals, to add a section making it the duty of municipal corporations to provide by ordinance for the punishment of cruelty to animals. It was contended that these were necessary for "oneness" or unity of object in the act. This position of plaintiff is controverted by the defendants, who urge that the title of the act is clear, and that it could convey no other purpose than to provide for the organization of societies for the prevention of cruelty to animals; and that the other part of the act, as we take it, which provides for the organization of these societies, directs mayors of cities to commission their agents as special officers, foreign to the purpose of the act. From these propositions the conclusion is arrived at by the defendants that the provision of this act contains three different nongermane objects. They are briefly stated: (1) To authorize societies to prevent cruelty to animals; (2) to direct the municipal corporations to issue commissions to designated agents as special officers of the society; (3) to punish offenders.

In our view, the different provisions of the act include a number of details which were deemed necessary in order to accomplish the purpose in view. There is not here the least inconsistency; they all harmonize to one end.

Theatrical performances, legalized by the payment of a tax imposed by the city authorities, are not within the provisions of an act giving such authorities power to make, limit, and impose reasonable fines for all misdemeanors, disorders, neglects, and nuisances committed within the limits of the city, for which the laws of the state have not provided an ample remedy. *Waters v. Leech*, 3 Ark. 110, 155.

Yet, an ordinance which prohibits noisy amusements, and prevents immorality, will be upheld as tending to prevent nuisances. *Ex parte Smith*, 38 Cal. 702.

The establishment of a public show, such as a menagerie, circus, or hippodrome, on a tract of land dedicated to a city or town for the purpose of a graveyard, and actually used as such, constitutes a public nuisance which may be abated by the authorities by means of their police power and as a government agency, and not merely in the discharge of their purely corporate power or duty. *Kansas City v. Lemen*, 12 U. S. App. 640, 57 Fed. Rep. 907.

R. W.

There is difference in details, but none as to objects. The municipality has been given no power save that needful to accomplish the one statutory object. Two agencies, it has been repeatedly held, may be combined under one authority, with the view of carrying out an end proposed. Power may be given to two corporations, and the statute is not illegal, as containing two objects, from the fact that it also authorizes the forming of a society solely, in matter, for the one object in view. The title, also, is broad enough to cover all the provisions of the act, and the body of the act contains one object,—to prevent cruelty to animals,—and is responsive to the title covering the one object. *State v. Taylor*, 84 La. Ann. 981; *Lucky v. Police Jury*, 46 La. Ann. 686.

We take up the next ground of defense,—the act violates article 285 of the Constitution, and permits infringement upon the rights of persons. This objection is founded upon the asserted favoritism of the society. If there is any foundation in fact in the position, it would be evidence of the violation of the statute by the society, and not an indication of permission to commit trespass or to inflict an injustice. The matter of notice to one, and not to the other, that he is exposed to arrest, because of his direct or indirect violation of the ordinance, does not give rise to any question of unconstitutionality of the statute. The complaint is not before us contradictorily with the asserted offending society. Moreover, if it be as asserted, the favoritism could not be justified by any of the terms of the statute. The prosecution was instituted in the name of the state; it cannot be (as defendants would have it) presumed that it was instituted by the society. The society, not being a party, cannot be held responsible for alleged partiality in the matter of the enforcement of the statute relative to cruelty to animals.

The illegality of the ordinance to prevent cruelty to animals is also urged on the ground that it does not come within the scope of the police power of the city; that the police power does not extend to the protection of animals in

the manner the ordinance would sanction; that there was no breach of order or disturbance of any kind, and the act of the defendant in question was of a personal character; it concerned only the appellants personally. We take it that the legislature had conferred needful power to the council to pass ordinances to prohibit nuisances. This conferred upon the city government authority to impose penalties upon those who make an unlawful, unreasonable, and offensive use of their property. Cruelty to animals on the public street, it has been held, works annoyance, and, as such, it is in violation of the rights of the public.

The objection of the appellants that the ordinance interferes with private rights of property, and the liberty of using it, and of enjoying the ownership, is equally as unfounded. The rights of the owner of animals cannot be injuriously affected or obstructed under the terms of an ordinance requiring that they be not cruelly treated in the public places of a city. The statute relating to animals is based on "the theory, unknown to the common law, that animals have rights which, like those of human beings, are to be protected. A horse, under its master's hands, stands in a relation to the master analogous to that of a child to a parent." Bishop, *Statutory Crimes*, §§1101 *et seq.* Reasoning from that basis, we feel certain that the ordinance and the statute do not interfere with the private right of property, as claimed.

In answer to the contention that we should review the facts, we deem it proper to say: This being an appeal from a fine imposed under a municipal ordinance, this court is not vested with jurisdiction to determine on the facts of the case, save to the extent needful to pass on the law points presented. This court has naught to do with the guilt or innocence of those against whom these proceedings were instituted. This, being exclusively a matter of fact, does not come within the exercise of our appellate power.

It is ordered and adjudged that the judgment appealed from be affirmed.

PENNSYLVANIA SUPREME COURT.

John J. PEPPERDAY

v.

CITIZENS' NATIONAL BANK OF LATROBE, *Appt.*

(183 Pa. 519.)

1. A bank receiving a check instead of cash, without authority from its principal, on a sale of his stock, and crediting his account with the amount of it, is liable to him therefor notwithstanding the fact that the check proves worthless, and irrespective of the question of its diligence in attempting to collect it.

2. Voluntary payment which cannot be recalled, by a bank to its principal, is

NOTE.—As to the acceptance of something besides money from a bank to constitute a discharge of the drawer of a check, see note to *Anderson v. Gill* (Md.) 25 L. R. A. 200.

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made where, after taking a check instead of cash without authority to do so, on the sale of stock, it notifies the principal of the deposit of the check to his credit, and afterwards pays his check for the proceeds.

(*Mitchell, Williams, and Fell, JJ., dissent.*)

(January 8, 1898.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Westmoreland County in favor of plaintiff in an action brought to recover the amount which had been received for the sale by defendant of securities belonging to plaintiff which reached defendant in the shape of a check which it failed to collect. *Affirmed.*

The facts are stated in the opinion.

Messrs. G. D. Albert, A. H. Bell, and Gaither & Woods, for appellant:

Plaintiff's right to recover must be predi-

cated upon the negligence of the defendant, and consequent loss to him.

This negligence might be either: (1) Negligence in the selection of a proper broker; (2) negligence in settlement with the broker for proceeds of the sale of stock; (3) negligence in failing to account to plaintiff or hand over to him the evidence of settlement with the broker.

Where the plaintiff complains of an injury resulting from the negligence or unskillful conduct of the defendants, in the performance of some work or duty undertaken by the latter, he must, whether the action be framed in contract, or in tort, prove: (1) The contract or undertaking on the ground of which the defendant acted; (2) the negligence of the defendant; (3) the loss which has resulted from it.

2 Tomlin, Law Dict. p. 680.

The facts disclose no negligence on the part of the defendant in its settlement with the brokers.

The commission of a negligent act, by the omission to perform a legal duty, is not actionable without proof of loss or injury.

Messrs. James S. Moorhead and John B. Head, for appellee:

When the defendant undertook to act as agent for the plaintiff in procuring a sale of his stock, the instructions of the principal were merely to sell the stock and receive the proceeds. It was bound to receive money only, and if it saw fit to accept anything else from the purchaser or any subagent it employed, its principal would not be bound thereby, but could compel it to account as if it had received the cash.

Paul v. Grimm, 165 Pa. 189; *Haslett v. Commercial Nat. Bank*, 182 Pa. 118; *Fifth Nat. Bank v. Ashworth*, 128 Pa. 212, 2 L. R. A. 491; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728.

Green, J., delivered the opinion of the court:

If the plaintiff had been the owner of the check in question, and had deposited it with the defendant bank for collection, it may be conceded that the bank would not have been liable for the nonpayment of the check. While the course and the process of collection were rather slow, it was still within the limits of ordinary bank usage, and we think a charge of negligence could not have been established. But the trouble with the case is that there were no such facts in it. The plaintiff was not the owner of the check, and he did not deposit it for collection. The check was drawn to the order of the defendant, and was, therefore, the property of the defendant. They might do with it as they chose. The liability of the defendant to the plaintiff was not a liability on the check, or for any use the defendant did make or could make of it. The check was the exclusive property of the defendant. The plaintiff had no interest in it whatever. In order that the plaintiff might become its owner, it would have been necessary for the defendant to indorse it, so as to make it payable to the plaintiff's order. Even if the plaintiff had received the physical custody of the check by delivery of its *corpus* to him, he could not have deposited it in the

defendant's bank for collection without the indorsement of it by the defendant to his order or in blank. But there were no facts of that character in the case. The bank never delivered the check to the plaintiff, nor did they deposit the check to the credit of the plaintiff's account. It assumed it itself, and, of course, assumed the collection of it. The plaintiff, as a matter of fact, had nothing whatever to do with the check. He had no right, title, or interest in it, and he was never placed in such a position by the bank that he could possibly have exercised any claim of dominion or ownership or interest of any kind in it. Moreover, the defendant still has the check. It has never delivered or tendered it to the plaintiff, and hence, if it had received the check from the plaintiff in regular course, it would have been liable. In *Fifth Nat. Bank v. Ashworth*, 128 Pa. 212, 2 L. R. A. 491, Mr. Justice Paxson, delivering the opinion, said: "It is safe to say, as a general rule, that when a bank receives a check from one of its depositors for collection, it must return him the check or the money." The present action is brought by the plaintiff, as a depositor in the defendant's bank, to recover the amount of his deposit, \$516.86, standing to his credit on the books of the bank, after the refusal of the bank to pay his check for that amount on December 27, 1895. The defendant company refuses to pay the money, because it says that, owing to a transaction which it had with the plaintiff, it had received from the plaintiff fifty-one shares of the capital stock of the Pennsylvania Railroad Company to be sold for his account, and upon his directions; that they had sent the certificates of stock to a firm of brokers, L. H. Taylor & Co., in Philadelphia, where they remained until, on December 17, 1895, the plaintiff directed the defendant to sell twenty shares of the stock at the best market price on December 18 or 19. This order was communicated to the brokers by the bank, and on December 18 the brokers reported that they had sold the stock. On December 20 the defendant received from the brokers their check on a Philadelphia bank, payable to the order of the defendant bank, for \$1,073.75. They then credited the plaintiff's account on their books, and sent the check, with other checks, to Second National Bank of Pittsburgh for collection for the account of the defendant bank. On December 24 they received a telegram, which announced the assignment of Taylor & Co., of Philadelphia, and on December 27 the check came back protested. It charged back on the plaintiff's account the amount of the check and protest, and thus reduced the amount of his credit so that his account was overdrawn. It claims that it was relieved of liability for the loss on the Taylor check, and might lawfully charge the plaintiff's account with this loss. The question at once arises, What was the true legal relation between the plaintiff and defendant as to this particular transaction? It is perfectly clear that it is not a relation of depositor with the bank. The plaintiff, never having had the check, never deposited it with the defendant. It is true, the defendant credited the plaintiff's account with the amount of

the check when it received it. It thus made itself debtor to him for the amount credited. This it had a perfect right to do, and the plaintiff had a perfect right to accept the credit and draw against it. When the bank gave the credit to the plaintiff, it, of course, assumed that the check would be paid, as it had a right to do; but does it follow that, when the check was dishonored, several days later, on presentation, the defendant had a lawful right to charge back the loss to the plaintiff's account? As has already been said, if the check had belonged to the plaintiff, and had been deposited by him, the bank would probably not have been chargeable with the commercial negligence which imposes liability on that ground upon such institutions. But it is perfectly clear that such was not the legal relation of the plaintiff and defendant, and hence the rule which would or might have exempted the bank from liability as a consequence of such a relation has no application, and cannot be invoked by the bank. What, then, was their true legal relation? The bank voluntarily undertook to sell the plaintiff's stock at his request. But in so doing it was not exercising any function which pertained to it as a bank. It is no part of the business of a national bank to engage in the selling of stocks for anybody. It was a transaction outside of its regular banking business, and not within its chartered powers. This being so, when the bank received the stock from the plaintiff, and agreed to sell it, it could only be understood to assume the relation of agent for the plaintiff as principal in that particular transaction. When it sold the stock, it was acting as his agent, and became subject to whatever rules of law are applicable to that relation. Of course, acting in that capacity, it could sell as any other agent, and would be responsible for its acts as any other agent.

In the case of *Fifth Nat. Bank v. Ashworth*, above referred to, the transaction in question was in the line of ordinary banking business, yet the defendant bank was held liable simply because, in collecting its customer's check, it took a cashier's check for the check deposited, instead of taking cash. The action was by a depositor against a bank with which he had deposited a check for \$2,622.25 on the Penn Bank. This check was presented next day through the clearing house, but the Penn Bank had then closed its doors, and the check was protested. A few days later the Penn Bank resumed operations, and was open, and doing business, on the day following. On that day the check was again presented, together with some other checks, by the defendant bank, and in exchange for them all a cashier's check of the Penn Bank was given to and received by the defendant bank. The Penn Bank was paying all checks presented. The cashier's check was deposited by the defendant bank with another bank through which it cleared, but on the next business day—which was Monday following the Saturday on which the cashier's check was given—the Penn Bank again closed its doors, and the cashier's check was not paid. On these facts we held the defendant bank responsible to the plaintiff for the loss. Paxson, J., 89 L. R. A.

further said: "It is also equally clear that if the collecting bank surrenders the check to the bank upon which it is drawn, and accepts a cashier's check, or other obligation, in lieu thereof, its liability to its depositor is fixed, as much so as if it had received the cash. It has no right, unless specially authorized to do so, to accept anything in lieu of money,"—citing *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728, and several other cases. "We need not discuss the question whether the defendant failed to exercise due diligence in not sending the dishonored check through the clearing house on Saturday. That it could have been done, and was done by some other parties, distinctly appears by the evidence, and is not disputed. We think the defendant bank fixed its liability by surrendering the check to the Penn Bank, and accepting the cashier's or teller's check of that bank. As between the defendant and its depositor, this amounted to payment. The plaintiff has neither his check nor his money." With how much more force do these remarks apply to the present case. Here the defendant accepted the check of Taylor & Co. in payment for the stock, when it had no legal right to accept anything but money. It credited the plaintiff's account with the amount of the check, and thereby assumed it to be that much cash. It might have notified the plaintiff that it had received the check, and delivered it to him, or might have held it for collection before crediting his account. If he had accepted it as cash, the bank would have been exonerated, or if he had agreed it might hold it for collection before giving him credit, and, had used due diligence in its collection, it probably could not have been held liable. But neither of these things was done; on the contrary, it assumed it as cash, and so treated it in its dealing with the plaintiff. We do not see how it can be relieved from responsibility. In the case of *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728, we held that a bank which had received for collection from a depositor a check on another bank, and had sent the check to the bank on which it was drawn, and had received from that bank a draft on some other bank, which was not paid, was liable to its depositor for the check he had deposited. It was claimed that there was no negligence, because the usual course of business was followed. But we held this was not sufficient. The court below said, and we affirmed it: "The defendant assumed the responsibility of sending the evidence of the plaintiff's right to have the money for which it called collected for their benefit, to the bank which was expected to make payment. Not obtaining the money, but a worthless draft, in return, the defendant, treating the check as not paid, charged the amount of it back to the plaintiff's account, and, when they called for the check, as the best evidence of their right to recover against the maker, they are informed: 'The check you call for cannot be returned. It was paid, charged to the drawer's account, and canceled.'" We held the same doctrine in *Hazlett v. Commercial Nat. Bank*, 132 Pa. 118. That an agent for sale has no power to receive anything but money in payment is too

familiar a rule to require the citation of authorities to support it. A single reference to one of our most recent decisions, where the subject is reviewed, will suffice. *Paul v. Grimm*, 165 Pa. 189.

We cannot see how this case can be decided upon the question whether the bank used due diligence in collecting the check of Taylor & Co. It never was the property of the plaintiff. He did not deposit it, and had nothing to do with it. The defendant received it, owned it, held it, still holds it, and never even tendered it to the plaintiff. The bank treated it as cash on its own responsibility, and credited the plaintiff's account with the amount of it. We know of no principle upon which it can charge back to him a check which he never saw, never owned, never had any interest in, and upon which his name never did, and does not now, appear, either as drawer, payee, indorser, or in any other manner whatever. The assignments of error are dismissed.

It is perfectly manifest that, if the bank had paid to the plaintiff in bank notes the amount of the check, and he had put them in his pocket, and gone about his business, the bank could never have recovered back the money. It could pay him the money if it chose, and he could receive it in good conscience. That being so, he could keep it, and could not be compelled to repay it. The law upon that subject is without question. The payment would be voluntary on the part of the bank, and, being such, the plaintiff could conscientiously receive it, and he could thereafter retain it. Now, it so happens that the actual facts make out just such a case. When the bank received the check and credited the plaintiff's account, it gave him notice to that effect, and thereupon he drew a check for \$1,600 against his account, which included the whole amount of the sum credited, and \$600 besides; and when the check was presented the bank paid it. It was not until after this that it charged back the credit against the account. This, it is very clear, they could not do without his consent.

Judgment affirmed.

Mitchell, J., dissenting:

As to the stock, the bank was a mere agent for transmission and sale, not responsible for anything but negligence, of which there is no evidence. This is conceded. In the ordinary course of business, the bank received the check for the proceeds of the sale of stock, and, of course, its title to the check was only as agent for the real owner, the plaintiff. Treating the check as money also in the ordinary course of its business, the bank passed the amount to the credit of the plaintiff in his account. It is said in the opinion of the court that it is clear that as to the check the relation of depositor did not exist. But with great respect for my brethren who so hold, I think it perfectly clear that this was the exact relation. The bank treated the check as money of its depositor, credited it in his deposit account, so notified him, and he ratified and assented to its action by drawing against the sum. It is 89 L. R. A.

the basis of the alleged balance of deposit in his favor for which this suit is brought. Without that check as part of his deposit account, he has no such balance, his account is overdrawn. When the check came back unpaid, the bank charged it up against its depositor, to offset the formal credit which had been given him for it. This it had the right to do, just as if it had credited him with a deposit of \$1,000 in bank notes or gold coin, which later were found to be counterfeit. It is also said that the bank still has the check, and has not delivered it to plaintiff. He refused it. When he was notified that it had come back, he said peremptorily he had nothing to do with it. In this he was wrong. It was the basis of a credit to which he was not entitled, and on which he should not be permitted to recover.

Williams and Fell, JJ., join in this dissent.

H. M. CLEMENTS and Wife,

v.

PHILADELPHIA COMPANY, *Appt.*

(184 Pa. 23.)

1. **An abandonment of a pipe line and the removal of the pipe may be made** by a natural gas company which has laid its pipe in the exercise of eminent domain across the lands of other persons, when there is a failure of the supply of gas.
2. **A right to enter and remove gas pipe without being liable as a trespasser** belongs to a gas company which has condemned a right of way for its pipeline where the supply of gas has failed, but this right must be exercised at the time and in the manner least harmful to the landowner and subject to the payment of compensation for any actual injury to growing grain or grass, and, if the field be a meadow, for any substantial injury to the turf beyond the mere opening and filling of the trench in which the pipe lay.

(January 3, 1896.)

A PPEAL by defendant from a judgment of the Superior Court affirming a judgment of the Court of Common Pleas No. 2 for Allegheny County assessing the damages for the injuries to plaintiff's land for the removal of gas pipes therefrom. *Reversed.*

The facts are stated in the opinion.

Messrs. Dalsell, Scott, & Gordon, for appellant:

A railroad company may "mark and determine such route for a railroad as they may deem expedient, not to exceed 60 feet in width, and thereon" erect the railroad and such structures as may be useful in connection with the same.

Purdon, 1793, pl. 77.

By proceeding under this act the railroad company becomes seised with what has been

NOTE.—For lien on pipe line, see *Steger v. Arctic Refrigerating Co.* (Tenn.) 11 L. R. A. 580.

For tax on pipe line, see *State, Tide Water Pipe Co., v. State Bd. of Assessors* (N.J.) 27 L. R. A. 664.

recently said by the supreme court to be a base fee; but whatever the name applied to it, it is such an estate as entitles the company to its exclusive occupation.

Pittsburgh, Ft. W. & C. R. Co. v. Peet, 152 Pa. 488, 19 L. R. A. 467; *Pennsylvania S. Valley R. Co. v. Reading Paper Mills*, 149 Pa. 18; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375; *Junction R. Co. v. Philadelphia*, 88 Pa. 424.

When we turn to a natural gas company, however, not only is the nature of the occupation of the ground entirely different, but also the wording of the act of assembly and the estate acquired by the company and that retained by the owner.

Act May 29, 1885, § 10 (Purdon, 1595, pl. 15).

The legislature never conferred upon natural gas companies the right to the exclusive possession of any part of the landowner's estate except the few inches actually occupied by the pipe, and the estate appropriated, instead of being a base fee such as a railroad company or canal company takes, or a fee simple such as the commonwealth takes, was simply and purely an easement for the purpose of laying down, maintaining, repairing, renewing, and removing a pipe, and nothing else.

The proprietor of an easement may enter upon the servient estate and do everything in the way of repairs or otherwise that is necessary for the comfortable and convenient enjoyment of the easement.

Pomfret v. Ricroft, 1 Wms. Saund. 321; *Leyford's Case*, 11 Coke, 46; *Goddard, Easem.* 2d ed. p. 264; *Washb. Easem.* chap. 6, *565.

The appropriation proceeding gives the company a right to enter upon the property, to lay down and maintain its pipes thereon and to remove them when the necessity for the public use has terminated.

Wagner v. Cleveland & T. R. Co. 22 Ohio St. 563, 10 Am. Rep. 770; *Randolph, Em. Dom.* § 221; *Lewis, Em. Dom.* § 598, p. 767; *Northern C. R. Co. v. Canton Co.* 30 Md. 347; *Brockenhausen v. Bochland*, 137 Ill. 547; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23; *Meig's Appeal*, 62 Pa. 28, 1 Am. Rep. 372.

Mr. J. P. Hunter, for appellees:

An easement is defined to be "a privilege without profit which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement, for the advantage of the former."

Goddard, Easem. Bennett's ed. p. 2.

An easement must be connected with a dominant tenement.

Appellant has the right to enter for the purpose of inspection, for repairs, for renewing its line, etc., because such acts are a necessary incident to such transportation and distribution, and are a part of the original appropriation, and to be considered in estimating the damages properly payable for the land taken.

But the reasons which necessitate the implication of the acquirement of such rights are in no sense applicable to the removal of the line; it is not necessary for such transporta-

tion and distribution that the line should be removed; such right of removal is not necessary to the enjoyment of the appropriation, it is not necessary to the "transportation and distribution of natural gas."

The bond having been approved the title of the owner was divested and the easement of the company was lawfully acquired and fixed.

Fries v. Southern Pennsylvania R. & Min. Co. 85 Pa. 74.

After such approval, its entry thereon and the construction of its line of pipes was a lawful entry, and no presumptions could arise against it, as in the case of one who entered upon property without lawful right, and made improvements thereon.

Elliott, Railroads, § 1998, p. 1447; *Northern C. R. Co. v. Canton Co.* 30 Md. 352; *Randolph, Em. Dom.* § 221; *Justice v. Nesquehoning Valley R. Co.* 87 Pa. 28; *Wagner v. Cleveland & T. R. Co.* 22 Ohio St. 563, 10 Am. Rep. 770.

The company has the right to abandon the right thus acquired, and as there is no implication of a dedication of the improvements placed upon the property, it has the right to remove such improvements. It is like trade fixtures, but is, like trade fixtures, to be removed without injury to the freehold.

Elwes v. Maw, 8 East, 38, 2 Smith, Lead. Cas. 208.

The jurors are to consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded.

Pittsburgh, B. & B. R. Co. v. McCloskey, 110 Pa. 442; *Schuykill Nav. Co. v. Thoburn*, 7 Serg. & R. 411; *Wallace v. Jefferson Gas Co.* 147 Pa. 206; *Searle v. Lackawanna & B. R. Co.* 88 Pa. 57; *Fisher v. Baden Gas Co.* 138 Pa. 302; *McGregor v. Equitable Gas Co.* 139 Pa. 230; *Davis v. Jefferson Gas Co.* 147 Pa. 137; *Denniston v. Philadelphia Gas Co.* 161 Pa. 44.

The right to remove the pipe is not one of the things to be contemplated and paid for in the original easement. It is too speculative and remote.

The action of the company in not specifying the width necessary for its purpose in its original appropriation was the more remarkable, as it has been the almost universal practice to specify such width as well as the number and size of the lines to be laid.

Davis v. Jefferson Gas Co. 147 Pa. 146; *Wallace v. Jefferson Gas Co.* 147 Pa. 206; *McGregor v. Equitable Gas Co.* 139 Pa. 230.

Williams, J., delivered the opinion of the court:

This case presents a somewhat novel question. The defendant company is engaged in the production and transportation of natural gas. In 1888 it acquired, by proceedings under the act of May 29, 1885, the right to lay its line of pipes by means of which its gas was transported to consumers in and upon the lands of the plaintiffs, and damages were duly assessed and paid to them for the injury sustained by reason of the appropriation of the easement to the uses of the company. In 1893 the wells supplying this pipe line ceased to produce natural gas in marketable quantity, and the line became useless. It was aban-

done as a line of transportation, and the pipe composing it became useless where it was, and was taken up and removed. It had been buried, as "the law required," not less than 2 feet below the surface, and its removal required the opening of the trench in which it had been placed, the lifting of the pipes to the surface, and the hauling of them away upon wagons. This was done in March, 1898, and this action was thereupon brought to recover the damages sustained by the plaintiffs in consequence of the abandonment and removal of the line from their lands. The question thus raised is over the measure of damages to which the plaintiffs are entitled. This must depend on the consideration of two preliminary questions: First, What was the character and extent of the easement acquired by the defendant under the proceedings had under the act of May 29, 1885? This is a question of law. The other is to what extent, if at all, the defendant has exceeded the limits of its right under the easement so acquired. This is a question of fact.

The act of 1885 confers the right of eminent domain "for the laying of pipe lines for the transportation and distribution of natural gas" to be exercised in the manner pointed out. If the line is laid "upon or over lands cleared and used for agricultural purposes, the line of pipe shall be buried at least 24 inches below the surface; and if any line of pipe shall be laid over or through any waste or wood land which shall be changed to farming land, then it shall be the duty of the corporation to immediately bury the said pipe to the depth of at least 24 inches as aforesaid." The easement acquired by the company is for the laying of the gas pipe beneath the surface of cleared land, or, as expressed by the act itself, for "burying" the pipe at least 24 inches below the surface in all such lands. The company does not require, nor is it to the interest of the landowner, that it should appropriate a definite strip of surface of 12 feet in width, as suggested by the learned judge of the court below, or of any other width, to which it shall have an exclusive right of possession as against the landowner. What is needed is the space under the surface in which the pipe may rest, together with the right to deposit or "bury" it out of the landowner's way, and the right of access to it for purposes of maintenance and repairs. Subject to the easement so defined, the landowner continues in the possession and use of the entire surface as freely as before the "burial" of the pipe took place; and, if the burial of the pipe is properly done, and the joints are made secure, the presence of the pipe line under the soil will in no way interfere with its cultivation or use. But the unlooked-for failure of the gas wells compels the abandonment of the line as a means of transporting and distributing gas. It had no value for any other purpose. The material belonged to the company, and it had a clear right to remove the pipe from its bed, and utilize it in whatever manner might seem best. The proceedings under the right of eminent domain had not affected the title to the pipe, or imposed any obligation upon the company to maintain line any longer than its own interests might dictate. The sole object and effect of the ap-

propriation was to secure the right to transport natural gas across the lands of the plaintiffs in the manner provided for by the act of 1885. The damages were assessed with reference to the fact that the company acquired thereby a right to enjoy the easement indefinitely. Yet if it happened that the supply for which the pipe line afforded the means of transportation should cease, it was within the knowledge and contemplation of the parties that the line would become useless, and that its abandonment must follow. In such a contingency the company may surrender the easement for which it has paid, and remove its pipes from the land. This is in case of the owner. A right of entry exists for this purpose, and, if the removal is conducted with a due regard to the interests and rights of the landowner, there is no ground for complaint on his part that the easement has been surrendered by a removal of the material that had been "buried" in his soil. But if the work is not properly done; if the trench is left open, or but partially filled; if the growing crops or grass are broken down or destroyed, or the turf unnecessarily cut into or injured, the owner has a right to complain. The right of entry was incident to the laying and care of the line while the easement was being enjoyed, and when its enjoyment was no longer possible it was an incident to the right to withdraw from the land, and surrender the privilege acquired under the right of eminent domain. But neither while the line was in use, nor after its use had ceased, did the right of entry authorize the doing of any substantial injury to the owners beyond the burying or removal of the pipe in the best way practicable. If it was to the interests of the company to remove its pipes in wet weather, and in doing so to drive over the plaintiffs' fields on the dryest routes it could find, thereby injuring the crops or grass, there is no reason why it should not pay for the injury so done. The measure of the damages to which the plaintiffs are entitled is the extent of the injury done them by the removal of the pipes at an improper time, or in an improper manner. The nature and extent of the easement permitted the cultivation of the surface over the pipe line in subordination to the rights of the company to enter upon it whenever such entry became necessary. If, because of an exercise of the right of entry incident to the easement, growing crops were disturbed, this was *damnum absque injuria* as to the surface necessarily occupied for the purposes for which the entry was properly made. An entry for the purposes of removal stands, however, upon somewhat different grounds. It is not made because of the necessities of transportation, but because they no longer exist. It is therefore the duty of the company to make the removal at the time and in the manner best adapted to the purpose and least harmful to the landowner. It is the duty of the company, upon a surrender of its easement, to fill the trench it has opened so as substantially to restore the surface of the land, and its failure to do so is just ground of complaint. It should make compensation for any actual injury to growing grain or grass, and, if the field be in meadow, for any substantial injury to the turf beyond the mere opening and filling of the trench in

which the pipe lay. Subject, however, to the limitations now indicated, it has the right to enter and remove its pipe without being liable as a trespasser therefor.

The judgment is reversed, that the proper measure of damages may be given to the jury, and a *venire facias de novo* is awarded.

J. S. ALLAM

v.

PENNSYLVANIA RAILROAD COMPANY, *Appt.*

(188 Pa. 174.)

1. The rule that a carrier must give notice to the consignee of the arrival of goods at destination is subject to exceptions growing out of special circumstances, and out of customs that have grown up for the mutual advantage of shipper and carrier.
2. A contract that goods shall be at the risk of the owners when unloaded on a platform at a station where there is no building or any agent of the carrier is not against public policy.
3. Unloading goods during a storm, on an open platform, and leaving them unprotected from the weather, is not a fault of the carrier where there is no building at that station or any agent of the carrier, and the bill of lading provides that when delivered on the platform they are at the risk of the owner.

(November 8, 1897.)

APPEAL by defendant from a judgment of the Superior Court affirming a judgment of the Court of Common Pleas No. 4 for Philadelphia County in favor of plaintiff in an action brought to recover damages for injuries resulting to goods in defendant's possession for transportation through its negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. John Hampton Barnes and George Tucker Bigham, for appellant: No obligation rests on railway carriers to give special notice of the arrival of goods to the person to whom they are consigned.

South & North Ala. R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749; *Southwestern R. Co. v. Felder*, 46 Ga. 433.

If the carrier must give such notice, may not this duty be waived by the mutual understanding of the parties; and may not such understanding be shown by, (1) general custom, (2) course of dealing, and (3) express contract?

Affirmative answers to the above contain propositions sound in law and policy, and well supported by authority.

Hutchinson, Carr. § 376; *McMasters v. Pennsylvania R. Co.* 69 Pa. 374, 8 Am. Rep. 264; *South & North Ala. R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749.

The contract is not against any public policy, nor is it a contract attempting to discharge the

carrier from any negligence in the performance of its duty.

Buck v. Pennsylvania R. Co. 150 Pa. 170; *Willock v. Pennsylvania R. Co.* 166 Pa. 184, 27 L. R. A. 228; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577; *Lang v. Pennsylvania R. Co.* 154 Pa. 842, 20 L. R. A. 380.

Messrs. Alfred J. Wilkinson and E. Hunn Hanson for appellee.

Williams, J., delivered the opinion of the court:

The judgment appealed from in this case was rendered by the superior court. Four of the learned judges of that court concurred in the judgment. Three of them dissented from it. The questions that came under consideration are of public importance, and that they are by no means free from difficulty is shown by the wide differences of opinion entertained as to them by the members of the superior court. They may be stated thus: First. Is it an invariable rule in this state that a common carrier must give to the consignee of goods notice of their arrival at the point of destination? Second. May not special circumstances, a general custom or usage of business, or a special contract, modify or relieve against this duty? Third. If the second question be answered in the affirmative, is not this case, upon the evidence, one in which such modification should be held to exist? The evidence shows, substantially, that along the lines of the defendant's railroad there are small stations, known as "prepaid stations," at which no depot building has been erected, and no freight agent located. The business at such stations will not ordinarily justify the expense which such conveniences would involve, but the railroad company will accommodate people near such stations by delivering goods consigned to them on a platform, or on the ground, as the case may be. Among such prepaid stations was one called "Strafford." The only convenience at Strafford for the receipt and delivery of goods was a platform by the side of the road. There was no shelter, and no employee of the company to give notice of the arrival of goods at this station, up to the 7th day of October, 1893. It is alleged, and evidence was given upon the trial to show, that a custom exists among the railroads of the country for consignees of goods at such stations to look out for the arrival of their parcels, and take charge of them when they are set down from the train. It is not difficult to see how such a custom should grow out of the necessities of the situation in which both shippers and the carrier find themselves at such stations. Shippers know—for they are bound to know—that at a prepaid station they cannot expect notice from the carrier, nor attention or shelter for their goods, yet their wants are such that they may prefer to accept the risks rather than be compelled to go to some more remote station, where shelter exists and employees are abundant, to receive their goods. When persons so situated elect to have goods shipped to them at a prepaid station, there is no hardship in holding that they thereby assume to do for themselves what they know the railroad company cannot do for them. If we hold that a carrier is bound to give notice to the consignee of the

—NOTE.—As to liability of carrier at destination, see also *East Tennessee, V. & G. R. Co. v. Kelly* (Tenn.) 17 L. R. A. 691, and note; and *Missouri P. R. Co. v. Nevils* (Ark.) 23 L. R. A. 80.

39 L. R. A.

arrival of goods at such stations, and keep them safely for a reasonable time, until they can be taken away, we simply compel the railroad company to abandon all such stations, and deprive the neighborhood of the accommodation which they afford. As there is no shelter there, the company cannot keep the goods for the owner. As there is no employee at the station, notice cannot be given. The carrier must transport the goods in the only way he can, or refuse to transport them to a prepaid station. If, therefore, the general rule as to notice be as contended for by the plaintiff where the ordinary facilities exist, we must nevertheless admit the existence of some exceptions, growing out of the special circumstances under which the carriage is undertaken, and out of the customs that have grown up for the mutual advantage of both shipper and carrier. But in this case we have an express contract, entered into because of the character of the station, and the refusal of the carrier to assume risks against which he cannot protect himself at the place for the delivery of the goods. In the bill of lading of February 22, 1894, there is the following provision: "When merchandise is destined to or from any way stations and platforms where station buildings have not been established by the carrier, or where there are no regularly appointed freight agents, it shall be at the risk of the owner until loaded into the cars, and when unloaded therefrom; and, when received from or delivered on private turnouts, it shall be at the owner's risk until cars are attached to, and after they are detached from, the train." The goods were received and transported under the terms of this agreement, by which the consignors undertook to receive the goods when they were put upon the platform at Strafford, and care for them at their own risk. If this was not done, it was not the fault of the carrier. He was to carry only, and all responsibility for protecting the goods, whether from thieves or from the weather, after reaching their destination, was assumed by the consignors, the owner. This contract the superior court held to be void, because against public policy, and cited as authority for such holding, among other cases, *Willock v. Pennsylvania R. Co.* 166 Pa. 184, 27 L. R. A. 228. But the cases cited are not exactly in point. In *Willock's Case* the question was whether the carrier could protect himself by a contract against the consequences of his own negligence or fraud. The headnote of the reporter is in these words: "A common carrier cannot stipulate for a release from the consequences of his own negligence or fraud." The case does not hold that he may not by contract so modify his common-law liability as to enable him to serve small communities, where no station house has been built, and no employee located. Such stipulations have been upheld in many cases where no effort was made to shield the carrier from his own negligence, and they have been held not to violate any rule of public policy. *Atwood v. Reliance Transp. Co.* 9 Watts, 87, 84 Am. Dec. 508; *Bingham v. Rogers*, 6 Watts & S. 495, 40 Am. Dec. 581; *Laing v. Colder*, 8 Pa. 479, 49 Am. Dec. 533; *American Exp. Co. v.*

Sands, 55 Pa. 140; *Furnham v. Camden & A. R. Co.* 55 Pa. 53; *Clyde v. Hubbard*, 88 Pa. 358; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577. The special contract relied on in this case does not stipulate for relief from the consequences of the negligence or fraud of the carrier. It recognizes the existence of circumstances that make it practically impossible for the carrier to discharge all the common-law duties of a carrier at Strafford, and that induce him to refuse freight to that station, except upon special terms. It agrees, in view of these circumstances, to accept such service as the carrier can render, viz., the simple transportation of the goods, and to supply what the carrier is not prepared to supply,—the care and protection of the goods when they reach the platform. The contract limits the liability of the company to what it undertakes to do, and relieves it of responsibility for all that lies beyond the mere transportation and setting down of the goods.

It is asserted that the goods were unloaded during a storm, and were not protected by the carrier from the weather. By the contract the consignor was to look after the goods on their arrival. It was his business to provide the shelter. He knew the company had none. He had agreed to take the risk of caring for them. When the accommodation train came that morning, at the usual hour for its arrival, the consignee was not at the platform. His foreman was not there, although he was expecting the goods, and had notice from the consignor of their shipment. What should be done? The contract of the carrier had been performed, and he had the right to unload the goods. He could not carry them to some station where he had a safe place for storage, and leave them there, for Strafford was the point of destination; and the carrier can neither deliver goods at a wrong place, nor to a wrong person, without liability to the owner. If the goods had filled the car, the car might have been left with the goods in it, but the goods did not fill the car. It contained other goods, to be delivered to other persons, and at other places. The only other way of preserving the goods from the weather would have been to hold the train until the rain was over before unloading the goods, but this was clearly impracticable. The alternative was to unload the goods, and leave the consignee to attend to them, as the shipper had agreed should be done. This the carrier did, and we see no negligence in his so doing. He did all he agreed to do, all he was employed to do, all he had the power to do. The complaint really is that he delivered the goods at the proper point of destination, in exact compliance with his undertaking. If, after they were put off at the station, they were damaged by being left in the rain, the consignee or his agent, who came a half an hour too late to the platform, must take the consequences of the risk assumed when the carriage of the goods was contracted for.

We sustain the assignments of error, and reverse the judgment appealed from. A *venire facias de novo* is awarded, as there is another item in plaintiff's claim, as to which negligence in the manner of unloading is alleged.

John H. BYERS, *Appl.*,

v.

Jacob BYERS.

(183 Pa. 509.)

1. A parol partition of land may be limited to the surface, and does not, as matter of law, extend to coal in the ground if the intent was to retain this in common.
2. The presumption, from the fact of the partition of the surface of land by parol, is that it includes the coal beneath as well as the surface, and one who denies it has the burden of proof.

(January 3, 1896.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas for Westmoreland County in favor of defendant in an action brought to obtain partition of certain coal beds. *Reversed.*

The facts are stated in the opinion.

Messrs. James S. Moorhead and John B. Head, for appellant:

Partition is a contract executed, not in part but in whole. It need not, indeed, be of all the lands which the parties hold in common or jointly, but it must be complete so far as relates to the part set out in severalty.

McConnell v. Carey, 48 Pa. 350.

A severance of coal and surface may be effected by parol as well as by an instrument of writing.

Tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law; but if they make partition between themselves by their agreement and consent, such partition is good enough.

Co. Litt. § 318; *Griswold v. Johnson*, 5 Conn. 863, 3 Lead. Cas. Am. Law of Real Prop. p. 128.

From the very beginning two essential facts must be proved to coexist in every parol partition before the law will recognize or the courts will enforce it. These are, first, an agreement to make partition; second, a withdrawal by the tenants from their previous common possession, and a subsequent exclusive possession by them of the part or parts set out in severalty.

Ebert v. Wood, 1 Binn. 216, 2 Am. Dec. 436; *Rider v. Maul*, 46 Pa. 376; *McKnight v. Bell*, 185 Pa. 371; *Griswold v. Johnson*, 5 Conn. 863, 3 Lead. Cas. Am. Law of Real Prop. p. 128; 17 Am. & Eng. Enc. Law, p. 668, and cases there cited.

An agreement to make a parol partition, not followed by a change of possession, is of no effect. A separate possession by two tenants in common, not predicated on an agreement to part and divide, but based on convenience or other reason, will not effect a partition.

Snively v. Luce, 1 Watts, 69; *Gratz v. Gratz*, 4 Rawle, 438.

Messrs. D. S. Atkinson, John M. Peoples, and W. S. Byers, for appellee:

Partition, if equal at the time it was made, would be good however unequal it might be.

NOTE.—For adverse possession of surface as affecting coal beneath it, see *Delaware & H. Canal Co. v. Hughes* (Pa.) 88 L. R. A. 826.

39 L. R. A.

come afterward by subsequent events. Neither is it essentially requisite that a voluntary partition should be by deed in order to make it binding; as between parceners, at least, it is good if made by parol without deed.

Calhoun v. Hays, 8 Watts & S. 132, 42 Am. Dec. 375.

If it was the fact that a division line had been actually run to divide the land between the plaintiff's ancestor and the defendant, and the latter took and held exclusive possession of the land on one side of it, without regard to what his cotenants did as to the remainder, and continued that exclusive possession, receiving the profits thereof, paying taxes, and otherwise exercising exclusive acts of ownership over it for twenty-one years, the presumption of an ouster of the cotenant would undoubtedly arise and be a bar after that lapse of time to a recovery by the cotenant, or any other person through him of any portion of the land so held.

Rider v. Maul, 46 Pa. 380.

Open, notorious, and uninterrupted possession of the whole by a tenant in common for twenty-one years, claiming the whole land as his own, and taking the whole profits exclusively to himself, is evidence from which the jury may draw the conclusion of an ouster and an adverse possession.

Susquehanna & W. V. R. & Coal Co. v. Quick, 61 Pa. 341.

To complete a title, possession and the right of property must both concur.

Hawk v. Senseman, 6 Serg. & R. 22.

Jacob Byers has held this part of the farm from 1848; and for almost fifty years has exercised every act of ownership possible.

John H. Byers was permitted to go into this coal mine, because of his relationship and because he was to aid in keeping up repairs, and was permitted to dig coal for his own use, and to sell if you please. Was this such possession as would give him title? Was this done for the purpose of asserting title? Clearly not.

Altamas v. Campbell, 9 Watts, 28, 34 Am. Dec. 494; *Shroder v. Brenman*, 21 Pa. 228; *DeHaven v. Landell*, 31 Pa. 126.

The uninterrupted use of a tract of land, as a timber lot, for the supply of a sawmill, or as a wood lot for iron works, even when backed by the payment of taxes on it, will not constitute adverse possession.

Wright v. Guier, 9 Watts, 172, 36 Am. Dec. 108; *Sorber v. Willing*, 10 Watts, 141.

The annual use of land as a sugar camp, under a junior survey, gives no title under the statute of limitations.

Adams v. Robinson, 6 Pa. 271; *Bradford v. Guthrie*, 4 Brewst. (Pa.) 358.

There was no right to make parol partition of the surface land only allowing the coal to remain in common as before.

Christy's Appeal, 110 Pa. 538.

The possession which tolls the right of entry must not only be notorious, but adverse, hostile, and exclusive, as against the owner.

... There must be an ouster by unequivocal act where there has been privity of title and possession; such an act as shows that the occupant claims in his own right, and does not acknowledge the right of the other.

Long v. Mast, 11 Pa. 189; *Bannon v. Brandon*, 84 Pa. 263, 75 Am. Dec. 655; *Lodge v. Patterson*, 3 Watts, 74, 27 Am. Dec. 385; *Peck v. Ward*, 18 Pa. 506; *Adams v. Robinson*, 6 Pa. 272; *Armstrong v. Caldwell*, 53 Pa. 288; *Sorber v. Willing*, 10 Watts, 141; *Martin v. Jackson*, 27 Pa. 510, 67 Am. Dec. 489; 15 Am. & Eng. Enc. Law, § 2, p. 506; *Tiedeman*, Real Prop. §§ 2, 695, 696, 698.

Mitchell, J., delivered the opinion of the court:

The parties derived title in common, under the will of their father, in 1835. In 1895 appellant brought this action for partition of the coal only, thereby admitting that the surface of the land was held in severalty. The appellee defended on a parol partition claimed to have been made in 1848. Both parties therefore agreed that there was a partition, and, as it was admitted that there had never been any deed between them, the partition necessarily rested in parol. Appellant, however, claimed that what was done in 1848 was a temporary division of the surface for convenience of working only, which did not include the coal, and which was incomplete, but ripened into title in severalty as to the surface by the long-continued separate possession of the purpurs taken under it. Appellee, on the other hand, contended that it was a complete and executed partition from its date, and included the coal as well as the surface. The difference as to how the partition of the surface became effective, whether by virtue of the agreement itself, or only by the subsequent several possession, is not material; and the only substantial question in controversy was what the partition included, the whole land or the surface only. The learned judge below charged the jury that there could be no parol severance of the estate in the coal from the estate in the surface, and therefore, if they found there had been a partition at all, it was a partition of the whole; or, to use his very graphic expression, if the jury found that there was a parol partition, "the cleaver of the law severed the ownership from the surface clear down to the center of the earth." This was practically a direction to find for the defendant, and all the assignments of error, though taken to different parts of the charge, and in varied phrase, are based upon this ruling of the court. We are of opinion that it was error.

It was settled as early as *Ebert v. Wood*, 1 Binn. 216, 2 Am. Dec. 436, that a parol partition between tenants in common is valid and conclusive. Chief Justice Tilghman puts the decision mainly on the ground of part performance, which the English courts of equity had held to take such contracts out of the bar of the statute of frauds. But another and equally weighty reason might be added from the nature of tenancy in common. As each tenant has not only title, but joint and several possession of the whole and of every part, the change to a title in severalty in any specified part is not such a transfer of title to land as is within the mischief contemplated by the statute of frauds. This reason was indicated in *Mellon v. Reed*, 114 Pa. 647, and again more fully in *McKnight v. Bell*, 135 Pa. 358, where it is said by our late Brother Clark: "A partition which

merely severs the relation existing between tenants in common in the undivided whole, and vests title to a correspondent part in severalty, is not such a sale or transfer of title as will be affected by the statute of frauds." The reason of this rule rests in this: that the partition is not an acquisition or purchase of land, nor is it in any proper sense a transfer of the title to land; it is a mere setting apart in severalty of the same interest held in common, not in other, but in the same, lands." The cases have drawn the line between a mere parol agreement to partition and an agreement followed by acts of the parties on the land itself, indicating several possession taken in execution of the agreement. The former is inoperative, but the latter is valid.

The right of partition by the parties is an incident of ownership, and, like the right of an owner in severalty to a lien, is only limited by such restraints as the law has put upon it in regard to personal capacity and mode of conveyance. The statute of frauds requires ordinary conveyances of land to be in writing, but, as we have already seen, the statute does not apply to executed partitions between tenants in common. They are therefore free, and, as they rest solely on the agreements and intentions of the owners, we see no room for distinctions in regard to the methods of partition, whether by vertical or by horizontal lines. There is no difference in the right nor in any other respect except in facility of proof of the intent, inasmuch as the ordinary mode is by vertical lines; and therefore such partition is more readily presumed, and acts done in pursuance of it on the surface are more easily shown. Horizontal divisions of land, as such, are comparatively rare, but they are well established, and may be made in the same way, and subject to the same rules, as any other mode, if the parties so agree. Their modern development, especially in this state, may well account for the absence of cases in our reports, but the principles on which such questions are to be decided do not admit of doubt. They are illustrated by the case of *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436, where, although the court is treating of a conveyance by deed, it said: "There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed, . . . than why land in its most ordinary signification may not be so held. In other words, mines are land, and subject to the same laws of possession and conveyance." And the analogous right of severance of the strata of land horizontally by the individual owner by acts, as well as by deed, is established in *Delaware & H. Canal Co. v. Hughes*, 133 Pa. 66, 38 L. R. A. 826 (opinion filed since this case was argued).

There was no objection to the plaintiff's proving, if he could, that the partition was limited to the service, and that the coal was left in common. The parties might make partition of all their land, or of any part of it, and in any manner they chose to agree upon. In *Coleman v. Coleman*, 19 Pa. 100, 57 Am. Dec. 641, the parties made partition of their land in 1787, excepting out of it the Cornwall ore banks, which they agreed should remain in common. This court held, not only that the

partition was valid, but that the retention of the ore banks in common was part of the consideration for the purparts in severalty, and therefore could not be subject to a new partition."

The ordinary mode of partition being of the whole land by vertical lines, and it being admitted that a partition had been made, the burden was upon the plaintiff to show that it was limited to the surface. In plaintiff's sixth point he asked the court to say that his continuing to take coal after the partition, even if only permissive, showed that there never was a fully executed partition of the coal, and plaintiff therefore must recover on his written title. This point, however, could not have been affirmed. The execution of a parol partition, which is required by the cases, means such acts of the parties upon the land as show a part performance of the agreement, sufficient, as suggested by Chief Justice Tilghman, *supra*, to bring it within the equity of enforcement. The presumption from the conceded fact of partition was that it included the coal as well as the surface, that being the usual method. On the question whether it did or not, the plaintiff was entitled to go to the jury, but he had the burden of proof. An occasional use, such as was shown here, if the jury should find it to be permissive only, and not in the exercise of a right, would not prevent the partition from being executed in the legal sense, and including the coal as well as the surface. It was evidence of a claim of right, but not conclusive either of such right or of the failure to execute the partition.

The will of John Byers had no bearing on the case, except as showing that he had in his mind the timber, coal, and limestone on the tract as distinct elements to be considered in the equal division which he directed. But his devise was of the fee in common, and his devisees could divide in any way they pleased.

Nor had the statute of limitations any bearing on the case. The plaintiff clearly never had any possession of the coal which was either adverse or exclusive, and the surface, as already said, was admitted by both parties to be held in severalty. There was no dispute as to the parol partition, and the only contested issue was what it included. The jury should have been instructed that the parties had the right to make such partition as they chose, either of the whole land or of the surface only; that the presumption was that they parted the whole, but that presumption would give way to the intention of the parties; and it was for the jury to determine from all the evidence what the parties intended to include in the partition, and to find a verdict that would carry out that intention.

Judgment reversed, and venire de novo awarded.

Re Estate of Richard H. STULL, Deceased.

APPEAL OF Ada MOREHOUSE.

(188 Pa. 625.)

The marriage in another state, where it is lawful, of a divorced man and his paramour, who go there to evade the law of their domicile, which prohibits their marriage during the life of the former wife, is not valid in the latter state.

(*McCollum, Mitchell, and Tell, JJ., dissent.*)

(January 8, 1898.)

A PPEAL by petitioner from a decree of the Orphans' Court for Washington County dismissing her appeal from a decree of the register of wills refusing to grant her letters of administration upon the estate of Richard H. Stull, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. R. W. Irwin, for appellant:

While it may be conceded that the state may pass an act which would prohibit citizens of the state from marrying anywhere under certain circumstances, while they were domiciled in this state, yet this is a highly penal statute, and must be strictly construed, and in the absence of an expressed statutory provision that the parties must not marry anywhere, the courts will hold that the legislative intent was that the parties should not marry in Pennsylvania.

It has been held, but on this point there is much conflict of opinion, that although a person divorced from a first wife for adultery is rendered by the law of the place incapable of contracting a second marriage, yet that, if he enters into a contract of marriage in another state where the same disability does not exist, the marriage will be valid. And where the parties resident in one state, to avoid the laws of the place of domicile, go to another state and are married, the marriage is held valid, if so regarded in the country where celebrated, both in America and England.

8 Am. & Eng. Enc. Law, p. 599; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189; *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408; *Putnam v. Putnam*, 8 Pick. 433; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 181; Bishop, Mar. & Div. 4th ed. §§ 348-389; Story, Conf. L. §§ 79-81.

Messrs. Boyd Crumrine and E. E. Crumrine, for appellee:

The husband or wife who shall have been guilty of the crime of adultery shall not marry the person with whom the said crime was committed during the life of the former wife or husband.

Act of March 18, 1815, § 9; 6 Smith's Laws, 286, § 9; 1 Purd. 688, pl. 29; 1 Pepper & Lewis, Dig. 1646, pl. 33.

A marriage contracted by parties authorized by law to contract, and solemnized in the man-

NOTE.—As to the validity of marriage of persons who go out of their own state to evade its laws by marrying, see also *Pennegar v. State* (Tenn.) 2 L. R. A. 708; *State v. Tutty* (C. S. D. Ga.) 7 L. R. A. 50; *Com. v. Graham* (Mass.) 16 L. R. A. 578.

ner prescribed by law, is a lawful marriage; and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of their marriage.

Milford v. Worcester, 7 Mass. 48.

Contracts of all kinds, generally speaking, are to be determined and controlled in the rights and obligations conferred by the law of the place where they are to be performed.

Archer v. Dunn, 2 Watts & S. 327; *Wood v. Kelso*, 27 Pa. 241; 2 Parsons, Contr. pp. 582, 583, *et seq.*

As to contracts generally, in respect of private internal law, there must be capacity to make a contract; and incapacities are exceptional, and are either natural, such as absolute duress, insanity, or imbecility, or artificial because arising by force of local laws, from marriage or slavery, or such other causes as are made grounds of incapacity only by positive laws, which vary in different states.

2 Parsons, Contr. p. 578.

Laws establishing incapacity, status, or condition "have no force, of their own proper vigor, beyond the territory of the state by which they are made. Every state may, by its own laws, bind all its own subjects and citizens, wherever they may be, with all the obligations which home tribunals may enforce."

U. S. Const. art. 4, § 1; 2 Parsons, Contr. pp. 573, 574.

The law of the domicile of a party to a contract must have its effect in the matter of capacity or incapacity in a foreign state which may be the place where the contract is entered into or solemnized, and in giving control, in its rights and obligations, in the place of the domicile or elsewhere that the contract is to be performed.

Whart. Conf. L. § 401.

Marriage is a contract, but it is more. Properly speaking, it begins in a contract assented to with more or less solemnity, by both parties. It differs in many respects from the common run of contracts, which are to be performed and are then ended.

Story, Conf. L. ed. 1857, § 108; Ferguson, Mar. & Div. 397-399.

Marriage cannot be shaped or modified at the will of the parties. It is a conjugal union for life. Grafted conditions which change its character are void.

Whart. Conf. L. § 126.

Personal statutes, which are the statutes of a state that, in the main, have as their subject the person and its attributes, though incidentally touching matters of property, "attach themselves to each person therein domiciled; and, wherever he goes, these laws adhere to him, and are to be applied to him by every foreign tribunal, until such domicile is lost by him, and a new one acquired, which new one then applies itself to him by the same process."

Whart. Conf. L. § 85.

In a strict and legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.

Story, Conf. L. § 41.

If it be the law of the domicile that when a married person commits adultery and a divorce is granted therefor, the guilty party and

the corespondent are prohibited from marriage during the lifetime of the complainant, the effect of the decree shall be the same in all other countries.

Story, Conf. L. § 65; Whart. Conf. L. § 21.

This doctrine of the law of the domicile, as imposing a personal status of capacity or incapacity in the state of the domicile, is recognized and applied in other states, whenever not inconsistent with or opposed to their own laws and distinctive policy.

Story, Conf. L. § 29; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 589, 10 L. ed. 274, 308.

Marriages are restrained and regulated, or prohibited, by the law of the domicile of the parties, by restraints or prohibitions which are to be divided into two classes: (1) Those relating to matters of form or ceremony, or peculiar religious faith, etc., or such as enlightened states generally do not feel themselves bound to recognize as of vital importance; (2) those relating to what are held to be, in the place of the domicile, matters of good order and good morals, or such matters as are made of a settled and distinctive policy therein.

By the express exception in favor of the children in our statute cases in our state like the present are to be distinguished from a few cases in our sister states, where marriages between like guilty parties, forbidden by statute, but without any statutory protection to children born, have been sustained for the benefit of innocent children, in order that they might inherit the property and rights of their guilty parents.

Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; *Medway v. Needham*, 16 Mass. 157, 8 Am. Dec. 131.

Here, the marriage of the parents is forbidden, made unlawful, without any exception as to them or either of them; and of course it follows that that prohibition, to be made effective, must mean that the thing prohibited is unlawful, if done.

Pennegar v. State, 87 Tenn. 244, 2 L. R. A. 703.

By the decree in the divorce proceeding, a personal incapacity for marriage was imposed by our statute upon Richard H. Stull and Ada Widdup, to continue during the lifetime of the first wife, who is still living. This incapacity, imposed by the law of their domicile, affected and followed them wherever they went, and so continued while they were temporarily in Maryland, and when they returned to Pennsylvania. Bound by the rules of private international law, and by the provision of the United States Constitution, that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" (art. 4, § 1), this incapacity was of full effect in Maryland. With this known incapacity upon them, and going into Maryland for the purpose of evading the laws of Pennsylvania, the parties were guilty of a fraud upon the laws both of Pennsylvania and Maryland, when they sought to be and were married in the latter state, to return to the state of their home where the marriage was to be consummated and performed. The prohibition in the state of Pennsylvania, not relating to mere form or ceremony, but to the subject of good

order, morals, and distinctive policy, it was invalid in Maryland as well as in Pennsylvania where its incidents are now sought to be enjoyed.

Story, Conf. L. ed. 1857, § 86; 2 Kent, Com. 3d ed. 91-93, 458, 459; *Putnam v. Putnam*, 8 Pick. 483; *West Cambridge v. Lexington*, 1 Pick. 505, 11 Am. Dec. 231; *Deccouche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478; *Ferguson, Mar. & Div.* 897-899; *Whart. Conf. L. ed. 1881, § 185; Com. v. Lane*, 118 Mass. 458, 18 Am. Rep. 509; *Dickson v. Dickson*, 1 Yerg. 110; *Williams v. Oates*, 5 Ired. L. 535; *Webb's Estate*, Tucker, 872; *Marshall v. Marshall*, 2 Hun, 238; *Van Storch v. Griffin*, 71 Pa. 240; *Ponsford v. Johnson*, 2 Blatchf. 51; *Kinney v. Com.* 80 Gratt. 858, 32 Am. Rep. 690; *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683; *Scott v. State*, 39 Ga. 321; *Dupre v. Boulard*, 10 La. Ann. 411; *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678; *Brook v. Brook*, 9 H. L. Cas. 193; *Phillips v. Gregg*, 10 Watts, 158, 86 Am. Dec. 158; *Hill v. Hill*, 42 Pa. 198; *Parker's Appeal*, 44 Pa. 809; *Walter's Appeal*, 70 Pa. 392; *Philadelphia v. Williamson*, 10 Phila. 176; *Smith v. Thornton*, 5 W. N. C. 372; *Hazzard's Estate*, 8 W. N. C. 484; *Adams v. Adams*, 2 Chest. Co. (Rep.) 560; *Le Breton v. Nouchet*, 3 Mart. (La.) 60, 5 Am. Dec. 786; *White v. White*, 105 Mass. 325, 7 Am. Rep. 526; *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 208; *Cropsey v. Ogden*, 11 N. Y. 228; *Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 708; *Elliott v. Elliott*, 38 Md. 358; *Sussex Peerage Case*, 11 Clark & F. 85, 17 Am. Law Rev. 166.

Green, J., delivered the opinion of the court:

The question at issue in this case arises upon the application of a woman, claiming to have been the lawful wife of the decedent at the time of his death, to have letters of administration upon his estate granted to her. The letters were refused by the register and orphans' court, on the ground that the petitioner was not the lawful wife of the decedent, and hence was not entitled to them. Briefly, the facts were that the decedent, Richard H. Stull, was married to Hannah M. Lewis, who still survives. In February, 1894, the wife obtained a decree of absolute divorce from him on the ground that he had committed adultery with one Ada Widdup. On April 5, 1894, the decedent and the said Ada Widdup, both being citizens and inhabitants of Pennsylvania went to Cumberland, in the state of Maryland, and were united in marriage. They at once returned to Pennsylvania, and there lived and cohabited as man and wife on the farm of the decedent, in Washington county, until his death, on June 11, 1895. They had no children, but there was one child, a son, Samuel A. Stull, by the first marriage. It was admitted and found in the court below, and is now conceded on the argument in this court, that the decedent and Ada Widdup, his paramour, with whom he had committed adultery, went into Maryland, to be there married, for the express purpose of evading the law of Pennsylvania which prohibits a marriage with a paramour during the life of the injured wife or husband. It is

also conceded that by the law of Maryland there is no such prohibition, and that under that law the marriage was lawful. The question arising is, Was the applicant the lawful wife of the decedent at the time of his death? She subsequently married one Morehouse, and now bears his name.

Our act of March 13, 1815 (Purd. Dig. p. 688, pl. 29, § 91), provides as follows: "The wife or husband who shall have been guilty of the crime of adultery shall not marry the person with whom the said crime was committed during the life of the former wife or husband; but nothing herein contained shall be construed to extend to or affect or render illegitimate any of the children born of the body of the wife during coverture." Section 10 disables a guilty wife, who after the divorce cohabits with her paramour, from alienating any of her lands and tenements, and avoids such conveyances if made. By the 9th section it will be perceived there is an absolute prohibition of any subsequent marriage between the guilty person and the paramour during the life of the former wife or husband. It forbids the marriage relation to be contracted in the most general terms. The guilty party "shall not marry the person with whom the said crime was committed." A personal incapacity to marry is imposed. The necessary meaning of this language is that they shall not marry at all, in any circumstances, or at any time, or any place, so long as the injured party is living. So far as the purpose and meaning of this statute are concerned, it is of no consequence where such subsequent prohibited marriage takes place. The relation itself is absolutely prohibited, and hence is within the operative words of the statute, without any reference as to where the marriage occurs.

It is now necessary to notice the other environments which affect the case. Both the parties to the prohibited marriage were citizens of Pennsylvania, domiciled on her territory, both before and after the marriage, and were only absent long enough to have the ceremony performed. They continued to reside together in Pennsylvania until the death of the husband. The woman resides here still. She never acquired any rights as an inhabitant of the state of Maryland, and can and does not now claim any right of that character. She is now claiming, not only the protection of our law, but a special privilege and right, accorded only to lawful wives under the intestate law of Pennsylvania, to wit, the right to have administration of the estate of her alleged husband. In this respect the case is different from many of the cases cited in the paper books, and the difference is against her claim. Here, she, being now and at all times a citizen of Pennsylvania, subject at all times to its laws and its policies, having committed a direct and positive violation of one of those laws, which relates to and immediately affects the very application she now makes, solicits a decree from an orphans' court of Pennsylvania, giving her property rights and a right of administration, on the specific ground that she acquired those rights, if she acquired them at all, in consequence of a violation of the law of Pennsylvania; and she asks this decree, as she only can ask it,

by the importation and actual enforcement of the law of a foreign state, within our own territory, and in our own judicature, when that law is contrary to the express terms of our own law, and contrary to the manifest and settled policy of our commonwealth. Moreover, it is expressly conceded that the parties left the territory of Pennsylvania, and entered that of Maryland, for the very purpose of evading the law of Pennsylvania which prohibited their marriage. We do not think that any of the cases cited for the appellant contain so many elements of invalidity as this.

There is no question as to the general rule that a marriage which is valid by the law of the place where it is solemnized is valid everywhere. Of course, even this general rule has its exceptions, where the particular marriage is contrary to good morals or public policy, or to the positive statutes of the country where it is sought to be enforced. But where a man and woman, citizens of the same state, and subject to an absolute statutory prohibition against entering into a marriage contract which is against good morals and contrary to public policy, leave their domicile, and enter another, for the express purpose of violating the law of their domicile in this respect, the case is highly exceptional, and the great weight of authority is against the validity of such a marriage in the place of their domicile. There have been conflicting decisions upon the question, but very few of them sustain the validity of the relation where it has been assumed for an intended evasion of the law of the domicile and is contrary to good morals. The fact of such an intended evasion has been repeatedly recognized as the basis of invalidity when otherwise validity would have been declared. Thus, in a noted case in Tennessee (*Pennegar v. State*, 87 Tenn. 244, 2 L. R. A. 703), decided in 1889, the same question precisely as in this case was raised, to wit, a marriage in Alabama between a man and woman domiciled in Tennessee, who had been guilty of adultery, and, after a divorce had been obtained in Tennessee on that ground, the guilty husband and his paramour went to Alabama, and were married, and at once returned to Tennessee. They were indicted in Tennessee for lewdness, and were convicted and sentenced, and appealed to the supreme court, claiming that the marriage, being lawful in Alabama, must be held lawful in Tennessee. In the latter state the statute prohibited such marriages in almost the very words of our own act of 1815, to wit: "When a marriage is absolutely annulled, the parties shall be severally at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed, during the life of the former husband or wife." In an elaborate opinion the supreme court sustained the sentence, and held the Alabama marriage to be void in Tennessee. In view of the close analogy of the case to the one we are considering, some citations from the opinion will be appropriate: "The marriage, being prohibited by statute, is void if solemnized in this state." "Does the rule that a marriage valid where solemnized is valid everywhere make the second marriage in Alabama in this case valid?" 89 L. R. A.

"Marriage is an institution recognized and governed to a large degree by international law prevailing in all countries, and constituting an essential element in all earthly society. The well-being of society, as it concerns the relation of the sexes, the legitimacy of off-spring, and the disposition of property, alike demand that one state or nation shall recognize the validity of marriages had in other states or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise." The opinion further holds that the rule that a marriage valid where solemnized is valid everywhere has its exceptions, to wit: "(1) Marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; (2) marriages which the local law-making power has declared shall not be allowed any validity either in express terms or by necessary implication. . . . This [second] class may be subdivided into two classes: (a) Where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of domicile of the parties, even where they have left their own state to marry elsewhere for the purpose of avoiding the laws of their domicile. (b) Cases which, prohibited by statute, may or may not embody distinctive state policy as affecting the morals or good order of society. . . . Each state or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society, to that degree which will render it proper to disregard the *jus gentium*, of 'valid where solemnized, valid everywhere.' . . . If, as we have seen, the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the courts would hold such valid here; but if the statutory prohibition is expressive of a decided state policy, as a matter of morals, the courts must adjudge the marriage void here, as *contra bonos mores*. . . . Now, believing, as we do, that the statute in question, which we are called upon to construe in the case at bar, is expressive of a decided state policy, not to permit the sensibilities of the injured and innocent husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded, or the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another state for the purpose of evading our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depend as much upon the judicious exceptions thereto as upon the inherent right of the rule itself." .

The foregoing reasoning is satisfactory to us. It invokes practically three distinct ideas, to wit: (1) That the foreign marriage is contrary to the positive statute of the domicile; (2)

that it is contrary to the public policy of the government of the domicile, in that it offends against the prevailing sense of good morals among the people there dwelling; and (8) it was contracted for the express purpose of evading the positive law of the domicile and is therefore to be regarded as a fraud upon the government and people of the domiciliary residence. The combination of these three objections seems to be most fatal to the validity of the marriage thus contracted. The writer is disposed to regard each one of them as fatal. Instances of invalidity from each source in other matters than foreign marriages are not at all uncommon, but it is not necessary to pursue them in the books, as it would involve unnecessary labor and space. There is abundant authority for their application in the marriage cases. Perhaps the most conspicuous case of the effect of mere statutory prohibition is the *Sussex Peerage Case*, 11 Clark & F. 85, which prohibited any marriage of any descendant of King George II. without the previous consent of the King. A marriage having been contracted at Rome between a son of George II. and a lady who was a British subject, without the royal consent, a question arose as to the validity of this marriage, which was submitted to the judges of the House of Lords. Chief Justice Tindal, delivering the opinion, said: "The statute [in question] does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally, and in the abstract. It is an incapacity attaching to the person of A. B., which he carries with him wherever he goes. But as a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage at Rome is as clearly within the prohibitory words of the statute as the incapacity to contract in England. . . . The prohibitory words of it [the statute] are general: 'That no one of the persons therein described shall be capable of contracting matrimony.'" "Here, again," said the chief justice, "the words employed are general, or, more properly, universal; and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated. . . .

It is . . . certain that an act of the legislature will bind the subjects of this realm, both within the Kingdom and without, if such was its intention." Lord Campbell said: "I have no doubt that it is competent to the British legislature to pass a law making invalid the marriage of particular British subjects all over the world; . . . and I am clearly of opinion that the intention is sufficiently testified by the language which has been employed." While the words used in this British statute related only to particular persons, they were specific in prohibiting any marriage between such persons, and for that reason it was held that the prohibition was general, and applied to any marriage, no matter where it was contracted. The same principle applies, as we have heretofore indicated, to the prohibition in the case at bar. It applies to any marriage, no matter where it may be celebrated, and as the parties were, and continued to be, citizens

89 L. R. A.

of Pennsylvania, it applied to them. In *Brook v. Brook*, 9 H. L. Cas. 212, another celebrated English case, where a man had married his deceased wife's sister, contrary to a British statute, the parties having gone to Denmark for that purpose, where such marriages were lawful, Lord Chancellor Campbell said: "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile if the contract is forbidden by the law of the place of domicile as contrary to the law of religion, or morality, or to any of its fundamental institutions." And, again: "If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and, immediately returning to their own state, to insist on their marriage being recognized as lawful." Upon the foregoing authorities, there is no doubt as to what the law is in England on this subject. It seems to us that these decisions are founded upon impregnable reasoning, which cannot be answered; and these decisions apply with the greatest possible force to the case in hand, for in those cases the statutes did not prohibit marriages involving immoral considerations, but here where the subsequent marriage is a sort of reward for the prior adulterous intercourse, and the subsequent cohabitation is distinctly offensive to all good citizens, the conclusion of invalidity is immensely strengthened by considerations of the greatest force.

In North Carolina, in the case of *Williams v. Oates*, 27 N. C. 535, involving the same principle and almost the same facts, a similar decision was reached as in the Tennessee case *supra*. A husband and wife domiciled in North Carolina were divorced for the wife's adultery. Afterwards the wife and a man (a third person), both also so domiciled, to evade the law of North Carolina, which prohibited her from marrying again, went into South Carolina, and were there married, according to the law of that state, and immediately returned to North Carolina, where they lived together as man and wife until the husband died, intestate. It was held that the second wife was not the lawful widow of the deceased, and was not entitled to an interest in his estate, the law of the domicile controlling the relation. In *Marshall v. Marshall*, 2 Hun, 288, decided in 1874, the facts were that the plaintiff, Marshall, in 1858, was divorced from his then wife on the ground of his adultery. The parties to the divorce were then domiciled in New York. In 1866 the husband and another woman, both then residing in New York, went to Philadelphia, to be married there, intending to return immediately to New York. They were married in Philadelphia, the first wife still living, and returned to New York, as intended. It was held that the second marriage was absolutely void, on the ground that "if citizens leave their own country and contract a marriage abroad, such marriage being forbidden by the law of the country of their

residence, but allowed by the law of the country where it is contracted, and being celebrated with an intent to resume, and followed by an actual resumption of, their old residence, the validity of the contract is to be determined by the law of the domicile." It is true that this case was afterwards overruled in the case of *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505, decided in 1881; but, as neither of the decisions is binding upon us, we much prefer the ruling in *Marshall v. Marshall*. It is also true that in *Medway v. Needham* (1819) 16 Mass. 157, 8 Am. Dec. 131, a contrary decision was made, in the case of a marriage between a mulatto and a white woman, which was solemnized in Rhode Island, where it was not unlawful. It was held valid in Massachusetts, where such marriages were prohibited although the parties were domiciled in Massachusetts, and immediately returned there. The marriage was not questioned because it was contrary to good morals, but only because it was contrary to the words of the Massachusetts statute. The decision, however, expressly excepted the case of incestuous marriages or others that "would tend to outrage the principles and feelings of all civilized nations," and hence is of scarcely any weight in the present contention. It was followed with reluctance in *Putnam v. Putnam*, 8 Pick. 433, but it was held to be doubtful of application in *West Cambridge v. Lexington*, 1 Pick. 506, 11 Am. Dec. 231, if the husband had come into Massachusetts to claim any marital rights, "upon the ground that the marriage on which he founded his claim was contracted in violation of the laws of this state, and that it was contrary to good policy, as well as detrimental to the public manners, that he should be allowed to enforce such claim."

It is proper to observe that the leading writers on the "Conflict of Laws" express the same conclusions as embodying the latest and best considered doctrine upon this subject. Thus, in Story, Conf. L. § 86, it is said: "But we are not, therefore, to conclude that every marriage by and between British subjects in foreign countries will be held valid, because it is celebrated according to the laws of such countries. On the contrary, where the laws of England create a personal incapacity to contract marriage, that incapacity has, in some cases, been held to have a universal operation, so as to make a subsequent marriage in a foreign country a mere nullity when litigated in a British court." Section 87: "Indeed, the general principle adopted in England in regard to cases of this sort appears to be, that the *lex loci contractus* shall be permitted to prevail, unless when it works some manifest injustice, or is *contra bonos mores* or is repugnant to the settled principles and policy of its own laws."

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In § 112, quoting from Lord Robertson in *Ferguson, Mar. & Div.* 397-399, it is said: "But a party who is domiciled here cannot be permitted to import into this country a law peculiar to his own case, and which is in opposition to those great and important public laws which our legislature has held to be essentially connected with the best interests of society." In a footnote to § 116a, the author quotes from 1 Burge, Col. Laws, pp. 188-191, as follows: "The law which prohibits persons related to each other in a certain degree from intermarrying, and declares their intermarriage to be null, imposes on them a personal incapacity *quoad* that act; and that incapacity must continue to affect them so long as they retain their domicile in the country in which that law prevails. The resort to another country where there was no such prohibitory law, for the mere purpose of evading the law of their own country, and with the intention of returning thither when their marriage had taken place, cannot be considered a change of their former domicile or the acquisition of a domicile in the country to which they had resorted. They must therefore be regarded as still subject to the personal incapacity imposed by the law of their real domicile." In Wharton, Conf. L. § 159, the writer says: "But when persons domiciled in a state where these prohibitions are in force are married without domicile, in violation of such prohibitions, in a state where there is no opposing legislation, the parties visiting the latter state for this purpose, will the former state recognize the validity of the marriage? The first point for the court of such a state to determine, on such an issue, is whether the prohibition of such marriages is part of the distinctive policy of the state. If so, the court, acting on the reasoning already given, must hold that persons domiciled in such state cannot evade its law by going to another state and then returning to live in the home state in a union that state condemns. And so it has been ruled on several occasions."—citing *Kinney v. Com.* 30 Gratt. 858, 32 Am. Rep. 690; *Williams v. Oates*, 5 Ired. L. 538; *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 680; *Scott v. State*, 39 Ga. 321; *Dupre v. Boulard*, 10 La. Ann. 411.

Upon the whole case, we consider that the weight of authority is against the validity of the marriage we are now considering; and, upon well-settled principles, we are convinced that it should not be sustained.

The decree of the court below is affirmed, and the appeal is dismissed, at the cost of the appellant.

McCollum, Mitchell, and Fell, JJ., dissent.

Rehearing denied January 17, 1898.

TEXAS SUPREME COURT.

BRITISH AMERICA ASSURANCE COMPANY, *Appl.*,

v.

George E. MILLER.

(.....Tex.....)

Insurance on wearing apparel, jewelry, satchels, trunks, books, etc., "while contained in" a specified building, does not cover the property when located at another place where the insured was temporarily staying with his family, although the insurance agent knew of his habit of taking his family periodically to such place for a temporary stay.

(January 27, 1898.)

QUESTIONS certified by the Court of Civil Appeals for the Second Supreme Judicial District arising upon an appeal by defendant from a judgment in favor of plaintiff in an action brought to enforce payment of the amount alleged to be due on an insurance policy. *Answers favorable to defendant.*

The facts are stated in the opinion.

Messrs. William Thompson and R. S. Baker for appellant.

Messrs. Carrigan & Montgomery and Theodore Mack, for appellee:

The written portions of an insurance policy will overcome the printed portions of the policy.

Georgia Home Ins. Co. v. Jacobs, 56 Tex. 369.

Where there is a general and particular description of the property, the particular description will control.

Words descriptive of location might, as to one class of property, or as to one kind of insurance, be treated as a statement of fact, relating to the risk, and as amounting to a stipulation or condition that the property should remain there; while as to another class of property, or as to other kinds of insurance, it might be construed as mere description for the purpose of identification.

DeGraff v. Queen Ins. Co. 38 Minn. 501.

The language being selected and used by the insurer to express the terms and conditions upon which it issued, the policy will be strictly construed against it and liberally in favor of the insured.

Brown v. Palatine Ins. Co. 89 Tex. 590.

The language used must be construed according to the evident intent of the parties, to be derived from the words used, the subject-matter to which they relate, and the matters naturally or usually incident thereto.

Brown v. Palatine Ins. Co. 89 Tex. 590.

Forfeitures are not favored in law; and if the language used is fairly susceptible of an interpretation which will prevent a forfeiture, it will be so construed.

Brown v. Palatine Ins. Co. 89 Tex. 590.

Every doubt arising from the terms of the instrument (insurance policy) must be resolved against the insurer.

Bills v. Hibernia Ins. Co. 87 Tex. 552, 29 L. R. A. 706.

The court will not imply anything in favor of a forfeiture, but must try the matter by the language used by the parties.

Bills v. Hibernia Ins. Co. 87 Tex. 552, 29 L. R. A. 706.

If the conditions or warranties be repugnant to the portions of the policy describing the subject of insurance, the condition must yield to that portion which expresses the terms of liability.

Bills v. Hibernia Ins. Co. 87 Tex. 552, 29 L. R. A. 706.

A stipulation which is not upon penalty of forfeiture of rights under the policy, in event of failure to perform the same, will not render void the policy for failure to perform the stipulation.

May, Ins. 156, 157; Eakin v. Home Ins. Co. 1 White & Willson Tex. App. Civ. Cas. § 870.

A distinction is taken between property described as contained in a certain locality in the sense of being absolutely maintained or stored in one place, in which case its removal is not contemplated, and property which from its very nature must be constantly removed.

1 Biddle, Ins. § 641.

Insurance on wearing apparel subjects the insurer to liability if destroyed while in its ordinary use elsewhere than in the *locus* described.

1 Biddle, Ins. § 641.

The stipulation "all while contained in the above-described building," if entitled to be construed as a warranty, and not a representation, should only be considered as warranting the then present condition of the property, and not as a promissory warranty that it will be continued to be devoted to the same use.

East Texas F. Ins. Co. v. Kempner, 87 Tex. 286, 12 Tex. Civ. App. 538.

If the company desired to make its liability contingent upon the goods insured remaining in the dwelling house of appellee, it must have so expressed its desire by apt words.

Burlington Ins. Co. v. Brockway, 188 Ill. 644.

The language of the policy being the language of the underwriters, if susceptible of two interpretations, that must be adopted which will sustain the claim of the assured, and give him the indemnity it was his object to secure.

Goddard v. East Texas F. Ins. Co. 67 Tex. 71; *Stone v. United States Casualty Co.* 34 N. J. L. 376; *Western Ins. Co. v. Cropper*, 32 Pa. 351, 75 Am. Dec. 561; *McKeesport Mach. Co. v. Ben Franklin Ins. Co.* 173 Pa. 53; *Boyd v. Mississippi Home Ins. Co.* (Miss.) 26 Ins. L. J. 582; *Graybill v. Penn Twp. Mut. F. Ins. Asso.* 170 Pa. 75, 29 L. R. A. 55; *Noyes v. Northwestern Nat. Ins. Co.* 64 Wis. 415, 54 Am. Rep. 681; *Peterson v. Mississippi Valley Ins. Co.* 24 Iowa, 494, 95 Am. Dec. 748; *Mills v. Farmers' Ins. Co.* 37 Iowa, 400; *McCluer v. Girard F. & M. Ins. Co.* 43 Iowa, 349, 22 Am. Rep. 249; *Aetna Ins. Co. v. Strout*, 16 Ind. App. 160;

NOTE.—As to location of movable property as affecting fire insurance upon it, see *note* to *Benton v. Farmers' Mut. F. Ins. Co.* (Mich.) 36 L. R. A. 237;

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Lakings v. Phenix Ins. Co. (Iowa) 28 L. R. A. 70; *Graybill v. Penn Twp. Mut. F. Ins. Asso.* (Pa.) 29 L. R. A. 55.

Longueville v. Western Assur. Co. 51 Iowa, 558, 38 Am. Rep. 146; *Everett v. Continental Ins. Co.* 21 Minn. 76; *Smith v. Mechanics' & T. F. Ins. Co.* 32 N. Y. 899; *Holbrook v. St. Paul F. & M. Ins. Co.* 25 Minn. 229; *London & L. F. Ins. Co. v. Graves* (Ky.) 12 Ins. L. J. 308; *De Graff v. Queen Ins. Co.* 88 Minn. 501; *Haws v. St. Paul F. & M. Ins. Co.* 180 Pa. 113, 2 L. R. A. 52; *Haws v. Fire Assn. of Philadelphia*, 114 Pa. 481; *Niagara F. Ins. Co. v. Elliott*, 85 Va. 962; *American Cent. Ins. Co. v. Haws* (Pa.) 11 Atl. 107; 1 Biddle, Ins. § 641; 2 Beach, Ins. p. 22, note; *Washington F. Ins. Co. v. Davison*, 80 Md. 91; *Fitchburg R. Co. v. Charlestown Mut. F. Ins. Co.* 7 Gray, 64; *Crooby v. Franklin Ins. Co.* 5 Gray, 504; *Allen v. Charlestown Mut. F. Ins. Co.* 5 Gray, 384; *Maryland Ins. Co. v. Bossiere*, 9 Gill & J. 121; *Allegre v. Maryland Ins. Co.* 6 Harr. & G. 408, 14 Am. Dec. 209; *Jolly v. Baltimore Equitable Soc.* 1 Harr. & G. 295, 18 Am. Dec. 288; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. 487; *Merrick v. Germania F. Ins. Co.* 54 Pa. 282; *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Pa. 31; *Wall v. Howard Ins. Co.* 14 Barb. 388; *Dole v. New England Mut. Marine Ins. Co.* 6 Allen, 373; *Roth v. City Ins. Co.* 6 McLean, 324; *Howard F. Ins. Co. v. Bruner*, 28 Pa. 50; *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 27 Ala. 77; *Bebee v. Hartford County Mut. F. Ins. Co.* 25 Conn. 51, 65 Am. Dec. 558; *Sayles v. Northwestern Ins. Co.* 2 Curt. C. C. 610; *Frisbie v. Fayette Mut. Ins. Co.* 27 Pa. 325.

Brown, J., delivered the opinion of the court:

The court of civil appeals for the second supreme judicial district has certified to this court the following statement and question: "We deem it advisable, both parties consenting, to certify to your honors for decision the controlling, if not the sole, question in this case, which, briefly, is whether, upon the agreed statement below, the terms of the fire insurance policy declared on by appellee covered the loss sustained by him during the life of the policy in a fire at Henrietta, Texas, which not only destroyed the residence of one Fraser, where appellee and his family were temporarily boarding during a term of the district court then being held by appellee, who was the then regular judge of said court, and which was known to appellant at the time of the issuance of the policy, but also \$840 worth of 'trunks, satchels, . . . family wearing apparel, . . . watches, jewels, and jewelry in use,' belonging to appellee, and then in ordinary use by himself and family; the policy having been issued to him in Wichita Falls, Texas, the place of his residence, covering all loss or damage by fire to his dwelling house, there situated, as described in the policy; which policy, in the printed part, contained these words: 'While located and contained as described herein, and not elsewhere;' and the printed slip attached to said policy by the agent, and describing the property insured, expressly mentioned 'trunks, satchels, . . . family wearing apparel, . . . watches, . . . jewels, and jewelry in use,' etc., 'all while contained in the above-described building;' and at the bottom of said slip is written

and printed: "This form is attached to and constitutes the written and descriptive portion of policy No. 922,657 of the British America Assurance Company of Toronto." "

The following is a condensed statement of the facts material for the decision of the question certified to us: Appellee, George E. Miller, was, on the 26th day of January, 1896, and still is, judge of the thirtieth judicial district of the state of Texas, which embraces the counties of Wichita, Clay, Archer, and Young. Judge Miller resided at Wichita Falls, in Wichita county, and owned a residence in that city, located as described in the policy of insurance sued on; and in which residence he resided with his family, which consisted of a wife and two children, respectively six and three years old. In the discharge of his official duties, Judge Miller held court twice in each year in the counties above named, at which times he carried his family with him; which facts were known to the agents of the appellant at the time that the policy of insurance sued upon was issued, but the agents did not know the length of time that the family remained with him at each term of the court. Anderson, Moore, & Bean were empowered to make contracts for the appellant, the British America Assurance Company, insuring property situated in Wichita Falls against loss from fire, but were not authorized to insure property situated elsewhere. On the 26th of January, 1896, Anderson, Moore, & Bean, as agents for the British America Assurance Company, made and delivered to George E. Miller a policy of insurance, from which we make the following extracts: "British America Assurance Company, Toronto, Canada. In consideration of the stipulations herein named and of twenty eight and $\frac{1}{2}$ dollars premium, does insure Hon. George E. Miller for the term of one year from the 26th day of January, 1896, at noon, to the 26th day of January, 1897, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding two thousand and ninety and no $\frac{1}{100}$ dollars, to the following described property while located and contained as described herein, and not elsewhere, to wit: . . . \$850 on his household and kitchen furniture, useful and ornamental, beds, bedding, linen, carpets, plate and plated ware, china, glass, and crockery ware, trunks, satchels, sewing machines, family wearing apparel, fuel and family supplies; also on musical instruments, printed books and music, mirrors, pictures, paintings, engravings, and their frames, statuary, bric-a-brac, watches, jewels, and jewelry in use; in case of loss none to be valued at exceeding cost; all while contained in the above-described building."

On the 7th day of October, 1896, Judge Miller was holding a regular term of the district court at Henrietta, in Clay county, and had with him his wife and children. They were boarding at the house of J. A. Fraser, at which place Judge Miller and his wife had with them for the use of themselves and their children, the property which was burned by fire, and which was a part of the personal property described in the policy of insurance in the clause above quoted and consisted of wearing apparel,

jewelry, satchels, trunks, books, etc., which property was usually contained in the residence of Judge Miller at Wichita Falls when he and his family were at home. At 2:30 P. M. on the said day a fire occurred at the house of Fraser, by which the wearing apparel, jewelry, etc., belonging to Judge Miller was damaged and destroyed to the value of \$840. There is no dispute of the claim of Judge Miller upon any ground except that which is embraced in the question agreed upon by the parties, which is as follows: "The issue to be determined under the above facts is whether or not defendant is liable to plaintiff under the policy; the loss having occurred in Henrietta, Texas. Defendant claims that its policy under the facts limits its liability to losses which may occur to the property while the same is located and contained in the residence described in the policy. Plaintiff claims that the policy covers the loss at Henrietta under the facts above recited." To the question propounded we answer that the property which was destroyed by fire at the city of Henrietta was not covered by the policy of insurance described in the statement submitted with the question, and the insurance company was not liable for such loss.

While it is true that courts will construe the language of an insurance policy, and especially a clause of forfeiture contained therein, most strongly against the insurer, and in such manner as to protect the insured, if the language used is susceptible of such construction, it is likewise true that, when a party dealing with an insurance company has made a contract which is unambiguous in its terms, courts will construe and enforce it in the same way as if made between natural persons. A number of cases have been cited which construe the language "contained in" as being descriptive of the place at which the property is located at the time the insurance is obtained and others in which courts have held that such language must be construed with reference to the use of the property insured,—that is, if its ordinary use causes it to be absent from such place; and if, being so absent from the place mentioned, it is destroyed by fire, the property is nevertheless protected by the policy, and the insurance companies have been held to be liable therefor. *McCluer v. Girard F. & M. Ins. Co.* 48 Iowa, 349, 22 Am. Rep. 249; *American Cent. Ins. Co. v. Haus* (Pa.) 11 Atl. 107; *Mills v. Farmers' Ins. Co.* 37 Iowa, 400. But in the cases above referred to the terms of the policies were less definite than is the one now before the court. In the policy under consideration the property is insured "while located and contained as described herein, and not elsewhere," and in connection with the clause which describes the property which was destroyed by fire this language is used: "All while contained in the above-described building,"—showing that the property was not insured while out of the house. It is claimed by the appellee that this case comes within the rule laid down in *Bills v. Hibernia Ins. Co.* 37 Tex. 547, 29 L. R. A. 706, and that the language used must be construed with reference to the ordinary use of the property insured. In the case of *Bills v. Hibernia Ins. Co.* the language under construction (a clause of for-

feiture) did not, in its terms, embrace some of the articles that were afterwards destroyed, which were embraced in the contract part of the policy; and in discussing the effect of the forfeiture clause this court said: "If the conditions of warranties be repugnant to the portions of the policy describing the subject of insurance, the condition must yield to that portion which expresses the terms of liability; as if, for instance, the body of the policy grants insurance upon a stock, such as is usually carried in a 'country store,' or such as is usually carried in a 'retail store,' and the conditions prescribing that the carrying in the stock certain articles named as extrahazardous will cause a forfeiture of the policy, and it appears from the evidence that the articles expressly named are usually carried in such stock and embraced in the terms of a policy describing the subject, the clause of forfeiture must yield to the language of the body of the policy and the forfeiture will not be enforced." This simply states the rule that, when there is a conflict, the contracting party of the policy will prevail over clauses of forfeiture. In other words, the court will not hold that the insurance company did not intend to insure that which it expressly contracted to insure; on the other hand, courts will not so construe plain language as to make a contract embrace that which it was intended not to include. It is insisted by the appellee that in the ordinary use of wearing apparel, jewelry, trunks, satchels, and the like, they would at times be absent from the residence of the owner, and that the agent of the insurance companies knew that the assured was in the habit of taking his family with him to the different places where he held terms of the district court in his district, and must have known that such things are generally used on such occasions; therefore the policy must be construed with reference to such general and known uses by the assured, and that the case comes within the line of authorities cited by the appellee to the effect that property thus used will be protected when absent from the house by a policy in which it is described as being "contained" in a certain house. However, in this policy, the insurance company so definitely and unequivocally expresses a contract by which it is not bound for the loss of the property when absent from the named place that there is no room for construction. The protection afforded by the policy is expressly limited to the time that the subject of insurance shall be contained in the house described, and whenever it was taken therefrom it was removed beyond the protection of the contract. *Green v. Liverpool & L. & G. Ins. Co.* 91 Iowa, 615; *Mawhinney v. Southern Ins. Co.* 98 Cal. 184, 20 L. R. A. 87; *Haus v. St. Paul F. & M. Ins. Co.* 130 Pa. 118, 2 L. R. A. 52.

The policy was not forfeited by the removal but remained in force, and covered the property when returned to the residence in Wichita Falls; hence the rule that demands a construction which would prevent a forfeiture has no application. The insurance company knowing that the class of property embraced in the policy was liable to be removed to other places provided against liability for it when located at such other points by the express and pla-

limitations. The appellee likewise knew that in the ordinary use of the property embraced in the contract of insurance it would be carried to other places than his residence in Wichita Falls whereby it would be voluntarily withdrawn from the protection afforded by the

contract of insurance, and if he desired to have it protected while using it away from home, he could have made a contract expressing such liability on the part of the insurance company.

WASHINGTON SUPREME COURT.

CARSTENS & EARLES, *Appl.*,
v.
LEIDIGH & HAVENS LUMBER COMPANY, *Resp't.*

(.....Wash.....)

1. An order quashing a summons is appealable under a statute permitting appeals from orders terminating the action or proceeding.
2. In the absence of proper exceptions to a finding on a mixed question of law and fact, the only question is whether the findings of fact warrant the conclusions of law.
3. Serving process on an officer of a foreign corporation which had no place of business in the state and had never done any business therein, when he was present only casually and temporarily in the state, is not sufficient to give jurisdiction to render a judgment *in personam* against the corporation.

(January 10, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to recover a balance alleged to be due for goods sold and delivered. *Affirmed.*

The facts are stated in the opinion.

Mr. James Kiefer, for appellant:

If a foreign corporation makes a contract within the state with a resident, and sends some of its officers, upon whom service may lawfully be made, to transact business within the state, and service be made upon such officer, the jurisdiction is complete.

No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state.

Const. art. 12, § 7.

Failure to maintain an office in this state, or to appoint a statutory agent as required by our statute in that respect, is no bar to the right of such foreign corporation to maintain an action in our courts against any of the citizens or residents of the state.

Foreign corporations making contracts within the state are liable to be sued in the courts of the state upon such contracts, and service upon any officer of the corporation in the state which would be good if made upon a domestic corporation, should be held to be good against such foreign corporation.

NOTE.—As to the person on whom process against a foreign corporation may be served, see *note* to *Foster v. Charles Betcher Lumber Co.* (S. D.) 23 L. R. A. 490.

89 L. R. A.

Morawetz, Priv. Corp. § 977; *Libbey v. Hodgdon*, 9 N. H. 396; *North Missouri R. Co. v. Akers*, 4 Kan. 453, 16 Am. Dec. 183; *Bushel v. Commonwealth Ins. Co.* 15 Serg. & R. 176; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421.

Appellant, a corporation organized under the laws of the state of Washington, and engaged in dealing in shingles and other lumber products, in the course of its business furnished to the respondent at its office in Kansas City, Missouri, price lists of these articles. Respondent wrote and telegraphed from time to time to appellant at its office in Seattle sundry orders for carloads of shingles. Appellant accepted these orders and deposited letters of acceptance in the postoffice at Seattle, and delivered the goods to carriers at Seattle, consigned to the defendant. This constituted a contract made in the state of Washington.

State v. Bristol Sav. Bank, 108 Ala. 3; 2 Parsons, Contr. 7th ed. p. 712; *Taylor v. Merchants' F. Ins. Co.* 50 U. S. 9 How. 391, 13 L. ed. 187; *Shuenfeldt v. Junkermann*, 20 Fed. Rep. 357.

The contract having been made in the state of Washington, defendant, a foreign corporation, must be held to have submitted itself to the jurisdiction of the courts of the state when properly summoned according to the statute regulating service of process on corporations.

Colorado Iron Works v. Sierra Grande Min. Co. 15 Colo. 499; *Dixon v. Order of Railway Conductors of America*, 49 Fed. Rep. 910; *National Condensed Milk Co. v. Brandenburg*, 40 N. J. L. 112; *Klopp v. Creston City Guarantees Waterworks Co.* 34 Neb. 808; *Pope v. Terre Haute Car & Mfg. Co.* 87 N. Y. 137; *Hüller v. Burlington & M. River R. Co.* 70 N. Y. 223; *Morawetz, Priv. Corp.* § 977, and cases cited. See also *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404, 15 L. ed. 451.

Messrs. Donworth & Howe, for respondent:

An order quashing the service of summons does not fall within the statute. To make an order appealable three things must concur: (1) the order must affect a substantial right; (2) it must in effect determine the action; and (3) it must prevent a final judgment. Certainly the order quashing the service of summons did not determine the action. Neither did it prevent a final judgment therein.

Brown v. Edgerton, 14 Neb. 458; *Roger v. Bertha Zinc Co.* (Va.) 19 S. E. 782; *Brown v. Rice*, 30 Neb. 236; *Reitmeir v. Siegmund*, 13 Wash. 624; *Freeman v. Ambrose*, 13 Wash. 1.

A general exception to all the findings, such as appears in this case, is not sufficient for any purpose.

Ballard v. Keane, 18 Wash. 201; *Hannegan v. Roth*, 12 Wash. 65; *Irwin v. Olympia Waterworks*, 12 Wash. 112.

Where appellant claims certain facts to be established by the evidence, he must request the trial court to find such facts; otherwise he cannot urge such alleged facts on appeal.

Davis v. Ford, 15 Wash. 107; *Forrest v. Gilchrist*, 14 Wash. 4.

The same rule applies where no findings of fact were made other than those incorporated in the decree or order appealed from.

Montesano v. Blair, 19 Wash. 188; *Washington Brick, Lime & Mfg. Co. v. Adler*, 12 Wash. 24; *Stoddard v. Seattle Nat. Bank*, 19 Wash. 658; *Fremont Milling Co. v. Denny*, 12 Wash. 251.

Conclusions of law made by the lower court cannot be reviewed unless duly excepted to.

Laws of 1898, § 3, p. 112; *Elliott*, App. Proc. § 793, and cases cited.

Service of process upon an officer or agent of a foreign corporation, casually or temporarily found within the jurisdiction, whether upon his own business or otherwise, will not give jurisdiction to render a judgment *in personam* against the corporation.

6 Thomp. Corp. § 8080, and authorities cited; *Phillips v. Burlington Library Co.* 141 Pa. 462; *Clews v. Woodstock Iron Co.* 44 Fed. Rep. 31; *Moulton v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 222; *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 17; *Carpenter v. Westinghouse Air Brake Co.* 32 Fed. Rep. 434; *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.* 32 Fed. Rep. 802; *Aldrich v. Anchor Coal & D. Co.* 24 Or. 32; *Rust v. United Waterworks Co.* 36 U. S. App. 167, 70 Fed. Rep. 129, 17 C. C. A. 16; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608.

As there has been no attachment of property in the case at bar, the action is purely one *in personam*, and therefore a judgment rendered against the defendant in this action would be without force.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; 6 Thomp. Corp. § 7529; 8 Am. & Eng. Enc. Law, 1st ed. p. 884, and also 22 Am. & Eng. Enc. Law, 1st ed. p. 182.

The conduct of the plaintiff in inducing Mr. Leidigh to believe that an amicable adjustment of the account between appellant and respondent would be made with him, and then attempting to serve him with process the moment appellant found him within reach, without beginning negotiations for an adjustment, would be an additional reason for quashing the service.

Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608.

Dunbar, J., delivered the opinion of the court:

This action was brought by the plaintiff, a corporation under the laws of the state of Washington, to recover a balance of \$910.48 for goods sold and delivered to the defendant, a corporation organized under the laws of the state of Missouri. Service was had upon the president of the defendant corporation in King county. The defendant appeared specially, and moved the court to set aside and quash the service of summons, and in support

of its motion filed the affidavit of John H. Leidigh, the president of the defendant corporation, showing that he was not a resident of the state of Washington; that on the 29th day of January, 1897, he came to the state of Washington, arriving at Seattle on February 2, and was served with summons by the appellant in this action on the following morning. Affidavits and counter-affidavits were filed, the case was tried upon said affidavits, and a judgment was rendered in favor of the defendant, declaring the service of the summons to be void.

It is contended by the respondent in its motion to dismiss that this is not an appealable order; but, whatever might be said concerning an order refusing to quash a summons, we think it is evident that an order quashing a summons in effect determines the action or proceeding, and is therefore appealable, under the statute.

It is objected also by the respondent that no proper exceptions were taken in the lower court to any of the findings of fact or conclusions of law made by the court, and we think this objection well taken. This case was tried as a mixed question of law and fact, and tried exclusively upon the affidavits which were considered by the court, and the court made its findings of fact and its conclusions of law in regular form. The findings of fact not having been excepted to under the rulings of this court in *Rice v. Stevens*, 9 Wash. 298, *Hannegan v. Roth*, 12 Wash. 65, and many subsequent cases, the only question for this court to determine is, Do the findings of fact warrant the conclusions of law? The court found that the defendant was a corporation duly organized and existing under the laws of the state of Missouri; that it had never appointed or had any agent residing in the state of Washington for any purpose whatever; had never done or carried on any business whatever in the state of Washington; had never had any property within the state of Washington; had never had an office for the transaction of business in any county in the state of Washington; and that it did not at any time have any officer or agent residing in any county in the state of Washington upon whom process might be served against said defendant company, or any officer or agent whatever of said defendant company. The appellant has based its argument so entirely upon the matters and things set up in the affidavits that it is of very little value to this court in determining the law governing this case, for, if we were to consider the affidavits, we might conclude that the transaction or sale had been made in the state of Washington; but the finding of the court is that the defendant has never done or carried on any business whatever in the state of Washington, and that John H. Leidigh, to whom a copy of summons and complaint were delivered, was at said time only casually and temporarily in the state of Washington, and has since departed therefrom; so that the argument of appellant made on the 16th, 17th, 18th, 19th, and 20th pages of its brief, in relation to the purpose for which Mr. Leidigh came to this state and the capacity in which he was acting, is not in point in the discussion of this case. We think, from an

investigation of the cases cited by the appellant, that it has confused the idea of jurisdiction of states over foreign corporations with the idea of a proper service. It is not questioned by any of the cases that we have seen, that where a summons has been served upon an officer of a corporation for whose acts the corporation is bound, where the statute provided for a legal service on such agents or parties, the jurisdiction of the state court over foreign corporations attached. But in this case it does not appear to us that service was made under the statute or in any other way that has ever been maintained by any court, viz., by serving an officer of the foreign corporation which had no place of business in the state, and which had never done any business in the state, such officer being simply temporarily present in the state. And most of the cases cited by appellant, as we before indicated, are cases simply sustaining jurisdiction under statutes which provided for legal service. It is true that in *Hiller v. Burlington & M. River R. Co.* 70 N. Y. 223, a service upon a director of a foreign corporation in the state of New York, while he was there temporarily on his own business, was a good service and a sufficient commencement of the action, although defendant had no property in that state, but in that case it was determined by the court that the contract was made in the state of New York. There the plaintiff had made a contract to enter defendant's service for a term of years, his business being to procure emigrants to purchase and settle on defendant's lands in Nebraska. Plaintiff was bound, under the contract, to maintain during the whole time an office in the city of New York; and was to go to Europe for two or three months to arrange for emigration, and, in accordance with said contract, opened and kept open in the city of New York the office, until the contract was terminated by the defendant. In that case the court very properly held that in an action for services under the contract, and for damages under the breach, it was to be assumed that the parties understood that plaintiff's principal duties under the contract would be discharged in New York city, and that, therefore, the cause of action arose within that state. Substantially the same doctrine was announced in *Pope v. Terre Haute Car & Mfg. Co.* 87 N. Y. 137. But the court in those cases was construing a statute vastly different from our statute, and maintained the doctrine that the manner of service depended entirely upon the legislature. These cases, however, stand alone, so far as the announcement of the doctrine is concerned that the service on the officer of a foreign corporation who is temporarily in the state is a good service, with the possible exception of *Klopp v. Creston City Guarantee* 89 L. R. A.

Waterworks Co. [34 Neb. 808], a Nebraska case; though this case is not in point here, for the reason that the statute of Nebraska was entirely different from our statute, and for the further reason that it was conceded in that case that the debt was contracted in Nebraska, while the finding of the court in this case is to the contrary, and, even if we should consider the complaint, there is nothing there that would indicate that the debt had been contracted in this state. The doctrine announced by the New York cases has not been followed by the Federal courts. See *Bentley v. London & C. Finance Corp.* 44 Fed. Rep. 667.

The contention of the appellant that § 7 of art. 12 of the Constitution, which provides that "no corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state," will be invaded if this judgment is maintained, has no force, from the fact that it appears from the findings of the court that the defendant corporation here is not transacting business within the state under any condition whatever. Mr. Thompson, in his work on Corporations (vol. 6, § 8030), lays down the rule governing this case as follows: "It is a principle of American law, firmly settled, and one which may be regarded as the law everywhere, except where changed by statute, that service of process upon an officer or agent of a foreign corporation, casually or temporarily found within the jurisdiction, whether upon his own business or otherwise, will not give jurisdiction to render a judgment *in personam* against the corporation. It can make no difference, in respect of the operation of this principle, whether the officer is casually or temporarily within the jurisdiction for his own private purposes, or for the purposes of the corporation,—always provided that the local statute law has not changed the practice." And the cases cited by the author overwhelmingly support the principle therein announced. In fact, not only the weight of authority, but all the authority that we have been able to find, outside of the New York and Nebraska cases above mentioned, sustains this text. The cases are reviewed in 8 Am. & Eng. Enc. Law, 1st ed. p. 384.

Under the circumstances of this case, then, as shown by the findings of fact, the judgment of the lower court must be sustained, and it is affirmed.

Scott, Ch. J., and Gordon and Reavis, JJ., concur. Anders, J., concurs in the result.

Rehearing denied.

MISSOURI SUPREME COURT (In Banc).

City of St. LOUIS, *Plff. in Err.*,EDWARD HEITZBERG PACKING &
PROVISION COMPANY.

(.....Mo.....)

1. **General power of a city to declare, prevent, and abate nuisances** does not include the power to declare that a nuisance which is not so in fact.
2. **An ordinance declaring the emission of dense black or thick gray smoke to be a nuisance**, without any limitation as to the length of time it is emitted or as to whether it is in fact a nuisance or not, and without providing for any inquiry as to these matters, is not within the general power of a city to declare, prevent, and abate nuisances.

NOTE.—*Municipal control over smoke as a public nuisance.*

The general rules governing the question of municipal control over nuisances in general will be found discussed in *note* to *Grossman v. Oakland* (Or.) 38 L. R. A. 593.

The power of municipalities over buildings and other structures as nuisances forms the subject of the *note* to *Evansville v. Miller* (Ind.) 39 L. R. A. 151.

Upon the question of municipal control over nuisances affecting safety, health, and personal comfort, see *note* to *Harrington v. Providence* (R. I.) 38 L. R. A. 305.

The *note* to *Ex parte Lacey* (Cal.) 38 L. R. A. 540, discusses the question of municipal power over nuisances in relation to particular trades or businesses.

The subject of municipal control over nuisances affecting highways and waters will be found in *note* to *Hagerstown v. Whitmer*, — L. R. A. —.

Upon the question of municipal power over nuisances affecting public morals, decency, peace, and good order, see *State v. Karstendiek*, *ante* 520.

The questions of prescription as affecting a public nuisance, and the power of municipal authorities to proceed in equity in abating nuisances, will form separate notes.

The principal case, *ST. LOUIS V. EDWARD HEITZBERG PACKING & PROVISION CO.*, holds that smoke is not a nuisance *per se*, and is not therefore within the power of the municipal authorities who cannot declare anything a nuisance which is not one.

It may be taken as a settled principle that filling the air around a dwelling house with dense smoke and soot or cinders, or with noxious or offensive vapors or odors or annoying noises, to such a degree as will render living in the house uncomfortable to persons of ordinary sensitiveness on those matters, is a nuisance, and an unlawful injury entitling the person so injured or affected to redress. The question, however, for determination in this *note* is not as to how and under what circumstances the party injured will be entitled to relief as against such nuisances, but as to the power of a municipal corporation to interfere in such cases, and as to how such nuisances are public in their character so as to call forth the intervention of the municipal authorities, and to the consideration of the latter questions the *note* is therefore confined.

Coal smoke in large and densely populated cities is productive of much injury to property and annoyance to the inhabitants, while it is not attended with that result in country towns and villages; and it is for this reason that the law treats the subject of an act or ordinance regulating and compelling

3. **All valid ordinances must fix the duty and liability of the citizen** by certain intelligible, prescribed rules by which he may govern himself without being subject to an unregulated official discretion.

(November 13, 1897.)

ERROR to the St. Louis Court of Criminal Correction to review a judgment in favor of defendant in an action brought to recover the penalty for violating the ordinance against smoke nuisance. *Affirmed.*

The facts are stated in the opinion.

Messrs. William C. Marshall and Eugene McQuillin, for plaintiff in error:

The declaration by the ordinance that "the emission into the open air of dense black or thick gray smoke within the corporate limits

ling the consumption of smoke emitted by the burning of coal as a nuisance in cities, and confers on them power to regulate and suppress it within their corporate limits. *Cincinnati v. Miller*, 29 Ohio L. J. 364, 365.

Anything that is detrimental to certain classes of property and business in a densely populated city,—such as dense smoke,—and is a personal annoyance to the public at large within the city, need not be defined by ordinance to be known to the common mind as a public nuisance, as smoke of that character is a nuisance *per se* when emitted from chimneys and smoke stacks in the midst of such a city, whether it is so declared by ordinance or not. *Cincinnati v. Miller*, 29 Ohio L. J. 364, 365; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 693.

In upholding a smoke ordinance of the city of Chicago valid, the court, in *Feld v. Chicago*, 44 Ill. App. 410, 411, stated that it was matter of common knowledge that smoke becomes soot which falls and blackens where it rests, that it is injurious to vegetation, to many kinds of goods, and annoying to people, and that such common knowledge was so generally diffused in the city that no jury could be without it.

Yet, unless dense smoke is a nuisance in fact the mere act of declaring it to be a public nuisance will not make it such, but the omission so to declare it does not make it the less a public nuisance. *Cincinnati v. Miller*, 29 Ohio L. J. 364, 365.

In *Prescott's Case*, 2 N. Y. City Hall Rec. 161, wherein the defendant was charged with erecting and continuing certain coppers, cisterns, boilers, and furnaces for the purpose of distilling, fomenting, and rectifying spirits by which certain noxious and offensive smells, stenches, vapors, and smokes were emitted, which rendered the air impure, unhealthy, and uncomfortable, to the great damage and common nuisance of divers inhabitants of the city, the court stated that the most important question was whether the smoke issuing from the chimney of such distillery might not be prevented from entering the windows of the adjacent buildings by carrying the chimneys higher, and that if the jury should believe that such annoyance might be prevented by that means the omission to do it was a nuisance for which the defendant was answerable. This case, however, was one wherein the defendant was indicted for the nuisance at common law and the question of municipal control did not, therefore, arise. It is, however, here cited as showing that smoke may become a public nuisance, and as supporting authorities holding the same as a public nuisance abatable by municipal authorities.

And in *New Orleans v. Lambert*, 14 La. Ann. 244, the power of the city authorities to abate or order

of the city of St. Louis is a nuisance," and the allegation in the statement and proof that such smoke was emitted from defendant's plant, and the common knowledge of the annoying and detrimental character of such smoke within a populous city, establishes a prima facie case on the part of the city.

The mayor and assembly shall have power within the city, by ordinance not inconsistent with the Constitution or any law of this state, or of this charter, to declare, prevent, and abate nuisances on public or private property, and the causes thereof.

St. Louis City Charter, art. 3, § 26, ¶ 6; Mo. Rev. Stat. 1889, p. 2098.

The declaration "that dense black or thick gray smoke" emitted into the open air within a populous city is a nuisance, is a valid exercise of the police power of the city.

Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698; *Fieled v. Chicago*, 44 Ill. App. 410; *People v. Lewis*, 86 Mich. 278.

The power of the city to pass the ordinance cannot be questioned. The ordinance is distinctively a police regulation.

Tarkio v. Cook, 120 Mo. 1; *Campbell v. Kansas*, 102 Mo. 326, 10 L. R. A. 593; *St. Louis v. Webber*, 44 Mo. 547; *St. Louis v. Jackson*, 25 Mo. 37; *St. Louis v. Russell*, 116 Mo. 248, 20

L. R. A. 721; *St. Louis v. Howard*, 119 Mo. 47; *Kansas City v. Neal*, 49 Mo. App. 72; *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 184; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210; *Wynehamer v. People*, 13 N. Y. 878; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381.

In addition to its general police powers, by virtue of the express provision in its charter, the city of St. Louis had a clear right by ordinance to declare that dense black or thick gray smoke emitted, etc., constituted a nuisance, and such declaration is prima facie evidence that such smoke so emitted is a nuisance.

Kirkwood v. Cairns, 44 Mo. App. 88; *St. Louis v. Schnuckelberg*, 7 Mo. App. 586; *St. Louis v. Stern*, 3 Mo. App. 48; *Kennedy v. Philadelphia Bd. of Health*, 2 Pa. 366; *Green v. Savannah*, 6 Ga. 1; *Roberts v. Ogle*, 30 Ill. 459, 88 Am. Dec. 201; *Crosby v. Warren*, 1 Rich. L. 885; *Kennedy v. Sowden*, 1 McMull. L. 323; *Goddard v. Jacksonville*, 15 Ill. 588; *Stuyvesant v. New York*, 7 Cow. 604; *Vanderbilt v. Adams*, 7 Cow. 349; *Baker v. Boston*, 12 Pick. 198, 194, 22 Am. Dec. 421.

Where the particular thing declared against is a nuisance *per se*, the action of the city authorities is conclusive.

St. Louis v. Stern, 3 Mo. App. 48; *St. Louis*

the abatement of a blacksmith's shop as a nuisance to the neighborhood by reason of the odor and smoke issuing therefrom was upheld, article 665 of the Civil Code providing that if the works or materials of any manufactory or other operation cause an inconvenience to those in the same or in the neighboring houses by diffusing smoke or nauseous smells, and there is no servitude established by which they are established, their sufferance must be determined by the rules of the police or the customs of the place.

Dense smoke emitted from a steam tugboat which in its effect is detrimental to some classes of property and businesses within a city and is a personal annoyance to the public at large, is such a nuisance as may be prohibited by the penal ordinance of a city, and an ordinance passed for the suppression of the same will be upheld as reasonable. *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698.

And § 1651 of the ordinance of the city of Chicago which declares that the emission of dense smoke from the smokestack of any boat or locomotive, or from any chimney anywhere within the city, shall be deemed and declared to be a public nuisance, provided that the chimneys of buildings used exclusively for private residences shall not be deemed to be within the provisions of the ordinance, is a definition of what the common council regarded as a nuisance. *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698.

An ordinance which prohibits the proprietor, lessee, or occupant of any building within the corporate limits from permitting or allowing dense smoke to issue or be emitted from the chimney, and declares the person so doing to be guilty of a nuisance, seeks only to prevent the emission of dense smoke, and in this particular does not go as far as authorized by the Ohio laws, which provide that all cities of the first class shall have the power to regulate and compel the consumption of smoke emitted by the burning of coal, and to prevent injury and annoyance from the same; neither does it contravene the provisions of the state Constitution. *Cincinnati v. Miller*, 29 Ohio L. J. 364, 365.

The mere fact that it is impossible to comply with the provisions of an act or ordinance relating 89 L. R. A.

to dense smoke does not of itself render such ordinance invalid, as it must appear that the thing required to be done is not within the power of man to accomplish, otherwise the law valid in other respects must stand and be obeyed; and therefore if the act required to be done is possible of execution, although attended with great hardship to the person affected, or be ever so difficult, the ordinance must be obeyed. *Cincinnati v. Miller*, 29 Ohio L. J. 364, 365.

So, dense smoke may constitute a nuisance within the definition given by the Minnesota Penal Code, where it is the product of bituminous or soft coal in a thickly populated neighborhood, where it becomes detrimental to certain classes of property, and is offensive, and a source of annoyance, to the public. *St. Paul v. Gillsilan*, 36 Minn. 206.

And a city ordinance, which makes the emission of dense smoke from any chimney or smokestack, within the city, or smoke containing soot or other substance, in sufficient quantity to permit the deposit of such soot or other substance on any surface within the corporate limits, a public nuisance, will be upheld, although it is contended on behalf of the defendant that it is unreasonable upon the ground that it excepts from its provisions and operation private houses and steamboats. *People v. Lewis*, 86 Mich. 278.

A business may be abated as a public nuisance, which, located in the midst of a populous community, constantly produces odors, smoke, and soot of such a noxious character, and to such extent, that they produce headache, nausea, and other pains and aches injurious to health among, and taint the food of, the surrounding inhabitants. *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L. R. A. 722.

If smoke, soot, and the emission of noxious odors and gases are so inseparably connected with a business that the conducting of it constitutes a nuisance, the facts that it is carried on in a careful and prudent manner, and that nothing is done by those managing it that is not a reasonable and necessary incident of it, cannot be relied on by its owners to defeat a prosecution for the maintenance of a nuisance. *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L. R. A. 722.

v. *Steele*, 12 Mo. App. 570, Appx.; *Kansas City v. Neal*, 49 Mo. App. 72; *Kansas v. McAleer*, 31 Mo. App. 436.

Many decisions hold that a mere declaration on the part of the city authorities that a thing is a nuisance is conclusive.

Van Wormer v. Albany, 15 Wend. 262; *Kennedy v. Philadelphia Bd. of Health*, 2 Pa. 866; *Green v. Savannah*, 6 Ga. 1; *State v. Heidenhain*, 43 La. Ann. 483; *Roberts v. Ogle*, 80 Ill. 459, 83 Am. Dec. 201; *Crosby v. Warren*, 1 Rich. L. 385; *Kennedy v. Sowden*, 1 McMull. L. 828; *Goddard v. Jacksonville*, 15 Ill. 588.

Dense black or thick gray smoke, i. e., heavy volumes of smoke, discharged in any considerable quantities into the atmosphere of a populous city, is *per se* a public nuisance.

Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698; *Field v. Chicago*, 44 Ill. App. 410; *Sullivan v. Royer*, 72 Cal. 248; *Ross v. Butler*, 19 N. J. Eq. 302, 97 Am. Dec. 654; *Tuebner v. California Street R. Co.* 66 Cal. 174; *Hurlbut v. McKone*, 55 Conn. 81.

Hence legislation to suppress the smoke nuisance is a valid exercise of the police power.

1 Dill. Mun. Corp. 4th ed. § 141; Wood, Nuisances, § 744, p. 822, § 745, p. 824; 88 & 89 Vict. chap. 55, § 91, ¶ 7, p. 875. See Garrett, Nuisances, pp. 274-278.

In *Field v. Chicago*, 44 Ill. App. 410, 411, the defendant complained of the court's refusal to instruct the jury that it is the duty of the city to prove that, among other things, the smoke that issued from the chimneys of the defendants at the time complained of was not only dense, but was, at that particular time, of a nature detrimental to the property which was close enough in proximity to it to be affected by it injuriously, or was of a nature to be personally annoying to the public at large, and unless the jury believed, from the evidence, that the smoke complained of was at the particular time in question dense, and also proved to be detrimental to property within the city, or was of a nature to be personally annoying to the public at large, then the verdict should be for the defendants; but the court stated that the last half of such proposed instruction, as to what the jury should believe in order to convict, was perhaps proper, but that the first half, requiring the city to prove what may be presumed without proof, was not proper.

Under an ordinance declaring the emission of dense smoke from the smokestack of any boat or locomotive, or from any chimney, anywhere within the city, a nuisance, and deeming any person permitting or allowing such smoke to issue from any such smokestack or chimney guilty of creating a nuisance, and providing that no owner of any boat or locomotive engine or the person or persons employed as engineers or others in the working of the engine or engines in any boat or of any locomotive engine, nor the proprietor, lessee, or occupant of any building, should allow such smoke to issue or be emitted from such smokestack or from the chimney of any building within the corporate limits of the city, and inflicting a punishment by way of fine or imprisonment upon every person creating such a nuisance,—it was held that the servant of the owner or occupant could not be held liable for the emission of dense smoke from the chimney of buildings. In this case, however, there was a dissenting opinion by Justice Collins. *St. Paul v. Johnson* (Minn.) 72 N. W. 64.

In *Gaskell v. Bayley*, 30 L. T. N. S. 516, the in-

Courts will not pretend to be more ignorant than the rest of mankind, therefore they will presume and take judicial notice of the fact of common knowledge that "smoke becomes soot, which falls and blackens where it rests; that it is injurious to vegetation, to many kinds of goods, and annoying to people," and hence that heavy volumes of dense, dark smoke, discharged within a populous city, are a public nuisance.

Field v. Chicago, 44 Ill. App. 410; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *Gaskell v. Bayley*, 30 L. T. N. S. 516.

In an action by public authorities to abate a public nuisance, it is not necessary to aver and prove that particular persons have been damaged or inconvenienced by the public nuisance sought to be abated.

Kansas v. McAleer, 31 Mo. App. 436; *Smiths v. McConathy*, 11 Mo. 518.

The city had express authority to pass the smoke ordinance, and its enactment makes out a *prima facie* case that it is reasonable.

Morse v. West Port, 110 Mo. 502; *State, Trenton Horse R. Co., v. Trenton*, 58 N. J. L. 182, 11 L. R. A. 410; *Fisher v. Harrisburg*, 2 Grant, Cas. 291; *Com. v. Robertson*, 5 Cush. 438.

Municipal corporations are *prima facie* the sole judges of the necessity of these ordinances, and courts will not ordinarily review their rea-

spectors of nuisances had reported to the local authorities the result of his investigation of smoke nuisances upon the defendant's premises, and notice had been given pursuant to the sanitary act of 1866 requiring the abatement of the nuisance which was referred to as the chimney upon the defendant's premises within the borough not being the chimney of a private dwelling house, sending forth black smoke in such quantities as to be a nuisance, and the defendant's contention was that it was necessary for the plaintiffs to show that the emission of such dense smoke was also injurious to health. The court held that it was not necessary to show that the issuing of black smoke was injurious to health, as well as a nuisance, and that the issuing of black smoke in the quantities and manner shown by the evidence was a public nuisance within the provisions of the statute.

So, in *Higgins v. Northwich Union Guardians of Poor*, 22 L. T. N. S. 753, the defendant was compelled to obey the order of the guardians of the poor and abate a nuisance arising from black smoke emanating from the chimneys on his salt works, the English sanitary act of 1860 including any chimney other than one of a private dwelling house sending forth black smoke, and constituting the same a nuisance.

Under the English nuisance removal act of 1855, and the sanitary act of 1866, each daily emission of smoke is a separate act of disobedience. *Queen v. Waterhouse*, L. R. 7 Q. B. 545, 41 L. J. M. C. N. S. 115, 26 L. T. N. S. 761.

So, under the English nuisances removal acts of 1855 and 1860, and the sanitary act of 1866, the master who authorizes and directs the lighting of fires causing the smoke on the premises is the person properly liable to be proceeded against for nuisances by reason of smoke created thereby, but the justices must inquire whether the nuisance was likely to recur or be repeated, and if satisfied that it is, must order its abatement. *Barnes v. Ackroyd*, 26 L. T. N. S. 692, 20 Week. Rep. 671, L. R. 7 Q. B. 474, 41 L. J. M. C. N. S. 110.

And in *Millard v. Wastall*, 67 L. J. Q. B. N. S. 277, in a suit by an inspector of nuisances of the borough against defendant for suffering a nuisance to

sonableness when passed in strict pursuance of an express grant of power.

Hannibal v. Missouri & K. Teleph. Co. 31 Mo. App. 23; *St. Louis v. Green*, 7 Mo. App. 468, 70 Mo. 562; *Kansas v. McAleer*, 31 Mo. App. 483.

A clear case should be made out to authorize a court to interfere with the powers of a city respecting the exercise of its police powers on the ground of unreasonableness.

St. Louis v. Weber, 44 Mo. 547; *State, Maggard, v. Pond*, 93 Mo. 606; *Plattsburg v. Riley*, 42 Mo. App. 18; *St. Louis v. Spiegel*, 8 Mo. App. 478.

Where the question is in doubt the action of the municipal corporation is conclusive.

North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; *St. Louis County Ct. v. Griswold*, 58 Mo. 192; *State v. Able*, 65 Mo. 357.

In determining whether it be reasonable, the court should not substitute its discretion for that of the municipal legislation.

Kansas v. McAleer, 31 Mo. App. 486.

Ordinarily, whether or not an ordinance is reasonable is a question for the court, and not

the jury. It is a question for the court in this case.

Com. v. Worcester, 3 Pick. 462; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671; 1 Dill. Mun. Corp. § 327; Ang. & A. Priv. Corp. § 357; *Boston v. Shaw*, 1 Met. 130; *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679.

The ordinance is clear, precise, and definite in its requirements and demands, uniform in its operation, since it affects all alike who come within its provisions; its classification is general, and it is neither discriminating nor oppressive.

State v. Kingsley, 108 Mo. 185; *State v. Adington*, 77 Mo. 110; *Kansas v. Cook*, 38 Mo. App. 660; *Chillicothe v. Brown*, 38 Mo. App. 609; *Kansas City v. Sutton*, 52 Mo. App. 598; *Tiedeman*, Pol. Power, chap. 9; *Horr & Bemis*, Mun. Pol. Ord. § 185; *State v. Bishop*, 128 Mo. 873, 29 L. R. A. 200; *Nichols v. Walter*, 37 Minn. 264; *People v. Lewis*, 86 Mich. 273.

No law will be declared unconstitutional unless clearly so, and every reasonable intention will be made to sustain it.

Wells v. Missouri P. R. Co. 110 Mo. 286, 15

exist and for noncompliance with the requisites of a notice served on him requiring him to abate it, it was held, under the English Public Health Act, of 1875, § 91, subs. 7, and §§ 94 and 96 that a notice to abate a nuisance caused by quantities of black smoke issuing from a factory chimney need not necessarily specify the work required to be done in order to abate the nuisance.

Yet in *Norris v. Barnes*, L. R. 7 Q. B. 537, 41 L. J. M. C. N. S. 154, 23 L. T. N. S. 622, 20 Week. Rep. 708, it was held that the justices had no jurisdiction to order the abatement of smoke issuing out of the chimney of a bichrome manufactory under the English acts of 1866 and 1865.

But it has been stated that the emission of dense smoke from smokestacks or chimneys is not necessarily a public nuisance, and whether it is so or not must depend largely upon the locality and surroundings. *St. Paul v. Gildilan*, 36 Minn. 298.

Smoke and noise, although they may disturb a party, are an inconvenience from which a party cannot be relieved under article 669 of the Revised Code of Louisiana, where a lawful business is authorized by the city authorities, and is not consistent with the provisions of the police regulation. *Lewis v. Behan*, 23 La. Ann. 130.

Where the legislature by its act does not authorize the city council to declare smoke a nuisance, but authorizes such council to regulate it and prevent injury and harm from it, the city by its ordinance cannot make it a nuisance *per se*, especially where no regard is had to the injury or annoyance that follows it, nor to the chimney or location. *Sigler v. Cleveland*, 3 Ohio N. P. 119.

And a city has no power to pass an ordinance declaring the emission of dense smoke from the smokestack of any boat or locomotive, or from any chimney anywhere in the city, a public nuisance, and making the owner of such building guilty of a misdemeanor by reason of such emission, there being no enabling statute or provisions in the charter authorizing the city council to define and declare what shall constitute a nuisance, nor to enact ordinances to prevent and punish the acts complained of without any lawful investigation or inquiry into the question whether it constitutes a public nuisance, chapter 4, § 3, of the charter of St. Paul containing no adequate or appropriate provisions to warrant the ordinance in question, even though, under subdivisions 81 and 82, 39 L. R. A.

§ 3, of the charter, the council are authorized to remove or abate nuisances in the public streets, and such as are injurious to the public health or safety, such provisions referring to things which are nuisances *per se*, or which may be determined to be such by competent authority, no authority being implied to declare things to be nuisances without investigation which may or may not become such according to circumstances. *St. Paul v. Gildilan*, 36 Minn. 298.

In *State, McCue, v. Ramsey County Sheriff*, 48 Minn. 236, 239, the defendant was arrested on the charge of creating and maintaining a nuisance in violation of Minn. Special Laws 1889, chap. 375, declaring the emission of dense smoke within the city of St. Paul under certain circumstances a nuisance, and prescribing a penalty. The 1st section prohibited the emission of dense smoke within the city with certain limitations as to distance, location, and surroundings, and the 2d prescribed the penalty, while the 3d declared that nothing therein contained should be construed to apply to manufacturing establishments using the entire product of combustion and the heat, power, and light produced thereby within the building wherein the same were generated or within a radius of 300 feet therefrom. Upon the defendants seeking to be released upon habeas corpus the court held that the act was invalid inasmuch as no arbitrary distinction between the different kinds or classes of businesses can be sustained, the statute being leveled against the nuisance occasioned by dense smoke, the distinction or qualification attempted to be made with regard to the different kinds of businesses being untenable.

And it has been held that the smoking of tobacco may be classed among the subjects of legislation by municipal corporations. *State v. Heidenhain*, 42 La. Ann. 483, 486.

But smoking in itself is not to be condemned by any public policy. *State v. Heidenhain*, 42 La. Ann. 483, 486.

Although smoking may be agreeable and pleasant, and almost indispensable to those who have acquired the habit, yet it is distasteful and offensive, and sometimes hurtful to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places, and therefore a city ordinance which prohibits smoking in street cars as a nuisance, is valid. *State v. Heidenhain*, 42 La. Ann. 483, 486.

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L. R. A. 847; *State, Atty. Gen., v. Simmons Hardware Co.* 109 Mo. 118, 15 L. R. A. 676; *State, Kansas City Park Dist., v. Jackson County Ct.* 102 Mo. 581; *State, Brown, v. Missouri P. R. Co.* 92 Mo. 187; *State v. Hope*, 100 Mo. 347, 8 L. R. A. 608; *State, Maggard, v. Pond*, 98 Mo. 618; *Kelly v. Meeks*, 87 Mo. 896; *State v. Addington*, 77 Mo. 110; *People v. Rosenberg*, 138 N. Y. 410; *People, Killeen, v. Angle*, 109 N. Y. 589; *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452; *Erie & N. E. R. Co. v. Casey*, 26 Pa. 287; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 828.

Messrs. Louis A. Steber and Alderson & McEntire, for defendant in error:

A steamboat which emits the largest quantities of dense black smoke may do so on the water portion of the city of St. Louis without being under the penalty of the ordinance.

If you issue or emit dense black smoke on the dry-land part of St. Louis, you must be punished.

Such legislation was condemned in—

State v. Walsh, 136 Mo. 400, 35 L. R. A. 231; *State, McCue, v. Ramsey County Sheriff*, 48 Minn. 236; *State v. Loomis*, 115 Mo. 314, 21 L. R. A. 789.

The law must treat all alike, under the same conditions, and in its classifications it must be within all who are under the same conditions.

State, McCue, v. Ramsey County Sheriff, 48 Minn. 236; *Pick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *State, Randolph, v. Wood*, 49 N. J. L. 88; *Low v. Rees Printing Co.* 41 Neb. 137, 24 L. R. A. 702; *Nichols v. Walter*, 37 Minn. 271; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 224, 8 L. R. A. 419; *Re Eight Hours Bill*, 21 Colo. 29; 1 Dill. Mun. Corp. 4th ed. § 322; *State v. Loomis*, 115 Mo. 318, 21 L. R. A. 789; *American Furniture Co. v. Batesville*, 139 Ind. 78.

The ordinance is class legislation discriminating against some and favoring others.

Pick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 225; *Re Quong Wo*, 13 Fed. Rep. 229; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 289.

Everyone has a right to demand that he be governed by general rules.

Millett v. People, 117 Ill. 801, 57 Am. Rep. 869; *State v. Loomis*, 115 Mo. 314, 21 L. R. A. 789; *St. Louis v. Bowler*, 94 Mo. 635; *Railroad Tax Cases*, 13 Fed. Rep. 738.

Although the city has power in its charter to abate and also to declare what shall be deemed nuisances, the power to declare cannot be so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not.

River Rendering Co. v. Behr, 77 Mo. 91, 46 Am. Rep. 6; *Corrigan v. Gage*, 68 Mo. 541; *Tarkio v. Cook*, 120 Mo. 9; *Hannibal v. Missouri & K. Teleph. Co.* 31 Mo. App. 32; *Plattsburgh v. Riley*, 42 Mo. App. 22; *State v. Morris*, 47 La. Ann. 1660; 2 Wood, Nuisances, 3d ed. § 745, pp. 996, 997.

In the smoke ordinance, it has not been reasonably exercised.

Sigler v. Cleveland, 3 Ohio N. P. 119.

The emission of dense smoke from smoke-stacks or chimneys is not necessarily a public nuisance.

St. Paul v. Gilfillan, 36 Minn. 298.

39 L. R. A.

The mere *ipse dixit* by city ordinances declaring the issuance of dense smoke a nuisance, does not make it so, unless in fact it can be shown that it is one.

St. Louis v. Schnuckelberg, 7 Mo. App. 536; *Hisey v. Mexico*, 61 Mo. App. 253; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 505, 19 L. ed. 986; *Re Sam Kee*, 81 Fed. Rep. 680; *Hennessy v. St. Paul*, 37 Fed. Rep. 565; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *Quintini v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62.

If the city has power to regulate the emission of dense smoke under proper restrictions this does not give it the power to entirely prohibit the emission, whether for a second of time or an hour.

State v. Mott, 61 Md. 297, 48 Am. Rep. 105; *State v. Burgdoerfer*, 107 Mo. 25, 14 L. R. A. 846; *Chillicothe v. Brown*, 38 Mo. App. 617; *Weil v. Ricord*, 24 N. J. Eq. 169; *McConville v. Jersey City*, 39 N. J. L. 48.

It would leave the whole question of the issuance of smoke to the uncontrolled will, whim, or caprice of the local authorities, and might be administered with an eye and mind partial and unequal in its operation.

Pick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 226; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 289; 1 Dill. Mun. Corp. 4th ed. § 374.

The provisions of the ordinance are too broad and sweeping.

Ex parte O'Leary, 65 Miss. 80.

The legislature cannot declare any use of property to be a nuisance which is not injurious to the health, welfare, or morals of the community, or which does not obstruct or interfere with public interests or a public right.

2 Wood, Nuisances, 3d ed. § 763, p. 1098, § 744, p. 976; *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6; *Quintini v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62; *Tiedeman, Pol. Power*, p. 426, § 122a; *People v. Rosenberg*, 138 N. Y. 410; *Coe v. Schultz*, 47 Barb. 64; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 40, 16 Am. Rep. 611; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 197, 23 Am. Rep. 71; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 208; *Evansville v. State, Blend*, 118 Ind. 447, 4 L. R. A. 93.

What the legislature itself cannot do directly, the city of St. Louis cannot certainly do indirectly.

Plymouth v. Schultheis, 185 Ind. 343.

While, ordinarily speaking, a person has a right to have the air diffused over his premises in its natural state, free from all artificial impurities (1 Wood, Nuisances, 3d ed. § 495), the law relaxes this strict rigor of the rule in towns and cities, and does not recognize every business or use of property as a nuisance that imparts a degree of impurity to the air.

1 Wood, Nuisances, 3d ed. § 496; *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 810, 12 L. R. A. 53.

What is a nuisance is a question of fact.

1 Wood, Nuisances, 3d ed. § 497; *St. Louis v. Schnuckelberg*, 7 Mo. App. 536; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984.

The very foundation of a nuisance is injury and damage to a clear and well-defined legal right.

1 Wood, Nuisances, 8d ed. § 880; *Paddock v. Somes*, 102 Mo. 226, 10 L. R. A. 254.

The law only deals with real substantial injuries, and such as arise from a wrongful use of property, and will not lend its aid to check one engaged in a lawful pursuit simply because his neighbor is annoyed, or even damaged thereby, unless the use complained of is both in violation of that neighbor's right, and unreasonable.

1 Wood, Nuisances, 8d ed. § 497.

The law does not meddle with a reasonable use of property. It is only when the use is unreasonable, in view of the rights of others, that it gives a remedy.

1 Wood, Nuisances, 8d ed. § 498.

If the injury complained of is to the enjoyment of property, it must, be such as would render the occupancy of the premises physically uncomfortable to a person of ordinary sensibilities, for any of the purposes to which the owner may choose to devote it.

1 Wood, Nuisances, 8d ed. § 497.

A nuisance is public when it annoys all the members of a community, and private when it injuriously affects the lands, tenements, or hereditaments of an individual.

Ellis v. Kansas City, St. J. & C. B. R. Co. 68 Mo. 181, 21 Am. Rep. 436.

To constitute a public nuisance from the use of real property the same degree of injury must be established as to sustain a recovery at the suit of an individual.

1 Wood, Nuisances, 8d ed. § 19; *State v. Wolf*, 112 N. C. 889; *Kirchgraber v. Lloyd*, 59 Mo. App. 59.

Residents of cities must submit to some inconveniences from trades and manufactures there carried on.

Gibson v. Donk, 7 Mo. App. 37; *Van De Vere v. Kansas City*, 107 Mo. 92; Wood, Nuisances, 8d ed. § 6, p. 18; *Powell v. Beniley & G. Furniture Co.* 34 W. Va. 810, 13 L. R. A. 53; *Com. v. Miller*, 139 Pa. 94; *Hyatt v. Myers*, 73 N. C. 237; *Green v. Lake*, 54 Miss. 545, 28 Am. Rep. 378.

The charter is the measure and limit of authority for the passage of an ordinance, and the scope and extent of the ordinance cannot exceed the powers granted.

Wood, Nuisances, 8d ed. § 743.

The emission of dense smoke is not necessarily a public nuisance. Whether so or not would depend largely upon the locality and surroundings.

St. Paul v. Gilfillan, 36 Minn. 298; *Sigler v. Cleveland*, 3 Ohio N. P. 119.

Every ordinance is void entirely if it cannot be reasonably applied according to its terms.

Re Frazee, 63 Mich. 896; *Anderson v. Wellington*, 40 Kan. 178, 2 L. R. A. 110; *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721; *State, Garrabed, v. Dering*, 84 Wis. 585, 19 L. R. A. 568; *Richmond v. Dudley*, 129 Ind. 112, 13 L. R. A. 587; *Bills v. Goshen*, 117 Ind. 221, 3 L. R. A. 261; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *May v. People*, 1 Colo. App. 157; *State v. Mahner*, 43 La. Ann. 496; *Des Plaines v. Poyer*, 123 Ill. 848; *Re Sam Kee*, 81 Fed. Rep. 680.

The test of the validity of the ordinance is not what has or may be done under its provisions, but what, by virtue of them, can be done.

slons, but what, by virtue of them, can be done.

Ex parte Bell, 32 Tex. Crim. Rep. 308.

The ordinance in question cannot be reasonably enforced, because to do so would bring before the bar of the police court every day the occupant of every building in the city.

Re Frazee, 63 Mich. 896; *Anderson v. Wellington*, 40 Kan. 178, 2 L. R. A. 110.

If a man lives on a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop.

St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 641; *Ex parte Robinson*, 80 Tex. App. 498; *Mason City v. Barngrover*, 26 Ill. App. 296; *Arkadelphia v. Clark*, 52 Ark. 23; *Ex parte O'Leary*, 65 Miss. 80; *Re Sam Kee*, 81 Fed. Rep. 680.

Gantt, J., delivered the opinion of the court:

The city of St. Louis instituted this action against the defendant to recover a fine of \$50 for the violation of what is known as the "Smoke Ordinance." That ordinance provides that "the emission into the open air of dense black or thick gray smoke within the corporate limits of the city of St. Louis is hereby declared to be a nuisance, and the owners, occupants, managers, or agents of any establishment, locomotives, or premises from which dense black or thick gray smoke is emitted or discharged are made guilty of a misdemeanor, and subject to a fine not less than \$10 nor more than \$50; and each and every day wherein such smoke shall be emitted shall constitute a separate offense." The statement of the city attorney averred that defendant had violated the above ordinance, in this,—to wit: "In the city of St. Louis, and the state of Missouri, on the 4th day of September, 1895, and on divers other days and times prior thereto, the said Edward Heitzeberg Packing & Provision Company, a corporation (Charles L. Heitzeberg, president), did then and there emit and discharge into the open air, within the corporate limits of the city of St. Louis, Missouri, dense black and thick gray smoke from the smokestack or chimney of the building, being numbered 3101 North Broadway, situated on west side of said street, in said city of St. Louis, Missouri, said Edward Heitzeberg Packing & Provision Company being the occupant of said building, contrary to the ordinance in such case made and provided." Defendant filed a motion to dismiss, which was overruled, and, on trial, defendant was convicted as charged, October 30, 1895, and fined \$10. On the same day, defendant perfected an appeal to the St. Louis court of criminal correction. Defendant renewed its motion to dismiss in the court of criminal correction, which was overruled, and which raised the following points: (1) The complaint does not state a cause of action against defendant. (2) The smoke ordinance is unconstitutional and void. (3) The complaint is not responsive to the ordinance.

On December 28, 1895, the cause was submitted on an agreed statement of facts, in substance as follows: That defendant is a corporation, and is the owner or operates and controls a large manufacturing plant, at No. 3101 North Broadway, corner of Branch street, in St. Louis, Missouri; that it owns, controls, and operates a furnace in connection with said plant, wherein are burned or consumed large quantities, daily, of soft or bituminous coal; that there is a smokestack or chimney connected with said furnace, which is owned and operated by defendant; that said street, known as "Broadway," on which the establishment fronts, is one of the principal thoroughfares of the city of St. Louis, and is located in a neighborhood in which there are numerous stores and dwellings and a large number of manufacturing establishments; that among the said manufacturing establishments, and most all of them using the same kind of coal, are the following (establishments enumerated); that the court may take judicial notice of the size and commercial importance of the city of St. Louis; that said city is densely populated, containing nearly 600,000 inhabitants; that on September 4, 1895, there was emitted and discharged into the open air, within the corporate limits of said city, from the stack or chimney of defendant's plant, 89½ minutes of dense black and thick gray smoke, arising from the use in the furnace of defendant corporation of common soft or bituminous coal as fuel, out of an observation of 100 minutes, from 9:55 A. M. to 11:35 A. M., conducted by three smoke inspectors, to wit, Samuel R. Fox, August Kulckmeier, and W. L. Scott, of which 18½ minutes of that time said stack discharged into the open air dense black smoke, so black and dense that it was opaque, and could not be seen through, and of that time said stack discharged into the open air thick gray smoke for a period of 21 minutes,—smoke that was heavy and dense, but not perfectly black; that said dense black and thick gray smoke so emitted and discharged as aforesaid was carried for a distance of several blocks before it became very much dissipated,—that is, before it became very much scattered and diffused into the air within the corporate limits of said city; that William B. Potter would testify that he is an engineer, and at present manager and chief engineer of the St. Louis Sampling & Testing Works, and is also chairman of the smoke commission of the city of St. Louis; that for a period of eight or ten years he had made a special study of the problem of smoke abatement, with special reference to the conditions of the plants and establishments of the city of St. Louis; that during said period he has tested and reported on the varying degrees of efficiency of numerous devices designed for the abatement of smoke where large quantities of common soft or bituminous coal are used as fuel; that, in his opinion, as a result of long study, experience, and observation in the city of St. Louis, it is entirely practicable to abate smoke, or, rather, reduce it below the terms of dense black or thick gray, as used in city ordinance No. 17,049, and at the same time use soft or bituminous coal in great quantities; that it is en-

tirely practicable to reduce the smoke in the various plants and establishments in the city of St. Louis so that dense black or thick gray smoke would not be emitted or discharged into the open air; that this reduction or abatement of the smoke can be accomplished without injury to the boiler plants, and without any unreasonable requirements as to skill or amount of labor on the part of those in charge of or of those operating the boilers; that dense black or thick gray smoke of the character above described, as having been emitted and discharged into the open air within the corporate limits of the city of St. Louis, from the smokestack or chimney of defendant's plant, would be damaging and detrimental to certain classes of property, and would cause inconvenience and annoyance to persons within said city; that said smoke ordinance, No. 17,049, is in existence and in force within said city. No further evidence being offered, at defendant's request the court declared the law to be that, under the law and the evidence, plaintiff could not recover. The city excepted to the declaration of law. Thereupon the court found a verdict and judgment for defendant, and ordered a discharge. In due time, the city filed its motion for a new trial, which was overruled, and, after perfecting its bill of exceptions, sued out a writ of error from this court.

By its charter (2 Mo. Rev. Stat. 1889, p. 2098, § 26, cl. 6), the city of St. Louis is authorized "to declare, prevent, and abate nuisances on public or private property, and the causes thereof." It will be observed that it is not specifically empowered to declare the emission of thick smoke within the city limits to be a nuisance *per se*. Notwithstanding the broad terms in which the power is given to declare nuisances, it is not competent for the city to declare that a nuisance which is not so in fact. We take it that the line of demarkation is quite plain under a municipal grant like this. As was said in *Lake View v. Letz*, 44 Ill. 81, and quoted with approval by Judge Scholfeld in *Des Plaines v. Poyer*, 128 Ill. 348: "There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character, in this respect, depending on circumstances." In the latter instance it is manifestly beyond the power of the village to declare in advance that those things are a nuisance." Judge Dillon, in his work on Municipal Corporations, discussing this power of municipal corporations to declare and abate nuisances, says: "Such powers, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such." 1 Dill. Mun. Corp. 4th ed. §§ 95, 374. This court, in *River Rendering Co. v. Behr*, 77 Mo. 91, 46 Am. Rep. 6, announced a safe and conservative rule on this subject. Said the court: "We do not deny that the general assembly may confer upon municipal authorities the power to abate nuisances, and to declare what shall be deemed nuisances, but the latter power cannot be so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a

given case or not," citing *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984, in which the Supreme Court of the United States, through Mr. Justice Miller, said: "But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance, unless it in fact had that character."

Now, smoke alone was not a nuisance *per se* at common law, nor has it been so declared to be by any statute of this state. The legislature has defined what shall constitute a nuisance in this state by a general enactment, in these words: "Every person who shall erect or maintain any public nuisance, . . . to the annoyance or injury of any portion of the inhabitants of this state, shall be deemed guilty of a misdemeanor." 1 Mo. Rev. Stat. 1889, § 8851. Numerous cases may be found collated by the author in 1 Wood, Nuisances, 8d ed. § 505, and notes, which hold that smoke alone may constitute a private nuisance; but, in order to have that effect, it must either produce a tangible injury to property, as by the discoloration of buildings, injury to vegetation, discoloration of furniture or clothing or merchandise, or some tangible injury to property, real or personal, or sensibly impair its comfortable enjoyment; but in all of these cases it is a question of fact, depending on the character of the smoke, the quantity, the location, and circumstances. *St. Paul v. Gillilan*, 36 Minn. 298; *Sigler v. Cleveland*, 8 Ohio N. P. 119. None of the authorities cited by the learned counsel for the city state the law otherwise save the decision in *Field v. Chicago*, 44 Ill. App. 410. That was a prosecution under the smoke ordinance of Chicago, and the defendants requested the trial court to give the following instruction: "The jury are instructed that it is the duty of the city to prove that, among other things, the smoke that issued from the chimney of the defendants at the time complained of was not only dense, but was, at that particular time, of a nature detrimental to the property which was close enough in proximity to it to be affected by it injuriously, or was of a nature to be personally annoying to the public at large, and unless the jury believe, from the evidence, that the smoke complained of was, at the particular time in question, dense, and also proved to be detrimental to property within the city of Chicago, or was of a nature to be personally annoying to the public at large, then your verdict should be for the defendants." Concerning the propriety of refusing this instruction, the court said: "The last half of it, as to what the jury should believe in order to convict, was perhaps proper, but the first half, requiring the city to prove what may be presumed without proof, was not. It is a matter of common knowledge that smoke becomes soot, which falls and blackens where it rests; that it is injurious to vegetation, to many kinds of goods, and annoying to people. This common knowledge is so generally diffused in Chicago, that no jury could be without it." That case is the only one which holds that smoke is a nuisance *per se*; that it is unnecessary to prove that any annoyance followed its emission, or that it was detrimental to any

property. The supreme court of Illinois, in *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698, expressly declined to say whether the mere emission of dense smoke in the city of Chicago, without proof that it was a nuisance in fact, was a nuisance *per se*. On the other hand, the supreme court of Minnesota, in *St. Paul v. Gillilan*, 36 Minn. 298, held that "the emission of dense smoke from smoke-stacks or chimneys is not necessarily a public nuisance. Whether so or not, would depend largely upon the locality and surroundings." In that case the ordinance was held void because no provision was made for a determination of the question upon the facts of any particular case, and for the reason that the city had no power to pass such an ordinance. The smoke ordinance of the city of Detroit was upheld by the supreme court of Michigan in *People v. Lewis*, 86 Mich. 278; but that ordinance was radically different from the St. Louis ordinance, in that it only made the emission of "dense smoke, or smoke containing soot . . . which shall damage the property or injure the health of any person, or shall specially annoy the public," an offense. It is unnecessary to add that the Detroit ordinance defines a nuisance at common law. In *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698, the admission that the smoke emitted was detrimental to property, and a personal annoyance to the public, was made the basis of the decision, whatever views the court may have entertained on the question before us. The British act of Parliament (29 & 30 Vict. chap. 90, § 19) enacts that "the word 'nuisance' shall include every chimney (not being the chimney of a private dwelling house) sending forth black smoke in such quantity as to be a nuisance." It is obvious from its terms that it depended in each case whether the smoke was emitted in such quantity as to be a "nuisance" within the meaning of the English law.

No one, we suppose, will doubt that dense smoke may be emitted in such quantities as to become an intolerable nuisance, both to the public and individuals; but the question before us is the power of the city, under its charter, to declare every emission of black dense smoke or thick gray smoke a nuisance, irrespective of the length of time it is emitted, or whether it is in fact a nuisance, and without providing for any inquiry as to these facts. In a word, is such an ordinance not so unreasonable that the courts should declare it void for that reason? Now, it was admitted at the bar of this court by the learned special counsel who argued the case for the city that the emission of dense black or thick gray smoke for one or two minutes constitutes an offense under this ordinance; and yet he admitted that up to this time no device or means was known or had been invented whereby such smoke could under all circumstances be suppressed or prevented; that in the first starting of a fire before the coal or wood was thoroughly ignited, dense smoke would necessarily be emitted; but he avoided this objection to the ordinance by claiming that the inspectors employed to detect violations of the ordinance exercise a wise discretion in such cases, and do not attempt to prosecute every emission of dense black or thick gray smoke. Now, the

ordinance itself would punish every house-keeper who kindled a fire to cook his or her morning meal, or to warm the house. Every replenishing of the furnace, whether in the heart of the business centers or upon the remote western boundary of the city, would alike subject the owner to punishment. No exception whatever is made as to time or quantity. When it is considered, as it must be by this court, that St. Louis has attained its growth in population and wealth in a large degree from the fact of its proximity to the great mines of bituminous coal which lie at its very door, and that this fuel has enabled it to become a great manufacturing city, and that this soft coal is peculiarly liable to produce this objectionable dense smoke, it seems to us that this ordinance, which makes no reasonable allowance for the regulation of this smoke, but essays, in advance of any known device for preventing it, to punish all who produce it to any degree whatever, is wholly unreasonable. On the other hand, if, as learned counsel suggests, the ordinance is not enforced in all its strictness, but much is left to the discretion

of the inspectors, then we have an unregulated official discretion, which of itself renders the ordinance void, for it cannot be tolerated that the rights of a citizen in this state shall depend entirely upon the caprice of any official, high or low. All valid ordinances must fix the duty or liability of the citizen by certain intelligible, prescribed rules, so that he may govern himself accordingly. Our conclusion is that while it is entirely competent for the city to pass a reasonable ordinance looking to the suppression of smoke when it becomes a nuisance to property or health, or annoying to the public at large, this ordinance must be held void, because it exceeds the powers of the city under its charter to declare and abate nuisances, and is wholly unreasonable.

The judgment of the St. Louis Court of Criminal Correction is affirmed.

Barclay, Ch. J., concurs in the result. Sherwood, McFarlane, Burgess, Robinson, and Brace, JJ., concur.

Rehearing denied.

WISCONSIN SUPREME COURT.

L. V. LEWIS, *Recept.*,

v.

AMERICAN SAVINGS & LOAN ASSOCIATION *et al.*, *Recept.*,

and

William D. HALE, Receiver, etc., of American Savings & Loan Association, *Appt.*

(.....Wis.....)

1. It is a reasonable presumption that a foreign corporation which has obtained a license by depositing securities which it had agreed to do, and which the law required as a condition of the license, did so in the manner and for the purposes prescribed by the law.
2. The compliance by a foreign building and loan association with the laws of the state which created it need not be investigated by the authorities of another state in which it deposits securities as required by statute in order to obtain a license to do business therein.
3. An extension of the business of a corporation into another state is within the power of the directors.
4. A deposit of securities by a foreign corporation as required by law in order to obtain the right to do business in the state is not *ultra vires*.
5. The plea of *ultra vires* will not be allowed to prevail when it will not advance justice, but will, on the contrary, accomplish a legal wrong.
6. A foreign corporation, as well as its stockholders and receivers, is estopped from disputing the validity of a trust upon which the

corporation deposited securities as a condition of the license to do business in the state.

7. Only resident shareholders and creditors are entitled to participate in the proceeds of securities deposited with the state treasurer by a foreign building and loan association under Sanb. & B. Anno. Stat. §§ 2014a, 2014b, in order to obtain the right to do business in the state.

8. Securities deposited by a foreign building and loan association "in trust for the benefit and security of its members in this state," in order to obtain the right to do business in the state under Sanb. & B. Anno. Stat. §§ 2014a, 2014b, will be sold or collected in case of insolvency, and the proceeds applied according to the trust, and the residue only turned over to the receiver appointed in the state of incorporation.

(January 11, 1898.)

APPEAL by defendant receiver from orders of the Circuit Court for Dane County retaining for distribution among Wisconsin creditors assets of the American Savings & Loan Association, a Minnesota corporation, which had been deposited with the treasurer of Wisconsin, for permission to do business in that state as against the claim of the Minnesota receiver to them. *Affirmed.*

Statement by Pinney, J.:

The American Building & Loan Association was incorporated and organized April 15, 1887, under and by virtue of the laws of Minnesota, as a building and loan association,

NOTE.—On the general question of the exclusion of foreign corporations or their recognition, see note to Cone Export & Commission Co. v. Poole (S. C.) 24 L. R. A. 289.

89 L. R. A.

As to the distribution of special funds of an insolvent insurance company, see note to Boston & A. R. Co. v. Mercantile Trust & D. Co. (Md.) 88 L. R. A. 97.

having its principal office and place of business at Minneapolis, Minnesota; and it continued to transact its corporate business there until 1893, when its corporate name was changed to that of the American Savings & Loan Association. The general nature of its business was declared to be "to assist its members in saving and investing money, and in buying and improving real estate, and in procuring money for other purposes, by loaning or advancing under the mutual building society plan, to such of them as might desire to anticipate the ultimate value of their shares, funds accumulated from the monthly contribution of its stockholders, and also such other funds as may from time to time come into its hands." The government of the corporation and the management of its affairs was vested in a board of seven directors, elected by the stockholders. Membership was acquired by taking stock in the company, and paying the prescribed admission fee. The directors were authorized "to enter into such contracts and agreements, and appoint such agents for its business management as they may deem for the best interest of its affairs;" and the directors "might sell and dispose of the mortgages held by the corporation whenever they might deem best, and as provided by the by-laws." No by-laws were ever passed on this subject July 11, 1889, the articles of incorporation were amended so as to provide that "the board of directors shall not sell or dispose of any of the mortgages held or owned by this corporation." The principal question presented by the appeals is as to the construction, validity, and effect of the law of Wisconsin requiring foreign mutual building and loan associations to make a deposit of securities of the value of \$100,000 with the state treasurer of Wisconsin as a condition upon which such corporations might receive a license from and do business in the state. The statute (Sanborn & Berryman, Anno. Stat. §§ 2014a, 2014b) provides that "no foreign building and loan association . . . shall issue its shares, receive moneys, or transact any business in this state, unless such association shall have and keep on deposit with the state treasurer of Wisconsin, in trust, for the benefit and security of all its members in this state, the securities of the actual cash value of \$100,000 of the kind mentioned in § 2 of this act [§ 2014b] to be approved and accepted by said state treasurer, and held in trust as aforesaid, until all shares of such association held by residents of this state shall have been fully redeemed and paid off by such association, and until its contracts and obligations to persons and members residing in this state shall have been fully performed and discharged." And it was provided that "if any securities on deposit, as provided in this act, are wholly or partially extinguished by payments on the same or otherwise, or such securities depreciate in value for any cause, new securities must be added, so that the deposit may at all times be kept good and of the value of \$100,000."

The defendant association was doing business in this state from the time of the passage of the above act, having 246 members in Wisconsin, 162 of whom became such prior to the date on which the law went into force, to

wit, April 19, 1889. The plaintiff, Lewis, a resident of Wisconsin, the holder of five shares of stock, upon which \$243 had been paid, alleging that there are a large number of residents and citizens of the state of Wisconsin, legal members, owning and holding stock in the defendant association, whose names he was unable to get, or their postoffice address, charged that the defendant association was insolvent; that a large part of its assets had been improvidently invested and squandered, and that, on the application of a creditor or creditors thereof residing in Minnesota, William D. Hale, the appellant, had been appointed receiver of all the property of the defendant association by the courts of Minnesota, in proceedings initiated therein; that, under the laws of Wisconsin, the defendant was entitled to withdraw all the securities deposited with the state treasurer, and substitute other and similar securities therefor, and that, during the year then passed, the defendant association had withdrawn a large portion of the securities theretofore duly deposited with the state treasurer of Wisconsin, and substituted in their stead other securities; that such securities so deposited consist in large part of mortgages upon real estate, which are likely to depreciate in value unless enforced according to law, and that the only property of said association in Wisconsin was the securities aforesaid, from which, if not preserved and properly cared for and converted into cash, it would be impossible for resident members of said association to recover back moneys paid into said association; that it was necessary for the protection of the rights of the plaintiff, and of the members and stockholders in said defendant association resident in the state of Wisconsin, that a receiver for the defendant association in Wisconsin should be appointed, in order to ascertain all of the members and stockholders in said association residing in Wisconsin, and the amount of their respective claims, and to convert into money the securities so deposited for their protection, and distribute the same to such persons as may be entitled thereto, under the direction and supervision of the court; and an injunction was sought restraining the defendant Peterson, as state treasurer, from in any manner parting with the custody and control of said securities, and permitting any withdrawal or substitution of the same. Judgment was prayed that said securities so held be sequestered and distributed among the members and stockholders of said association who are residents of the state of Wisconsin, including the plaintiff, according to law; that a receiver or receivers, to take charge thereof, and convert the same into money, with the usual powers and authority, be appointed. An injunction restraining and enjoining all persons from proceeding in any manner or way to obtain a lien on said securities, and from in any manner interfering with or intermeddling with the same, was prayed for; and that the court direct notice to be given, as it might deem proper, requiring all members and stockholders of said association who are residents of the state of Wisconsin to submit their claims, and become parties to the action, within such reasonable time as might be fixed

by the court; and for such other and further relief, etc. In addition to these facts, it appeared from the pleadings that some time prior to May 10, 1889, the defendant association deposited with the state treasurer of the state of Wisconsin, in trust for the benefit and security of all its members in that state, securities consisting of mortgages taken by it in the course of its business, to the actual cash value of \$100,000, which were duly approved and accepted by such treasurer, and which had since been held in trust by him and his successors in office, under the laws of this state relating to foreign building and loan associations, by which the state treasurers are required to hold such securities until all shares of stock in said association shall have been fully redeemed and paid off by the defendant association, and until all contracts and obligations of the defendant association to members and persons residing in the state of Wisconsin shall have been fully performed and discharged; that the defendant Peterson, as such state treasurer, holds said securities in his custody under said trust to the face value of \$113,891.80. The appellant, William D. Hale, who had been appointed by the district court of Hennepin county receiver for said association, petitioned the court to be made a defendant in the action in the circuit court for Dane county; and it was ordered accordingly, and he interposed an answer and counterclaim, in which he admitted that the association was duly licensed by the state of Wisconsin to do business in said state in the year 1889, which said license was continued from time to time thereafter until the 1st day of January, 1894. The plaintiff and the defendant S. A. Peterson, as treasurer, etc., and M. C. Clarke, the receiver appointed by the circuit court of Dane county, Wisconsin, demurred to said answer and counterclaim. Orders were entered sustaining the demurrers, from which the defendant William D. Hale, the receiver appointed by the Minnesota court, appealed. The board of directors of the defendant association passed a resolution May 1, 1889, as follows: "Resolved, that the state treasurer of Wisconsin be made a depository of the association for temporary convenience in complying with the law of Wisconsin in regard to the deposit of securities, \$100,000. Also, resolved that the association comply with the Wisconsin law as soon as possible."

The counterclaim alleged: (1) that the mortgages belonging to the American Savings & Loan Association in the possession of S. A. Peterson, state treasurer, at the time of making and filing plaintiff's complaint aggregated in value the sum of \$145,234. That prior to the 11th of July, 1889, there were delivered to said Peterson, as such treasurer, mortgages of said association aggregating in value the sum of \$108,060, of which there remained in his hands at the time of making and filing the plaintiff's complaint, as a part of the mortgages first above stated, mortgages aggregating in value the sum of \$20,784; and between July 11, 1889, and the 1st of January, 1894, there was, of the mortgages above stated as in the possession of said state treasurer at the time of making and fil-

ing the complaint, delivered to him at various times, mortgages aggregating \$80,850; and after January 1, 1894, there was delivered to him the remainder of said mortgages, which were in his possession at the time of the making and filing of said complaint, aggregating in value the sum of \$43,600. That, of the mortgages delivered to him subsequent to the 11th day of July, 1889, a large part thereof were delivered to him in lieu of mortgages in his possession prior to said date, which had been by him surrendered to said association, and the remainder thereof were delivered to him as an addition to those delivered prior to that date. (2) That all of said mortgages are regular building and loan association mortgages, made and executed by shareholders and members of said association to secure the payment by said members of their regular installments of dues upon their stock, upon which said stock they had been granted an advancement or loan, and to secure the payment of the amount of such loan, and that they were non-negotiable, and could not be transferred by said association. (3) That, being a mutual building and loan association, it has no power or authority at any time to pledge, transfer, assign, sell, or dispose of any of its mortgages; and that none of said mortgages were deposited with said state treasurer by said association, but were given and delivered to him by officers and employees of said association, who were not authorized by said association to so deliver the same; and that they kept in the books of said association a statement or account of said mortgages so delivered to said treasurer. (4) That said mortgages, and each of them, held by the state treasurer at the time of making and filing the complaint, were held by him wrongfully, and without right or authority of law for said possession; that the shareholders had no knowledge whatever of the delivery of said mortgages, nor did they at any time consent thereto or acquiesce therein; that the only action ever taken by said association relative to making a deposit with the state treasurer of Wisconsin was taken by its board of directors on the 1st of May, 1889, at a call meeting of said board, as hereinbefore stated. The entire number of shareholders residing in Wisconsin when the action was commenced was 246, 162 of which had become such prior to the time when the Wisconsin statute took effect. (5) The Wisconsin stockholders, on becoming members, etc., subscribed for their shares of stock in the same manner, and received like certificates therefor, as did all the other shareholders of said association, wheresoever residing; and that said association was a mutual corporation; and that each shareholder therein, including the plaintiff, and "all the other shareholders in Wisconsin, enjoyed and were subject to like rights, privileges, immunities, and liabilities that other members enjoyed." (6) That, under its articles of incorporation, none of the shareholders of the association did or could have higher or superior rights than those enjoyed by all: that at the date of appellant's appointment, it had shareholders in thirty-five states, owned real estate in nineteen states, and held mortgages on real estate in twenty-nine states. (7) That

the association had violated certain laws of the state of Minnesota, had become insolvent, and incapable of effectuating the object for which it was organized and created, and incapable of carrying out its contracts and obligations; that the appellant, William D. Hale, was duly appointed, pursuant to the statutes of Minnesota, as fully set forth, by the district court of Hennepin county, general receiver of such association, in an action wherein the state of Minnesota, on the relation of its attorney general, was plaintiff, and said association was defendant; and that the order appointing him required him to take charge of all the property and effects of such association, to collect, sue for, and recover all debts, dues, and demands that were due said association, and to manage and administer all the affairs of said association under the direction of said court; that, pursuant to said order and appointment, the said association executed and delivered to the receiver, William D. Hale, deeds of all the real estate owned by it, and due and sufficient assignments of all its property, including said mortgages herein referred to, as being in the possession of said Peterson, as treasurer of the state of Wisconsin, on the 14th day of January, 1896. (8) That M. C. Clarke, on the 5th of February, 1896, was, by the order of the circuit court of Wisconsin for Dane county, appointed receiver of said association for the state of Wisconsin; and the defendant S. A. Peterson, state treasurer, was ordered and directed to turn over all the said mortgages referred to in the plaintiff's complaint, and specified in the answer and counterclaim, to said Clarke, as such receiver; and that the said Peterson had turned over and delivered the same accordingly; and that said Clarke was proceeding to collect the same, and would, unless interfered with by the court, distribute the proceeds of the same to the shareholders resident in Wisconsin, thereby giving to said Wisconsin shareholders a preference over the other shareholders of said association. (9) That the assets of the association are not sufficient to pay to all its shareholders dollar for dollar of the amount which they had paid in or any other or greater sum than 40 per cent thereof; that if said Clarke, acting as receiver, should collect said moneys, and distribute the proceeds thereof to the Wisconsin shareholders, they would receive dollar for dollar of the amount they paid in to said association, and thereby be constituted a preferred class of shareholders, against equity and good conscience, and contrary to the purpose of said association, as defined by its articles of incorporation, by-laws, and contracts for membership with its shareholders; and, finally, that the law under which it is alleged said mortgages were deposited was intended to protect said Wisconsin shareholders in all their rights growing out of their membership in said association, and not for the purpose of extending, altering, or changing said rights; that the purpose for which any deposit made by said association with said state treasurer under said law was made terminated and was at an end when said association became insolvent and incapable of carrying out its con-

tracts, and effectuating the purposes of its being. The defendant prayed that the court might, by its decree, direct said Clarke, as such receiver, to turn over and deliver said mortgages so held by him to said William D. Hale, to be by him collected, and the proceeds equitably distributed to all the shareholders, wherever residing, and for general relief.

Mr. Eugene G. Hay, for appellant:

Absolute mutuality of interest is the foundation of all such corporations.

Towle v. American Bldg. Loan & Inv. Soc. 60 Fed. Rep. 181.

Each shareholder, upon becoming a member of this association, agreed with each other shareholder, that he would share with him equally the profits and bear with him equally the losses of the common enterprise. Each shareholder, upon accepting his certificate of stock, agreed that he would be a mutual participant in the fortunes of the association, whether they be good or bad.

Towle v. American Bldg. Loan & Inv. Soc. 60 Fed. Rep. 181; *Strohen v. Franklin Sav. Fund & L. Asso.* 115 Pa. 278; *Security Loan Asso. v. Lake*, 69 Ala. 456; *Knutsen v. Northwestern Loan & Bldg. Asso.* (Minn.) 69 N. W. 889; *Ebermann v. Schmitt*, 53 Ohio St. 174, 29 L. R. A. 184; *Price v. Kendall* (Tex. Civ. App.) 36 S. W. 810; *Rogers v. Rains*, 18 Ky. L. Rep. 768; *Taylor v. Life Asso. of America*, 18 Fed. Rep. 493; *Towle v. American Bldg. & Loan Asso.* 75 Fed. Rep. 938; *Endlich, Bldg. Asso.* 2d ed. §§ 121-123, 514, 523, 524, and following.

The proceeds of the mortgages will not be distributed to Wisconsin shareholders unless rightfully in the possession of the state treasurer, and the statute authorizes it.

The insolvent corporation here under consideration has no creditors in Wisconsin. The 264 shareholders resident in that state are not creditors. They may become creditors and they may become debtors, dependent entirely upon whether the assets of the insolvent estate are sufficient to pay the claims of the creditors who are not members of the association. They derive all their rights through the laws of Minnesota, and their contracts with each other entered into when they became members of the mutual corporation.

Taylor v. Life Asso. of America, 18 Fed. Rep. 493.

These shareholders hold no promise of the corporation to return the contributions they have made in payment of their stock dues. Independent of such rights as may grow out of the state treasurer's possession of these mortgages resulting from the circumstances of their delivery to him, and the laws of Minnesota and of Wisconsin relative thereto, the shareholders of Wisconsin have no right to the proceeds thereof to the exclusion of the shareholders in the thirty-four other states.

Where a foreign mutual corporation has funds or property in another state, the members of that mutual corporation, residing in that state, will not be permitted to acquire a preference over the members residing in other states, by seizing that property and distribut-

ing it to themselves to the exclusion of the other members.

Taylor v. Life Asso. of America, 13 Fed. Rep. 493; *Rundel v. Life Asso of America*, 10 Fed. Rep. 720; *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 805; *Life Asso. of America v. Rundle* ("Relfe v. Rundle"), 103 U. S. 222, 26 L. ed. 337; *Baldwin v. Hoemer*, 101 Mich. 119, 25 L. R. A. 789; *Buswell v. Supreme Sitting. O. of I. H.* 161 Mass. 224, 23 L. R. A. 846; *Ware v. Supreme Sitting. O. of I. H.* (N. J.) 28 Atl. 1041.

The mortgages were wrongfully in the possession of the state treasurer. He acquired no right or title of any kind to them.

The delivery of the mortgage to the state treasurer was *ultra vires* of the officers or employees of the association who delivered them.

Alexander v. Caldwell, 88 N. Y. 485; *Bar-gate v. Shortridge*, 5 H. L. Cas. 297.

The deposit of the mortgages with the state treasurer was *ultra vires* of the corporation.

Bullene v. Smith, 73 Mo. 151; *Platt v. Union P. R. Co.* 99 U. S. 43, 25 L. ed. 424; *State v. Deusting*, 33 Minn. 102, 53 Am. Rep. 12; *Auerbach v. Hitchcock*, 28 Minn. 75; *Guile v. Mc-Nanny*, 14 Minn. 520, 100 Am. Dec. 244.

The deposit of these mortgages with the state treasurer of Wisconsin constituted a pledge of them to said state treasurer for the benefit of Wisconsin shareholders.

Edwards, Bailm. § 176; *Story*, Bailm. §§ 7, 300; *Mitchell v. Roberts*, 17 Fed. Rep. 778.

The building association's charter and its articles of incorporation authorized it to do no more than gather together the stated contributions of its members and loan the same to such members as wished to borrow upon the plan and under the contracts heretofore described, and said charter required it to treat all of its members alike and prohibited it from giving a preference to any of them.

Abbott v. American Hard Rubber Co. 33 Barb. 578; *Lucas v. White Line Transfer Co.* 70 Iowa, 541, 59 Am. Rep. 449; *Ashbury Railway Carriage & I. Co. v. Riche*, L. R. 7 H. L. 698; *Hall v. Coppell*, 74 U. S. 7 Wall. 558, 19 L. ed. 248; *Morawetz*, Priv. Corp. § 580.

Section 2014a is intended to insure to Wisconsin shareholders their contractual rights; not to change or enlarge them.

Taylor v. Life Asso. of America, 13 Fed. Rep. 493; *Rundel v. Life Asso. of America*, 10 Fed. Rep. 720; *Davis v. Life Asso. of America*, 11 Fed. Rep. 782; *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 805; *Life Asso. of America v. Rundle* ("Relfe v. Rundle"), 103 U. S. 222, 26 L. ed. 337; *Bockover v. Life Asso. of America*, 77 Va. 85; *Reno*, Nonresidents, § 164.

The contention that out of the securities deposited with the treasurer, the Wisconsin shareholders are to receive back dollar for dollar of the amount contributed by them in the payment of their dues, is to constitute them preferred shareholders.

The proper construction of this law is that the mortgages deposited with the state treasurer were there only to enable the Wisconsin shareholders to enforce such rights as they might have in the association, growing out of their contractual relation; the insolvency of the association and the appointment of the re-

ceiver have abrogated these contracts; hence the purpose for which the deposit of the mortgages with the state treasurer was made is at an end, and the mortgages should be turned over to the domiciliary receiver, and distributed equitably among all of the shareholders of the association the same as all of the other assets of the association will be distributed.

Toule v. American Bldg. & Loan Asso. 75 Fed. Rep. 988; *Pittsburg & S. R. Co. v. Allegheny County*, 79 Pa. 214; *Wright v. Lee*, 2 S. D. 596, 4 S. D. 237; *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67; *Washburn Mill Co. v. Bartlett*, 8 N. D. 138; *Toledo, T. & L. Co. v. Thomas*, 83 W. Va. 566; *American Bldg. & L. Asso. v. Rainbolt*, 48 Neb. 434; *Morawetz*, Priv. Corp. 2d. ed. § 665; *Rogers v. Hargo*, 92 Tenn. 35.

Is § 2014a in conflict with the Constitution of the United States?

Ogden v. Saunders, 25 U. S. 12 Wheat. 213, 256, 6 L. ed. 606, 620; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *Green v. Biddle*, 21 U. S. 8 Wheat. 83, 5 L. ed. 567; *Life Asso. of America v. Rundle* ("Relfe v. Rundle"), 103 U. S. 225, 26 L. ed. 339; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020.

Messrs. W. H. Mylrea, Attorney General, and *Lewis, Briggs, & Dudgeon*, for respondents:

The deposit of mortgages was within the powers of the association, and lawful.

Public officers are presumed by the law to do their duty, and where the doing of an official act, as the granting of a license to a corporation to do business, is conditioned upon the performance of any requirements imposed upon such corporation by law, it is presumed that all such requirements were fulfilled before the official act was performed.

Lycoming F. Ins. Co. v. Wright, 60 Vt. 515.

A demurrer only admits the sufficiency of facts well pleaded.

Pratt v. Lincoln County, 61 Wis. 62; *Quinney v. Stockbridge*, 33 Wis. 505; *Kewaunee County Supers. v. Decker*, 80 Wis. 624.

Any general averment, then, that the officers and employees of the association were not authorized to make the deposit is not sufficient.

The by-laws of a corporation are binding upon none but its members and officers, and notice thereof is not chargeable upon other persons.

Ang. & A. Priv. Corp. § 359; 2 Am. & Eng. Enc. Law, *By-Laws*, p. 709; *Ward v. Johnson*, 95 Ill. 215.

In the absence of notice to the contrary, the state treasurer had a right to presume that the board of directors acted in accordance with the by-laws.

Heath v. Silverthorn Lead Min. & Smelt. Co. 89 Wis. 146; 17 Am. & Eng. Enc. Law, *Officers*, p. 158, and cases cited.

A building and loan association may do those things reasonably necessary in order to accomplish the objects and purposes of its organization which are not expressly forbidden.

North Hudson Mut. Bldg. & Loan Asso. v. First Nat. Bank, 79 Wis. 31, 11 L. R. A. 845; *Endlich*, Bldg. & Loan Asso. 2d. ed. §§ 227, 229.

In exercising the powers conferred by its

charter, a corporation may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate unauthorized business.

Clark v. Farrington, 11 Wis. 307; *Madison, W. & M. Pl. Road Co. v. Watertown & P. Pl. Road Co.* 5 Wis. 173; *Lyon v. Ewings*, 17 Wis. 62; *Western Bank v. Tallman*, 17 Wis. 531; *State, Priest, v. Regents of University*, 54 Wis. 159.

The right of a state to prescribe such conditions as it chooses upon a foreign corporation doing business therein is as firmly settled as any principle of law.

Hooper v. California, 155 U. S. 648, 89 L. ed. 297, and cases cited; *Morse v. Home Ins. Co.* 30 Wis. 496, 11 Am. Rep. 580; *State, Drake, v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692; *State v. United States Mut. Acci. Assn.* 67 Wis. 624; *State, Covenant Mut. Ben. Assn., v. Root*, 83 Wis. 667, 19 L. R. A. 271; *Larson v. Aultman & T. Co.* 86 Wis. 281; *Wyman v. Kimberly-Clark Co.* 93 Wis. 554; *Murfree, Foreign Corp.* § 326, p. 242.

The power of the state over a foreign corporation doing business within its limits is full and complete.

Lafayette Ins. Co. v. French, 59 U. S. 18 How. 404, 15 L. ed. 451; *Hagerman v. Empire State Co.* 97 Pa. 584; *Funk v. Anglo-American Ins. Co.* 27 Fed. Rep. 336; 8 Am. & Eng. Enc. Law, *Foreign Corporations*, p. 384; *Life Assn. of America v. Rundle* ("Relfe v. Rundle"), 103 U. S. 222, 225, 26 L. ed. 857, 839; *Rust v. United Waterworks Co.* 70 Fed. Rep. 129, 185; *Taylor v. Life Assn. of America*, 18 Fed. Rep. 493; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Hooper v. California*, 155 U. S. 648, 89 L. ed. 297; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 435; *Fry v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 197.

The association and its receiver are estopped from questioning the validity of the deposit.

High, Receivers, 3d ed. §§ 201, 204, 205; *Wardle v. Hudson*, 96 Mich. 432; *Hughes v. Hunner*, 91 Wis. 116.

By the fact of doing business in the state the corporation asserted a compliance with the laws of the state, and, after enjoying all the benefits of that business, and receiving the money of the assured, it will not be heard to say that it never submitted to the jurisdiction of the state.

Berry v. Knights Templars & M. Life Indemnity Co. 46 Fed. Rep. 439, and cases cited; *Diamond Plate Glass Co. v. Minneapolis Mut. F. Ins. Co.* 55 Fed. Rep. 27; *Baltimore & O. R. Co. v. Harris*, 79 U. S. 13 Wall. 65, 20 L. ed. 354; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. Rep. 202; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404, 15 L. ed. 451; *Ehrman v. Teutonia Ins. Co.* 1 Fed. Rep. 471; *Gibson v. Manufacturers' F. & M. Ins. Co.* 144 Mass. 81; *Sparks v. National Masonic Acci. Assn.* 100 Iowa, 458; *Murfree, Foreign Corp.* § 203.

While a contract *ultra vires* remains executory courts will interfere to prevent its enforcement, or, on the application of a shareholder or other authorized persons, prevent its execution; but when it has been carried into effect, and the corporation has received the benefit of it, it cannot plead the excess of its power in discharge of its liability.

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Kadiash v. Garden City Equitable Loan & Bldg. Assn. 151 Ill. 531; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; 27 Am. & Eng. Enc. Law, pp. 860, 864, 867, and cases cited; *North Hudson Mut. Bldg. & Loan Assn. v. First Nat. Bank*, 79 Wis. 31, 11 L. R. A. 845; *Hall Mfg. Co. v. American Railway Supply Co.* 48 Mich. 331; *Pneumatic Gas Co. v. Berry*, 118 U. S. 322, 326, 28 L. ed. 1003, 1005; *Morawetz, Priv. Corp.* §§ 648-653, 689-699; *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689.

Receiver Hale is merely an officer of the court by which he was appointed, and as such has no extraterritorial powers. The association had deposited these mortgages in Wisconsin and thereby disposed of them as is admitted. He could not then, by his appointment as receiver, derive any title to these mortgages, nor can he be permitted to maintain any action therefor.

McClure v. Campbell, 71 Wis. 350; *Filkins v. Nunnemacher*, 81 Wis. 91; *Hughes v. Hunner*, 91 Wis. 116; *Swing v. White River Lumber Co.* 91 Wis. 517; *Wyman v. Kimberly-Clark Co.* 93 Wis. 554; *Murfree, Foreign Corp.* § 484.

The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other.

M'Cracken v. Hayward, 43 U. S. 2 How. 608, 11 L. ed. 397; *Green v. Biddle*, 21 U. S. 8 Wheat. 92, 5 L. ed. 570; *Planters' Bank v. Sharp*, 47 U. S. 6 How. 301, 12 L. ed. 447; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858; *Louisiana, Elliott, v. Jumel*, 107 U. S. 711, 27 L. ed. 448.

Apart from the statutory trust, the courts of Wisconsin would hold these mortgages for the benefit of Wisconsin creditors.

Lindquist v. Glines, 3 Misc. 214; *Fawcett v. Supreme Sitting, O. of I. H.* 64 Conn. 170, 24 L. R. A. 815; *Bussell v. Supreme Sitting, O. of I. H.* 161 Mass. 224, 23 L. R. A. 846; *Ware v. Supreme Sitting, O. of I. H.* (N. J.) 28 Atl. 1041; *Baldwin v. Hosmer*, 101 Mich. 119, 25 L. R. A. 789; *Filkins v. Nunnemacher*, 81 Wis. 91; *McClure v. Campbell*, 71 Wis. 350; *Gilman v. Ketcham*, 84 Wis. 60, 23 L. R. A. 52.

Every state exercises as it deems expedient the comity giving effect to the transfer of property, as a result of judicial proceedings in another state, and, as a general rule, will not give it effect to the prejudice of its own citizens.

Cole v. Cunningham, 188 U. S. 107, 33 L. ed. 538; *Reynolds v. Adden*, 186 U. S. 848, 353, 34 L. ed. 360, 362; *Bagby v. Atlantic M. & O. R. Co.* 86 Pa. 291; *Re Waite*, 99 N. Y. 433; *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 87; *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 174; *Taylor v. Columbian Ins. Co.* 14 Allen, 553; *Hurd v. Elizabeth*, 41 N. J. L. 1.

Pinney, J., delivered the opinion of the court:

The principal question presented by these appeals is as to the construction, validity, and

effect of the law of Wisconsin requiring foreign mutual building and loan associations to make a deposit of securities of the value of \$100,000 with the state treasurer as a condition upon which such corporations may receive a license from and transact business in this state. The statute (Sanborn & Berryman Anno. Stat. §§ 2014a, 2014b), provides that "no foreign building and loan association . . . shall issue its shares, receive moneys or transact any business in this state unless such association shall have and keep on deposit with the state treasurer of Wisconsin, in trust, for the benefit and security of all its members in this state, the securities of the actual cash value of \$100,000 of the kind mentioned in § 2 of this act [§ 2014b]; to be approved and accepted by said state treasurer, and held in trust as aforesaid, until all shares of such association held by residents of this state shall have been fully redeemed and paid off by such association, and until its contracts and obligations to persons and members residing in this state shall have been fully performed and discharged." The deposit is required at all times to be kept good and of the value of \$100,000. The defendant corporation, in order to be allowed to enter the state, and transact its proper business as a building and loan association therein, and to obtain a license to that end, as it did May 10, 1889 (which was renewed from time to time, and continued in force during the entire period it transacted business in said state), deposited with the state treasurer of Wisconsin, as it appears, its mortgage securities taken in the course of its business, to the required amount. The defendant corporation was a foreign corporation, created and existing under the laws of the state of Minnesota, located and having its principal office in Minneapolis. The general nature of its business was "to assist its members in saving and investing money, in buying real estate, and in procuring money for other purposes, by loaning or advancing under the mutual building society plan." By article 6 of its articles of association, the government of the corporation and the management of its affairs were vested in a board of seven directors, chosen from and by the stockholders. By its amended articles of association adopted July 31, 1889 (art. 19), it was provided that "the board of directors may sell and dispose of the mortgages held by this corporation, whenever they may deem best and as provided by the by-laws; but no by-laws on the subject were adopted. Article 18 of the same date provided that "the directors of this corporation may enter into such contracts and agreements and appoint such agents as they may deem best for the interest of its affairs." Article 19 was amended July 11, 1889, so as to read as follows: "The board of directors shall not sell or dispose of any of the mortgages owned by this corporation." The Minnesota statute (chapter 236 of the General Laws for 1889, which became a law April 22 of that year, before the defendant corporation was licensed to do business in Wisconsin, as amended June 1, 1891, and embodied in Minn. Gen. Stat. 1894, § 2860) provided, in substance, that every building and loan association governed by the act should

deposit and keep with the state auditor or a trust company all mortgages or other securities received by it in the usual course of business, and that, whenever required by the laws of any other state, territory, or nation, its securities sufficient to allow such association to enter and do business in such state, territory, or nation might be deposited with some officer authorized to receive the same in such state, territory, or nation, under the laws thereof, for the benefit of its members and creditors. Provisions were made regulating the transfer accordingly, which are so extended as not to admit of convenient quotation; but they seem to plainly recognize as lawful a deposit in another state of securities of the association, in order to entitle it to a license to enter such state and transact its business therein. Suffice it to say that the provisions of the Minnesota statute seem designed to facilitate the convenient using and tracing of its securities deposited for the purpose indicated, and its provisions appear to be in the main directory. Compliance with it appears to be a matter of local administration, and not a condition precedent to the right to use and deposit its securities for the purpose of entering and transacting business in such other state. Within twenty days after the enactment of the Wisconsin statute, the corporation had constituted the state treasurer of Wisconsin "a depository for temporary convenience, in complying with the laws of Wisconsin in regard to deposit of securities, \$100,000," and resolved that it would "comply with the Wisconsin law as soon as possible." A license was issued to it pursuant to the statute, and it was renewed or continued in force until January 1, 1894.

2. In view of the action of the defendant through its board of directors, and the fact that it is conceded that the securities of the kind and character mentioned were held by the state treasurer of Wisconsin when the action was commenced to the amount of \$145,234, we must conclude and hold that the mortgages in dispute were deposited with the state treasurer by the defendant corporation, or by its authority, in a bona fide attempt "to comply with the Wisconsin law," as it had already resolved to do, and had made the state treasurer of that state its depository for that purpose. The Wisconsin law required the deposit of securities under the act to be made with the state treasurer. The defendant corporation obtained the prescribed license. It was required and it was its duty to deposit the securities mentioned to the amount of \$100,000. This, it would seem, had been agreed should be done; and, upon the facts disclosed by the record, we think that it is a reasonable presumption that what was agreed to be done was done in the manner and for the purposes prescribed by the act. In *Sparks v. National Masonic Acct. Asso.* 100 Iowa, 458, it was held that when a foreign insurance company is shown to have transacted business in a state where, by the statute, certain acts were to be done by that company before it had a right to transact business therein, a conclusive presumption arises that the company has complied with the law in that respect. It is alleged in the counterclaim, in substance, that the provisions of the Minnesota statute were

not complied with by the corporation defendant in making the deposits with the state treasurer of Wisconsin. The state authorities of Wisconsin, in receiving these securities, as provided by the statute, were not bound to investigate the question of local administration or compliance with the law of Minnesota by the corporation and state authorities. The allegations that the possession of the securities by the state treasurer was wrongful, and that they were delivered to him by officers and employees of the corporation without lawful authority, are legal conclusions. It was enough that the securities were, as it is conceded, the property of the corporation; and that its directors, who deposited them for the purpose indicated, had power "to enter into such contracts and agreements as they might deem for the best interests of its affairs;" and that the directors, in the exercise of their discretion, desired to obtain a license to prosecute and carry on the business of the corporation in Wisconsin in order to realize the profits and advantages consequent upon such extension of its business, which it appears has been extended to thirty-four states. *Heath v. Silverthorn Lead Min. & Smelt. Co.* 89 Wis. 146.

8. It was within the power of the directors to determine upon and make the intended extension of the business of the corporation; and it was their duty and within their power as well to make the necessary deposit of its securities as required by the Wisconsin law, which was a condition precedent to the right of the corporation to obtain the desired license, and transact its business in Wisconsin. In any view that may be taken of the case, we think that the transaction was within the undoubted power of the corporation. The deposit was made accordingly. The license was issued. The defendant entered the state, and carried on its business therein, and for a period of five years derived the benefits and advantages expected to result from such extension of its business, and the protection and authority of the state. It was well understood by the corporation, its directors, officers, and members, that these securities had been deposited, and had so remained, with the state treasurer, under the pledge specified in the Wisconsin statute, and until financial disaster and insolvency overtook the corporation. It could enter the state of Wisconsin, and carry on its business, only on complying with the terms and conditions of the Wisconsin statute. Having the right to extend its business, it seems clear that it was not *ultra vires* the corporation to comply with the conditions upon which alone it could lawfully obtain a license to so enter the state and carry on its business, the prosecution of which was for the common advantage and profit of the corporation, and of all its members and shareholders.

4. It is familiar law that the recognition of the existence of a corporation by any other than the state of its creation, and the enforcement of its contracts made therein, depend purely upon the comity of such other state or states,—“a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but 89 L. R. A.

depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as, in their judgment, will best promote the public interests. The whole matter rests in their discretion.” This was so held by the Supreme Court of the United States, nearly thirty years ago, in *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 181, 19 L. ed. 357, 360, affirmed in that court by many subsequent cases, and as well by other courts of the highest respectability and authority. *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, and cases cited; *Life Assn. of America v. Rundle* (“*Reife v. Rundle*”), 108 U. S. 222, 225, 26 L. ed. 337, 339; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485; *Morse v. Home Ins. Co.* 30 Wis. 496, 11 Am. Rep. 580; *State, Drake, v. Doyle*, 40 Wis. 175, 197, 23 Am. Rep. 692; *State, Covenant Mut. Ben. Assn., v. Root*, 83 Wis. 687, 690, 19 L. R. A. 271; *Wyman v. Kimberly-Clark Co.* 93 Wis. 554.

In *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, the cases in the Supreme Court of the United States on the subject are collected and cited, and it was there stated that “the principle that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state, has been long settled, and many phases of its application have been illustrated by the decisions of this court. . . . While there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the Federal nature of its business. As, for instance, where it has derived its being from an act of Congress, and has become a lawful agency for the performance of governmental or quasi governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is therefore solely within the paramount authority of Congress. In these cases, the exceptional business is protected against interference by state authority.” In the case cited, the court said: “The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company; and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or

through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact, and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States." The doctrine thus established is, in our judgment, conclusive as to the validity of the pledge of the securities here in question, under the Wisconsin statute, and of the trusts therein specified. The defendant association clearly had the power to make the deposit as incident to the accomplishment of the purpose for which it was created. In *North Hudson Mut. Bldg. & L. Asso. v. First Nat. Bank*, 79 Wis. 31, 36, 11 L. R. A. 845, this court held that a building and loan association might lawfully do those things reasonably necessary in order to accomplish the objects and purposes of its organization which were not expressly forbidden. In general, in exercising the powers conferred by its charter, a corporation may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate unauthorized business. *Clark v. Farrington*, 11 Wis. 307; *State, Priest, v. Regents of Wisconsin University*, 54 Wis. 159; *Madison, W. & M. Pl. Road Co. v. Watertown & P. Pl. Road Co.* 5 Wis. 173.

The association defendant had not been forbidden to make the deposit of its securities taken in the course of its business to enable it to enter the state of Wisconsin or any other state, and obtain a license to transact its business therein. It was the absolute owner of these securities, and it might lawfully so use them. It was required by the statutes that "if any securities on deposit as provided by this act are wholly or partially extinguished by payment of the same or otherwise, or such securities depreciate in value for any cause, new securities must be added, so that the deposit may at all times be kept good and of the value of \$100,000." The association defendant, by accepting its license, was bound to comply with the law; and, in the absence of any allegations to the contrary, it must be presumed that all mortgages deposited at or after the date of the license, May 10, 1889, were deposited for the purpose of complying with the law, and keeping its deposit up to the required amount of \$100,000. The subsequent amendment to the articles of incorporation (July 11), providing that "the board of directors shall not sell or dispose of any of the mortgages held or owned by the corporation," is relied on; but this provision must be construed, we think, in connection with the statute of Minnesota, which, as already noticed, quite clearly contemplated that the securities of the association might be used and pledged, if need be, for the purpose of complying with the law under which it could enter to transact business in another state. It was not intended by this amendment to deprive the corporation of the power, by the use of its securities, to maintain and keep good its deposits, in order to transact its business in the thirty-four states

which it appears to have entered for that purpose. The more reasonable view would seem to be that the amendment was intended to prevent an absolute sale or traffic in its securities, and not a deposit of such securities for the purpose indicated. We arrive, therefore, at the conclusion that the deposit of securities in question, made with the state treasurer for the purpose indicated, was within the lawful power of the corporation as represented by its directors, and that the action of the directors in making it was binding upon the corporation and all its members to the extent and according to the terms of the statute under which it was made.

5. The deposit was, as we have said, within the power conferred upon the corporation, and not in violation of the trust reposed in the board of directors, that the affairs of the corporation should be managed, and its property and funds applied, solely for the purpose of carrying out the objects for which the corporation was created. It is well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract in question has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. Much less will the claim that the transaction was *ultra vires* be allowed as a ground for rescinding the contract, and restoring to the complaining party, on that ground, the property or funds with which he has parted, after he has had the benefit of full performance of the contract by the other party; and, in general, the plea of *ultra vires* will not be allowed to prevail, whether interposed for or against a corporation, when it will not advance justice, but, on the contrary, will accomplish a legal wrong. *Kadiash v. Garden City Equitable Loan & Bldg. Asso.* 151 Ill. 531; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Union Nat. Bank v. Matthews*, 98 U. S. 628, 629, 25 L. ed. 190. "Where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains." *Sedgw. Stat. Constr.* § 73. In 2 Beach, *Priv. Corp.* § 425, the subject is fully considered, and numerous modern authorities are cited, showing that "where a contract has in good faith been fully performed either by the corporation or the other party, the one who thus has received the benefit will not be permitted to resist its enforcement by the plea of mere want of power." *Darst v. Gale*, 83 Ill. 186; *Carson City Sav. Bank v. Carson City Elevator Co.* 90 Mich. 550; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 260; *Rider Life Raft Co. v. Roach*, 97 N. Y. 378; *Bradley v. Ballard*, 55 Ill. 415, 7 Am. Rep. 656; *State Board of Agriculture v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.* 83 Pa. 160, 166.

The result of these views is that the receiver appointed by the circuit court for Dane

county, Wisconsin, is entitled to retain the securities in question, and to subject them, under the order of the court, to the fulfillment of the trust upon which they were so deposited; and, to that end, they may be sold or collected, and the proceeds so applied, and any residue that may remain must be turned over to the appellant, the receiver appointed by the district court of Hennepin county, Minnesota. The corporation defendant, as well as its stockholders and its receiver, appointed by the court in Minnesota, are estopped from disputing the validity of the trust upon which the state treasurer had received these securities, and held them when the corporation became insolvent, and this action was commenced. The corporation, by its directors, consented to and made the deposit, and their action became binding alike on members and stockholders in other states; and they have thus waived all right, on legal or constitutional grounds, to question the validity of the trust on which the securities are held, as expressed in the statute.

6. We cannot perceive how it can be maintained that the contract clause of the Federal Constitution can be invoked to release these securities from the operation and effect of such pledge and estoppel, whatever view may be taken of the rights and relations of the entire body of stockholders as between themselves and the corporation. They have waived their right to insist upon the constitutional objection they urge against the Wisconsin statute, or to question the validity of the trust. Whatever modification or change may have occurred in the contractual relations existing between these parties is the sole result of their lawful and proper consent, or of those who were chosen and fully empowered in law to represent them, namely, the board of directors, without whose authority the securities could not have been deposited or pledged under the statute. The right to invoke the contract provision of the Federal Constitution, we think has been waived by them; and the case on this point falls strictly within the principle stated by Judge Cooley in his celebrated work on Constitutional Limitations (p. 214), where he states that "there are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it. Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will." And several instances of the application of this principle are given. The learned author states: "In these and the like cases the statute must be read with an implied proviso that the party to be affected shall assent thereto; and such consent removes all obstacle, and lets the statute in to operate the same as if it had in terms contained the condition." There are many well-considered cases sustaining the position that a party may, by his own act or conduct, preclude himself from insisting upon constitutional objections to a statute affecting his rights. The subject is discussed by Paine, J., in *Burrows v. Bashford*, 22 Wis. 104, where the opinion is expressed

that it is not unconstitutional for the legislature to provide that a party may voluntarily subject himself to unconstitutional provisions as a condition to the enjoyment of a new advantage given by the act. So, in the present case, in consideration of the benefits derived by the defendant corporation and its shareholders from the statute under consideration, in being allowed to enter the state and transact business therein, they must be precluded from insisting upon the invalidity of the statute. *Bank of Columbia v. Okely*, 17 U. S. 4 Wheat. 235, 4 L. ed. 559; *People v. Murray*, 5 Hill, 468. A party may renounce a constitutional provision made for his benefit (*Embury v. Connor*, 3 N. Y. 511, 53 Am. Dec. 325; *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624), and, having waived it, cannot subsequently ask for its protection. The views we have already expressed render the contention of the appellant in respect to the relations which the shareholders of a mutual building association ordinarily sustain to the corporation and to each other inapplicable, as well as the contention that the enforcement of the trust specified in the statute in these securities will destroy equality of right between the shareholders in general, rendering, as it is contended, the Wisconsin shareholders preferred shareholders.

7. Whatever the practical result of the enforcement of the trust in favor of Wisconsin shareholders, creditors, and others sustaining contractual relations with the corporation defendant may be, it rests, as we think and as we hold, upon the consent of the corporation and of its shareholders lawfully given, as it well might be in the present case, by and through its board of directors, for a valid consideration received by the corporation to the benefit and advantage of those now denying its validity. The right of the state of Wisconsin to pass and enforce the act for the better protection of its citizens and residents against irresponsible foreign corporations entering, or desiring to enter, the state, and transact business therein with its citizens, cannot, we think, be denied. We cannot assent to the position that the security afforded by the deposit required by the act, and thus consented to and made by the corporation through its directors, may be avoided or nullified at the instant when the necessity for retaining it and enforcing it becomes imperative. If it was lawful to require and take the security, it is rightful and lawful to insist on it, and enforce it, according to the very terms and true meaning of the act under which it was given; and insolvency of the corporation will not release the trust or discharge it. The language of the Wisconsin statute is free from doubt or ambiguity, and construction has no office to perform in respect to it. Its meaning and purpose are obvious, and it is the manifest duty of the court to give it full effect. This cannot be done without strictly applying the securities or their proceeds to the uses prescribed by the statute. This trust was not created for the benefit or indemnity of members, creditors, and shareholders of the defendant corporation generally, residing out of the state. These were not within its plan, purpose, or policy. The deposit was required and made in pursuance of a wise state policy,

solely for the benefit and indemnity of resident shareholders and creditors, and for their protection and advantage only. Language could not have been readily employed to have made the intention plainer than is expressed in the statute. To now turn these securities over to the appellant, to the end that they may be collected and converted, and the proceeds applied ratably in satisfaction of all the claims of shareholders and creditors generally, whether residents of Wisconsin, or not, would, we think, be a manifest perversion of the trust, and render the security and indemnity they were deposited to furnish resident shareholders, and others indicated in the statute, a mere delusion. We think that the demurrers to the appellant's answer and counterclaim were properly sustained.

The orders appealed from are affirmed.

SECOND WARD SAVINGS BANK of Milwaukee, *Appt.*,

Henry C. SCHRANCK, Assignee, etc., of Louis Henes, Jr., *Resp't.*

Re Assignment of Louis HENES, Jr., for Benefit of Creditors.

(.....Wis.....)

- 1. The remedy on promissory notes and warrants of attorney** by statutes in force at the time they were made, which authorized the holder to enter judgment, issue execution, and levy upon and sell the debtor's property notwithstanding any assignment for creditors which he might make more than sixty days after their issue, constitutes an essential part of the contracts or securities, and cannot be taken away by a subsequent statute which attempts to provide that all levies or other processes shall be dissolved by such an assignment.
- 2. Error in taxing an item of costs** is cured by promptly remitting that item.

(*Cassoday, Ch. J., dissents.*)

(October 22, 1897.)

A PPEAL by plaintiff from an order of the Circuit Court for Milwaukee County directing the sheriff to turn over to the assignee for creditors of Louis Henes, Jr., property in his possession under an execution in favor of plaintiff. *Reversed.*

CROSS-APPEALS from orders of the Superior Court for Milwaukee County in a proceeding to enforce payment of a claim against Louis Henes, Jr., in favor of plaintiff; the plaintiff appealing from the order dissolving the levy of the execution; and defendant appealing from the order refusing to vacate the judgment and execution. *Reversed on plaintiff's appeal. Affirmed on defendant's appeal.*

Statement by **Pinney, J.:**

On the 4th of May, 1897, the plaintiff caused to be entered in the superior court of Milwaukee county a judgment by confession upon a certain promissory note, dated August 15, 1896, in and by which Louis Henes, Jr., promised to pay to the plaintiff or order \$24,000 in thirty days from date, with interest at 6 per cent from the date thereof, and claiming that \$24,078.90, for principal and interest, was due thereon. Costs were included in the entry of the judgment, for the amount of \$32.20. \$25 whereof was for attorney's fees, as costs by statute. Execution was issued upon said judgment, and on the 4th day of May, 1897, the sheriff of Milwaukee county levied upon certain personal property of the defendant, Henes, of the value of about \$10,000; and it was made to appear that he still retained the custody thereof, and claimed the right to sell the same, by virtue of said execution. An order was granted, upon the record, documents, etc., in the action, that plaintiff, together with the sheriff of Milwaukee county, show cause, etc., on the 29th day of May, before said court, at the court-house, etc., why the judgment in said action, and the execution issued thereunder, should not both be vacated and set aside, and the levy made thereunder dissolved. The order was also based upon the affidavit of Henry C. Schranck, from which it appeared that on the 10th day of May (six days after the entry of said judgment and levy) the defendant, Louis Henes, Jr., made to said Schranck a voluntary assignment of all his property and estate not exempt by law, pursuant to chapter 80 of the Revised Statutes of Wisconsin, and acts amendatory thereof; that said Schranck qualified as such assignee, and was then acting as such; that long prior to the entry of said judgment the said defendant was, and ever since had been, insolvent; and that on the 10th of May, 1897, after the making of such voluntary assignment, and after this deponent had duly qualified, he demanded of such sheriff in writing, the possession of the property so levied on, but that said sheriff and said plaintiff refused, and ever since refused, to deliver up the same to him as such assignee; that said sheriff proposed to offer for sale and sell the said property on or before Wednesday, the 26th day of May, 1897; that the majority of the creditors of said assignee were nonresidents of the state of Wisconsin; that they were interested in said property, and any sale that might be had thereof, and that the best interests of all such creditors would be promoted, and better bids would probably be procured, provided said sale was postponed for a reasonable time; that, as appeared from the judgment roll in the action, the costs therein were taxed at the sum of \$32.20, and allowed, upon the consent of the defendant's attorney, as set forth in his answer; that said costs so taxed and allowed at said sum included an item designated, "Costs by statute, \$25," which the defendant alleged to be grossly excessive, and was included without the authority or consent of the

NOTE.—For change of remedy as impairing obligation of contract, see note to *Best v. Baumgardner* (Pa.) 1 L. R. A. 368, and note; *Pinney v. Pinney* (Me.) 4 L. R. A. 348, and note; *Greenwood v.* 39 L. R. A.

Butler (Kan.) 22 L. R. A. 465; *State, Thomas Cruse Sav. Bank, v. Gilliam* (Mont.) 31 L. R. A. 721, and note; also 33 L. R. A. 556.

defendant, and in fraud of his rights and the rights of creditors; that, as deponent was informed and believed, the note upon which the judgment was rendered was from time to time renewed, and the time of payment thereof extended, by agreement between the parties to said action, and the last renewal or extension thereof was made April 14, 1897, for a period of thirty days; and that the principal of said note was not due or payable until after the judgment was entered. The plaintiff, afterwards, on the 4th of May, remitted said item of \$25 so taxed and included in the judgment, and notified such assignee thereof. Upon the hearing of this motion the court ordered "that by reason of the voluntary assignment by said defendant, made on the 10th day of May, 1897, and within ten days after the property of said defendant was levied upon under the execution issued herein on the 4th day of May, 1897, said levy became, and is hereby declared to be, dissolved, and the said sheriff is hereby directed to forthwith turn over to said assignee, all and singular, the property levied upon by him under said execution, and that the motion of said assignee, in so far as it seeks to dissolve said levy, be, and the same is hereby, granted."

It was further ordered "that said judgment and execution issued thereunder be not vacated nor set aside, but that the same stand, and that the motion of said assignee to vacate or set aside said judgment and execution be denied." The plaintiff appealed from that portion of the order directing the sheriff of Milwaukee county to turn over to the assignee of the defendant herein property levied upon under the execution issued upon said judgment, and declaring said levy to be vacated. The said Henry C. Schranck, as assignee, etc., appealed from that part of the order of the superior court which denied his motion to vacate and set aside the judgment therein, and the execution issued thereon.

On the 18th day of May, 1897, Henry C. Schranck, as assignee of Louis Henes, Jr., obtained an order from the circuit court of Milwaukee county, in the matter of the assignment of said Louis Henes, Jr., requiring the plaintiff in said judgment, the Second Ward Savings Bank, and the sheriff of Milwaukee county, to show cause before said circuit court, at, etc., why they, and each of them, should not be required to deliver and turn over to Henry C. Schranck, as assignee of Louis Henes, Jr., the property and assets levied upon by said sheriff of Milwaukee county under two certain executions issued upon judgments of the superior court of Milwaukee county in favor of said Second Ward Savings Bank against Louis Henes, Jr., and for such other or further order or relief, etc. This order was based upon the petition of said Henry C. Schranck, assignee, stating the execution and delivery to him by said Louis Henes, Jr., of the voluntary assignment of all his property and estate for the benefit of his creditors on May 10, 1897, and that he thereupon duly qualified as such assignee, and had ever since and was then acting as such.

The petition further alleged that the assignor, at the time of the assignment, and for many years prior thereto, had been engaged in the business of a wholesale and retail dealer

in coal and wood in said city, and that on or about August 15, 1896, said assignor executed and delivered to the Second Ward Savings Bank his promissory note for \$24,000, dated that day, and due thirty days after date, together with a warrant of attorney thereto annexed, in the usual form, authorizing the confession of judgment thereon; that on or about November 21, 1896, said assignor executed and delivered to said Second Ward Savings Bank his certain other promissory note for \$2,000, with warrant of attorney to confess judgment thereon thereto annexed, in the usual form, payable sixty days after date.

The petition further stated that upon the 6th of May, 1897, three days prior to the execution and delivery of said assignment, the Second Ward Savings Bank caused judgment to be entered in the superior court by confession upon said judgment notes as follows, namely, a certain judgment for \$24,111.10, damages and costs, and a certain other judgment for the sum of \$1,086.53, damages and costs, and that on said 6th day of May, 1897, executions issued on said judgments were delivered to F. G. Isenring, sheriff of Milwaukee county, who on that day levied upon, all and singular, the property of the said assignor, and ever since had and retained the custody of, and claimed the right to sell, the same, by virtue of said executions.

It was further stated in said petition that at the time of the execution of said assignment, and the time of the entering and docketing of the said judgments, said Louis Henes, Jr., was insolvent, and that it appeared from his books and papers in the possession of the petitioner, and from statements made by him to petitioner, that said assignor on the 6th day of May, 1897, owed debts to the amount of about \$57,000, and that "according to the best knowledge, information, and belief of your petitioner, the assets of said assignor consisted of the divers items therein stated, of the cash value of not to exceed \$10,000;" that at the time of the execution and delivery of the said judgment notes said Louis Henes, Jr., was insolvent, and that at the time of the receipt of said judgment notes by said Second Ward Savings Bank it knew, or had reasonable cause to believe, said assignor to be insolvent; and that at the time of the execution and delivery of said assignment, and of the entry of the aforesaid judgments, said assignor was insolvent. It alleged demand by the assignee of the sheriff for possession of, all and singular, the property of the assignor so levied on, under and pursuant to the provisions of chapter 334 of the Laws of Wisconsin for the year 1897, but that the said sheriff and the said Second Ward Savings Bank refused, and still did refuse, "to deliver up possession thereof to your petitioner." And the petitioner prayed the order of the court in the premises, requiring said sheriff to deliver and turn over to him, as such assignee, all and singular, the property levied upon by him as aforesaid, under and pursuant to the statutes in such case made and provided.

An affidavit was read at the hearing, made by one Charles C. Schmidt, one of the general officers of the Second Ward Savings Bank, a judgment creditor, to the effect that he was and had been cashier of such bank for many

years, and, as such officer, personally conducted the transactions mentioned in the affidavit and order to show cause, and knew all the circumstances connected with and surrounding the same; that the judgments mentioned and order to show cause were entered and docketed, and the executions issued and delivered to the sheriff of Milwaukee county, and the levies and seizures thereon were made on the 4th day of May, 1897, and not on the 6th day of May, 1897, as alleged in said affidavit; and, further, that, at the time of the receipt of the judgment notes by the bank from said assignor, the said bank did not know, nor did affiant or any of the other officers of said bank, nor did they or either or any of them, have any cause to believe, that the assignor herein was insolvent; that the bank accepted and received both of said judgment notes from the assignor on the dates mentioned in the affidavit, in good faith and for a valuable consideration. Upon the hearing, on motion by the attorneys for each and all of said parties, it was ordered that said circuit court assume and take jurisdiction of the matters set forth in said petition and order, and of the parties appearing therein. And it was ordered that the prayer of said petition be and was thereby granted, and that by reason of said voluntary assignment the levies set forth in said petition be, and they were thereby dissolved; and said sheriff was directed to forthwith turn over to said assignee, all and singular, the property levied upon by him under the executions. From said order the said Second Ward Savings Bank appealed.

Messrs. Howard & Mallory, for appellant:

Rev. Stat. § 1693a, was before this court in *McCaul v. Thayer*, 70 Wis. 188, in which case it was held that an execution levy made under a judgment entered within sixty days prior to an assignment for the benefit of creditors, upon a judgment note given by the assignor more than sixty days prior to such assignment, is not void.

The provisions of chapter 384 of the Laws of 1897, providing for the dissolution of process and levies upon the making of a voluntary assignment by the debtor, cannot be held to apply to execution levies made under judgments entered upon judgment notes given more than sixty days prior to the making of such assignment, and long prior to the passage of said chapter 384, Laws of 1897.

To hold otherwise would be to sanction an impairment of the obligation of the contract between appellant and respondent's assignor.

Oatman v. Bond, 15 Wis. 20.

A state cannot constitutionally pass an insolvent law which is to apply to contracts entered into before its passage.

2 Story, Const. § 1387; Cooley, Const. Law, 5th ed. pp. 357, 358; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529; *Farmers' & M. Bank v. Smith*, 19 U. S. 6 Wheat. 181, 5 L. ed. 224; *Leavitt v. Lovering*, 64 N. H. 607, 1 L. R. A. 58.

Any law which in its operation amounts to a denial or obstruction of the rights accruing by contract, though professing to act only on 89 L. R. A.

the remedy, is directly obnoxious to the prohibition of the Constitution.

Davis v. Rupe, 114 Ind. 591; *M'Cracken v. Hayward*, 43 U. S. 2 How. 618, 11 L. ed. 401; *Long v. Walker*, 105 N. C. 98; *Bronson v. Kinzie*, 42 U. S. 1 How. 811, 11 L. ed. 143; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Baldwin v. Hale*, 68 U. S. 1 Wall. 223, 17 L. ed. 531; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773; *People, Reynolds, v. Buffalo*, 140 N. Y. 801.

The remedy given to appellant, to enforce the right given to him by the execution of the judgment notes in this case, by the law as it existed at the time of the execution of said notes, was to enter judgment, issue execution thereon, levy upon the property of the debtor and sell the same to satisfy its debt. And, at the time of the execution of the judgment notes in this case, this right could not be taken away by the making of a voluntary assignment by the debtor, providing that the judgment note, upon which judgment was entered, was given more than sixty days prior to the making of such assignment.

McCaul v. Thayer, 70 Wis. 188.

Mr. William D. Van Dyke, with **Messrs. Sylvester, Scheiber, & Orth**, for respondent:

Unless the act is unconstitutional beyond all reasonable doubt, the courts will hold it constitutional.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 699, 39 L. ed. 1147; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 812, 12 L. R. A. 486, 8 Inters. Com. Rep. 584; *Beverly v. Barnitz*, 55 Kan. 466, 31 L. R. A. 74.

Chapter 344, Laws 1897, is a mere change of remedy. Certain remedies may be changed.

A change in the law respecting execution levies is a change in the remedy.

Freeman, Executions, § 84; *Johnson v. Fletcher*, 54 Miss. 638, 28 Am. Rep. 888; *Wendell v. Lebon*, 30 Minn. 234.

Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of contract.

Cooley, Const. Law, 6th ed. p. 284; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529; *Von Baumbach v. Bade*, 9 Wis. 560, 76 Am. Dec. 283.

Hon. John F. Dillon, in 5 Am. L. Reg. N. S. p. 91, says that such decisions may in a general way be divided into three classes:

One class maintains that the obligation of a contract, legally regarded, consists in the remedy which the law gives to enforce it, and as a consequence, the efficiency of the remedy cannot be impaired without thereby impairing the obligation. Another class broadly distinguishes between obligation and remedy, and maintains that the remedy may be changed or even wholly taken away by the legislature without contravening the Constitution of the United States.

But the prevailing view is a middle one between these extremes, and asserts the doctrine that the remedy may be changed in the regu-

lar and ordinary course of legislation, provided it is not destroyed, or the rights which existed in favor of the creditor at the time the contract was made are not substantially interfered with, seriously embarrassed, or defeated.

No definite lines have been drawn between the obligations of a contract and permitted changes of remedies. Every case has been and must be determined upon its own circumstances.

United States, Von Hoffman, v. Quincy, 71 U. S. 4 Wall. 535, 18 L. ed. 403; *Antoni v. Greenhow*, 107 U. S. 775, 27 L. ed. 471; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Bronson v. Kinzie*, 42 U. S. 1 How. 817, 11 L. ed. 145; *Davis v. Rupe*, 114 Ind. 588; *Day v. Madden* (Colo. App.) 48 Pac. 1053; *Von Baumbach v. Bade*, 9 Wis. 560, 76 Am. Dec. 288; *M'Cracken v. Hayward*, 43 U. S. 2 How. 608, 11 L. ed. 397; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93.

State insolvent laws discharging the debtor impair the obligation of prior contracts.

Sturges v. Crowninshield, 17 U. S. 4 Wheat. 122, 4 L. ed. 529; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 218, 6 L. ed. 606.

The reason assigned is that the discharge changes the express terms of the obligation by extinguishing it.

Denny v. Bennett, 128 U. S. 489, 32 L. ed. 491.

So do statutes destroying all remedy, or rendering the only remaining remedy practically useless.

Bronson v. Kinzie, 42 U. S. 1 How. 311, 11 L. ed. 143; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *Outman v. Bond*, 15 Wis. 21; *Hasbrouck v. Shipman*, 16 Wis. 297.

So do statutes extending the time of redemption.

Bronson v. Kinzie, 42 U. S. 1 How. 311, 11 L. ed. 143; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93; *Robinson v. Howe*, 13 Wis. 34.

The reasons assigned are: (1) such changes are directly contrary to the express terms of the contract, and (2) take from the mortgagees, etc., and confer upon the mortgagor an equitable estate with an extended right of possession, etc.

Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93; *Day v. Madden* (Colo. App.) 48 Pac. 1053.

So do unreasonable exemption laws.

Gunn v. Barry, 82 U. S. 15 Wall. 610, 21 L. ed. 212; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793.

So do valuation and appraisement laws.

Bronson v. Kinzie, 42 U. S. 1 How. 311, 11 L. ed. 143; *M'Cracken v. Hayward*, 43 U. S. 2 How. 608, 11 L. ed. 397.

Stay laws.

Jacobs v. Smallwood, 63 N. C. 112; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793.

Statutes changing any remedy included in the contract, by its express terms, like any other change of its terms, its legal construction, its validity, or its discharge, impair its obligation, unless a substantial remedy remains.

Billmeyer v. Evans, 40 Pa. 324; *Boice v. Boice*, 27 Minn. 371.

The following changes of remedy do not impair the obligation of contracts:

1. Statutes abolishing imprisonment for debt.

Penniman's Case, 103 U. S. 714, 26 L. ed. 602; *Mason v. Haile*, 25 U. S. 12 Wheat. 370, 6 L. ed. 660.

(2) Statutes abolishing distress for rent.

Van Rensselaer v. Snyder, 18 N.Y. 299; *Conkey v. Hart*, 14 N. Y. 22; *Stocking v. Hunt*, 3 Denio, 274; *Madland v. Benland*, 24 Minn. 372.

(3) Statutes creating reasonable additional exemptions.

Morse v. Gould, 11 N. Y. 281, 63 Am. Dec. 103.

(4) Statutes changing the rate of interest on judgments.

Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648; *Morely v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925.

(5) Statutes relating to time:

(A) Statutes of limitation.

Jackson, Hart, v. Lamphire, 28 U. S. 3 Pet. 280, 7 L. ed. 679; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365.

(B) Statutes increasing the time to answer and requiring six months' notice of foreclosure sale.

Von Baumbach v. Bade, 9 Wis. 560, 76 Am. Dec. 283.

(C) Statutes requiring thirty days' notice for mechanics' liens and tax deeds.

Curtis v. Whitney, 80 U. S. 13 Wall. 68, 20 L. ed. 513; *Best v. Baumgardner*, 122 Pa. 17, 1 L. R. A. 356.

(D) Recording acts giving priority as to time.

Jackson, Hart, v. Lamphire, 28 U. S. 3 Pet. 280, 7 L. ed. 679.

(E) Statutes requiring ten days' notice to quit.

Woods v. Soucy, 166 Ill. 407; *Van Rensselaer v. Snyder*, 18 N. Y. 299.

(6) Statutes postponing time of sale under mortgage foreclosure until one year after judgment.

Northwestern Mut. L. Ins. Co. v. Neeres, 46 Wis. 147.

(7) Statutes vacating prior attachment levies after an assignment.

Bigelow v. Pritchard, 21 Pick. 169; *Gay v. Raymond*, 140 Mass. 69; *Baum v. Raphael*, 57 Cal. 361; *Baldwin v. Buswell*, 53 Vt. 57; *Elton v. O'Connor*, 6 N. D. 1, 33 L. R. A. 524; *Day v. Madden* (Colo. App.) 48 Pac. 1053.

(8) Statutes vacating garnishments.

Freiberg v. Singer, 90 Wis. 608; *Charles Baumbach Co. v. Singer*, 86 Wis. 329; *North Star Boot & Shoe Co. v. Lorejoy*, 33 Minn. 229.

Any statute is unconstitutional, as impairing the obligation of contracts, which introduces a change into the express terms of the contract, its legal construction, its validity, or discharge.

The remedy provided by law for the enforcement of a contract is no part of its obligation,—unless included in the express terms of the contract,—and whatever pertains merely to the remedy may be changed, modified, or abrogated by the legislature in its discretion to any extent, provided a substantive remedy be still left to the creditor, and such changes may constitutionally apply to existing contracts.

3 Am. & Eng. Enc. Law, p. 753; *Von*

Baumbach v. Bade, 9 Wis. 560, 76 Am. Dec. 288; *Oatman v. Bond*, 15 Wis. 21; *Robinson v. Howe*, 13 Wis. 842; *Bronson v. Kinzie*, 42 U. S. 1 How. 811, 11 L. ed. 148.

The legislature may abolish a part of the remedy or one of two remedies.

Mason v. Hasle, 25 U. S. 12 Wheat. 370, 6 L. ed. 660; *Beers v. Houghton*, 34 U. S. 9 Pet. 359, 9 L. ed. 157; *United States, Butz, v. Muscatine*, 75 U. S. 8 Wall. 575, 19 L. ed. 490; *Penniman's Case*, 103 U. S. 714, 26 L. ed. 602; *Tennessee, Bloomstein, v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Richardson v. Cook*, 37 Vt. 599, 88 Am. Dec. 622.

The time within which a remedy may be exercised may be limited or extended for a definite and reasonable period.

Von Baumbach v. Bade, 9 Wis. 582, 76 Am. Dec. 288.

The fact that the substituted or remaining remedy is less beneficial does not make the change unconstitutional.

Bronson v. Kinzie, 42 U. S. 1 How. 811, 11 L. ed. 148; *Curtis v. Whitney*, 80 U. S. 13 Wall. 68, 20 L. ed. 513; *Von Baumbach v. Bade*, 9 Wis. 580, 76 Am. Dec. 288; *Streubel v. Milwaukee & M. R. Co.* 12 Wis. 68; *Cooley, Const. Lim.* 6th ed. 285; *United States, Von Hoffman, v. Quincy*, 71 U. S. 4 Wall. 535, 18 L. ed. 408; *Hamilton Gaslight & C. Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 968; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825.

The question of the sufficiency of the remaining remedy is one of reasonableness.

Von Baumbach v. Bade, 9 Wis. 580, 76 Am. Dec. 288; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468; *Jackson, Hart, v. Lamphire*, 28 U. S. 3 Pet. 280, 7 L. ed. 679; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365.

Tested by the few general principles laid down by the courts, chapter 384 is constitutional.

The remedy in question on this appeal was a purely special, statutory remedy, permitting a preference, and was subject to change.

McCaul v. Thayer, 70 Wis. 188; *Freiberg v. Singer*, 90 Wis. 608; *Watson v. New York C. R. Co.* 47 N. Y. 157.

Statutes abolishing priorities or preferences given by statute do not impair the obligation of contracts.

Harrison v. Sterry, 9 U. S. 5 Cranch, 298, 3 L. ed. 106; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Elton v. O'Connor*, 6 N. D. 1, 38 L. R. A. 524; *Baldwin v. Buswell*, 52 Vt. 57, *Davis v. Rupe*, 114 Ind. 588; *Watson v. New York C. R. Co.* 47 N. Y. 157.

The constitutionality of chapter 384 is supported by the authorities.

Elton v. O'Connor, 6 N. D. 1, 38 L. R. A. 524; *Bank of United States v. Longworth*, 1 McLean, 85; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 30 L. ed. 825; *Wendell v. Lebon*, 80 Minn. 284; *Day v. Madden* (Colo. App.) 48 Pac. 1053; *Denny v. Bennett*, 128 U. S. 497, 32 L. ed. 494; *Bigelow v. Pritchard*, 21 Pick. 169; *Baldwin v. Buswell*, 52 Vt. 57; *Von Baumbach v. Bade*, 9 Wis. 580, 76 Am. Dec. 288; *Northwestern Mut. L. Ins. Co. v. Neves*, 46 Wis. 147; *Freiberg v. Singer*, 90 Wis. 608.

39 L. R. A.

Pinney, J., delivered the opinion of the court:

Except as to a matter of costs in the entry of the largest judgment against Louis Henes, the question involved in these appeals is whether chapter 384, Laws 1897, as applied to the facts stated, is unconstitutional, as impairing the obligation of the contracts contained in the notes and warrants of attorney upon which the judgments above set forth were entered; the respondent claiming that this statute is a permitted change of the existing remedy, while the defendant bank claims that the statute is a law impairing the obligation of these contracts, and its substantial rights under them, and therefore void, under the provisions of the Constitutions of the state and of the United States, prohibiting the passage of any law impairing the obligation of contracts. The act in question took effect April 30, 1897, and is "An Act to Amend Chapter 80, Rev. Stat. for 1878, Entitled, 'Of Voluntary Assignments.'" It provides that "whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor, or a garnishment is made against such a debtor, such debtor may, within ten days thereafter, make an assignment of all his property and estate not exempt by law, for the equal benefit of all his creditors, as provided by law; whereupon all such attachments, levies, garnishments, or other processes shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver." The act is a general one, and is an amendment to and a part of the voluntary assignment law of the state, which, taken in connection with the act providing for the discharge of a debtor (Laws 1889, chap. 385), is, in substance and effect, an insolvent or bankrupt law, and as such permitted, in the absence of Federal legislation. The notes and warrants of attorney had been given more than sixty days before the passage of the act. The remedy given to the appellant at the time these contracts were made was to enter judgment pursuant to the warrants of attorney, issue execution thereon, and levy the same upon the property of the debtor, and sell it to satisfy the debt. This right, at the time the notes and warrants of attorney were given, could not be taken away by the making of a voluntary assignment by the debtor, if the notes and warrants of attorney upon which the judgment was entered had been given more than sixty days prior to the making of such assignment, even though the maker was insolvent at the time they were given, and when the judgment was entered. *McCaul v. Thayer*, 70 Wis. 188. Section 1693a, Sanborn & Berryman, Anno. Stat., provides that "every execution levy made under a judgment confessed against any such insolvent debtor within sixty days prior to any assignment for the benefit of creditors, or under a judgment entered on a judgment note, by any such debtor, within sixty days prior to any such assignment, and the lien of any such judgments upon real estate, shall be void and of no effect."

In *McCaul v. Thayer*, 70 Wis. 188, this section was before the court for consideration; and it was held that an execution levy made under a judgment entered within sixty days prior

to an assignment for the benefit of creditors, upon a judgment note given by the assignor more than sixty days prior to such assignment, was not void. The court, by Orton, J., said that the only mischiefs to be cured by the act were acts of the debtor by which he preferred creditors, and prevented "the equal distribution of his property among all of his creditors," and that the entry of judgment at the instance of the plaintiff or creditor alone, "upon a judgment note given," was in no sense his act at the time of such entry. "He is entirely passive. He can do nothing to aid it or to prevent it. He has given a power of attorney, which is irrevocable, because coupled with an interest. The entry of judgment on such a note by the creditor is not one of the evils or within the mischief to be cured, or named in the title, or within the purview of the law." "The rights of the parties had become fixed by the giving of such a note when it was lawful and could not possibly change the condition of the debtor as to his creditors, or prevent the equal distribution of his property among them." And that "the entry of judgment is a mere legal consequence of the giving of the judgment note. It is not a new act by the debtor, but a natural and legal result, beyond his control," that "the judgment, so to speak, is embodied within the note, and a necessary part and essential element of it, and the note naturally changes its form into a judgment of record, under the statute." And, further commenting upon such securities, he said: "A judgment note is a security, and a valuable one, to the holder, and it is so recited in the power of attorney. This method of business has grown into the very necessities of our business of banking, merchandising, commerce, and of buying and selling in all forms, and of exchange. It is the most common as well as the most valuable method of security in connection with commercial paper, and to destroy or discredit it would derange and unsettle the business of the country, and seriously affect the public interests."

The contention that the debtor could prevent the entry of judgment indirectly, by making an assignment, was combated, as not within the intention of the legislature, as it would work a violation of the contract rights of such a creditor. It was further laid down that the power of attorney to enter judgment upon the note when due, and which gave the note the name and character of a judgment note, added value thereto in the market, as well as intrinsically, "and that value neither the debtor nor the legislature has any right to lessen by prohibiting its use in entering judgment by any pretext of technical or legal fraud;" and it was there held that the 2d clause of § 2, chap. 349, Laws 1883, should be construed as if it read, "or under a judgment entered on a judgment note made by any such debtor within sixty days prior to any such assignment." Under the decision in *McCaul v. Thayer*, 70 Wis. 188, judgment notes were thus placed upon a basis by which they were greatly increased in value, and a much more extended use was made of them by merchants, bankers, and business men, as securities.

The remedy given to the appellant by the law

in force at the time these notes and warrants of attorney were given, and which entered into, and formed a part of, the contracts, and made them particularly valuable, was to enter judgment, issue execution, and levy upon the property of the debtor, and sell the same to satisfy the debt. The debtor could not defeat it by revoking the warrant of attorney. The notes and warrants of attorney were potentially judgments upon which an execution could be speedily issued and levied. They were substantially preferences legally and properly acquired by the appellant over all other creditors of the defendant. The time within which they might be questioned by the assignee of the maker, under his voluntary assignment for the benefit of his creditors, had expired, and the preferences had become absolute, before the act of 1897 became operative. The effect of the statute upon these contracts, according to its terms, was to enable the debtor (assignor) to revoke the remedy thus given, and to render these securities as a means of reaching and selling his property to satisfy the judgments thereon of no value whatever. It authorized and empowered the debtor, at his option, to withdraw his property from a levy for that purpose, and defeat the remedy which made them especially valuable; and, if the contention of the respondents is maintained, the remedy secured by these contracts might thus be utterly defeated at the option of the assignor. The orders appealed from, pursuant to the statute, dissolved the levy made, and rescued the property from the hands of the sheriff and the creditor thus rightfully pursuing it, to work out the remedy secured to him by the law of the contracts. It is contended in support of the act that it is a part of the state system of insolvency or bankruptcy, and that it is legislation which relates to the remedy, and so within the constitutional competency of the legislature.

In *Edwards v. Kearney*, 96 U. S. 600, 24 L. ed. 796, it was said that "the obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing. . . . A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy would involve its discharge; and a statute forbidding the sale of any of the debtor's property under a judgment upon such a contract would relate to the remedy.' . . . It cannot be doubted, either upon principle or authority, that each of such laws would violate the obligation of the contract, and the last not less than the first. These propositions seem to us too clear to require discussion. It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or

incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement."

In *Green v. Biddle*, 21 U. S. 8 Wheat. 1, 5 L. ed. 547, the court said: "It is no answer that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests." And it was further said [42 U. S. 1 How. 816, 11 L. ed. 145] that: "whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the Constitution,"—and that the test as to whether a contract has been impaired is whether its value has, by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force. *Planter's Bank v. Sharp*, 47 U. S. 6 How. 801, 12 L. ed. 447.

In *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468, it was said that "it is competent for the state to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. . . . Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution and to that extent void."

In *Brine v. Hartford F. Ins. Co.* 96 U. S. 627-637, 24 L. ed. 858-861, it was held, through Mr. Justice Miller, that "all the laws of a state existing at the time a mortgage or any other contract is made which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts; [that] the construction, validity, and effect [of contracts] are governed by the place where they are made and are to be performed. . . . It is therefore said that these laws enter into, and become a part of, the contract. There is no doubt that a distinction has been drawn, or attempted to be drawn, between such laws as regulate the rights of the parties, and such as apply only to the remedy. It may be conceded that in some cases such a distinction exists. In the recent case of *Tennessee, Bloomstein, v. Sneed*, 96 U. S. 69, 24 L. ed. 810, we [the court] held that, so long as there remained a sufficient remedy on the contract, an act of the legislature changing the form of the remedy did not impair the obligation of the contract. But this doctrine was said to be subject to the limitation that there remained a remedy which was complete, and which secured all the substantial rights of the party. . . . At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the con-

tract that no change in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States." *Edwards v. Kearney*, 96 U. S. 595, 24 L. ed. 793. And the learned justice, enforcing his argument, quoted from the opinion of Chief Justice Taney in the case of *Bronson v. Kinzie*, 42 U. S. 1 How. 816, 11 L. ed. 145, as follows: "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contracts, but if that effect is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution." And further that "it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it."

In *Denny v. Bennett*, 123 U. S. 497, 32 L. ed. 494, quoting the language of the court in *Gilman v. Lockwood*, 71 U. S. 4 Wall. 409, 18 L. ed. 432, it was said that "state legislatures may pass insolvent laws, provided there be no act of Congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts."

The whole subject of legislation in violation of these constitutional provisions is elaborately considered in the recent case of *Barnitz v. Beverly*, 168 U. S. 118, 41 L. ed. 93, in which it is laid down that, "the obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence any law which, in its operation, amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution." And it is obvious it can make no difference as to the character of the law,—whether it be an insolvent law, or a law upon any other subject,

having the effect indicated. *Denny v. Bennett*, 128 U. S. 497, 32 L. ed. 494.

The extent of the power of the legislature over remedies was fully considered and discussed in the case of *Von Baumbach v. Bade*, 9 Wis. 560, 76 Am. Dec. 283, and cases cited; and the result was reached that the legislature possesses the power of changing or modifying laws governing proceedings in courts of justice, in respect to past as well as future contracts, and this power is unrestricted, except that a substantial remedy must be afforded according to the course of justice as it existed at the time the contract was made. *Hasbrouck v. Shipman*, 16 Wis. 297. The doctrine of the case of *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 798, that the remedy subsisting in a state when and where a contract is made and is to be performed is a part of the obligation, is now universal; and any legislation, though acting merely upon the remedy, that substantially impairs or lessens the value of the contract, is forbidden by the Constitution, and therefore void. *People, Reynolds, v. Buffalo*, 140 N. Y. 307.

The situation when the judgments are entered was this: The maker of the notes and warrants of attorney had become insolvent. The creditor bank invoked the remedy existing when the contracts were made, which entered into and formed a part of them, and made them valuable securities, by which they had become valid preferences. The law authorizing the entry of judgment on them, and immediate execution and levy thereof upon the debtor's property, had not been withdrawn. Judgments were entered, and levy was made accordingly upon a sufficient amount, it would seem, to pay a considerable part of the debt. The debtor thereupon elected to make, and did make, a voluntary assignment for the benefit of his creditors. By virtue of the assignment and the operation of the act in question, the creditor is deprived of the benefit of his lawful remedy, which we think was an essential part of the contracts or securities. By the subsequent action of the courts, executing the statute, the fruit of such lawful remedy, out of which to satisfy its debt, has been wholly wrested from its grasp, and turned over to the debtor's assignee for equal distribution among all his creditors, so that the amount which the creditor bank will probably receive from such property will be but a trifling sum. The remedy, therefore, which entered into and formed an important part of the contracts evidenced by the notes and warrants of attorney, within the meaning and effect of the decisions referred to, is practically abrogated and taken away.

Conceding that the legislation in question belongs to the class known as "remedial" it is still evident that the value of these contracts was materially lessened by and through its operation, and their validity and binding force were impaired. It is needless to add that legislation having such an operation or effect upon prior contracts cannot be justified or sustained because it relates to, or is amendatory of, state legislation on the subject of insolvency or bankruptcy. Existing contracts may be impaired by such legislation as well as by any other. We hold, therefore, that the pro-

visions of the act in question, as applicable to notes and warrants of attorney, and judgments and executions to enforce the same, given more than sixty days before a subsequent assignment for the benefit of creditors, impair the validity, force, and effect of such contracts, and are therefore void.

2. It was argued that the larger judgment should be set aside because costs were included in it; that the proceeding was a special proceeding under the statute, upon which, by law, no costs could be allowed. It is sufficient, upon this point, to notice that by the warrant of attorney the defendant expressly stipulated for the entry of "judgment with costs." The supervision which courts exercise over judgments entered, as these were, upon warrants of attorney, is of an equitable character; and, as the costs were certainly reasonable in amount, the case does not present any equity or merit which should incline the court to vacate or set aside the judgment on that ground. Six days after the entry of the judgment the plaintiff bank remitted the item of "\$25 by statute," taxed and included in the judgment, and declined to contend for it. Whatever error or irregularity there may have been in this respect must be held to have been cured, if not by the stipulation for release of errors, certainly by promptly remitting the item objected to. *Re Ellis* (No. 11, August term, 1897), 73 N. W. 887.

It follows from these views that the order of the Circuit Court for Milwaukee county, directing the sheriff of Milwaukee county to forthwith turn over to said assignee, all and singular, the property levied upon by him under said executions, *must be reversed*, with costs, and the cause remanded, with directions that said court cause said property, or its proceeds, to be restored to the sheriff of Milwaukee county, to be disposed of and applied in satisfaction of the executions mentioned, and that the order of the Superior Court, appealed from by the Second Ward Savings Bank of Milwaukee *must be reversed*, with costs, and the cause remanded to that court, with directions to cause to be restored to the sheriff of Milwaukee county the property, or its proceeds, turned over by the order of that court to Henry C. Schranck as assignee of Louis Henes, Jr., to the end that it may be applied in satisfaction of the said judgments in favor of the Second Ward Savings Bank of Milwaukee against said Louis Henes, Jr., the assignor, and that the part of the order of said Superior Court refusing to vacate the said judgment and execution against the said Louis Henes, Jr., *must be affirmed*, with costs; and judgment is ordered accordingly:

Cassoday, Ch. J., dissenting:

The power of a state legislature to pass state insolvent laws was determined by the Supreme Court of the United States seventy years ago, but only after one of the most able and persistent controversies ever experienced by that exalted tribunal. *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213-369, 6 L. ed. 606-659. It was there held that (1) in the absence of legislation by Congress on the subject a state had the authority to pass such a law; (2) that "a bankrupt or insolvent law of any state which dis-

charges both the person of the debtor, and his future acquisitions of property, is not 'a law impairing the obligation of contracts,' so far as respects debts contracted subsequent to the passage of such law;" (8) but that a "certificate of discharge, under such a law, cannot be pleaded in bar of an action brought by a citizen of another state, in the courts of the United States, or of any other state than that where the discharge was obtained." There were at the time only seven members of the court, and Mr. Justice Johnson wrote the only opinion in support of the third proposition quoted, and was the only member of the court concurring in all three propositions stated. Marshall, Duval, and Story dissented from the first and second propositions, and Washington, Thompson, and Trimble dissented from the third proposition. The three propositions thus determined in that case have since been repeatedly acquiesced in by the whole court as the settled law of this country on the subject. *Boyle v. Zacharie*, 81 U. S. 6 Pet. 348, 635, 648, 8 L. ed. 428, 527, 532; *Cook v. Moffat*, 46 U. S. 5 How. 310, 12 L. ed. 166. Thus, it appears that the opinions of Mr. Justice Johnson were the controlling opinions in the case, and hence what he said about impairing the obligation of contracts may be instructive. "'Right' and 'obligation' are considered by all ethical writers as correlative terms. Whatever I by my contract give another a right to require of me, I by that act lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three,—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The Constitution was framed for society, and an advanced state of society, in which I will undertake to say that all the contracts of men receive a relative, and not a positive, interpretation; for the rights of all must be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted. . . . In the construction of their contracts they are controlled by the laws of the society of which they are members, and for the construction and enforcement of their contracts, they rest upon the functionaries of its government. They can enter into no contract which the laws of that community forbid, and the validity and effect of their contracts is what the existing laws give to them. The remedy is no longer retained in their own hands, but surrendered to the community, to a power competent to do justice, and bound to discharge towards them the acknowledged duties of government to society, according to received principles of equal justice. . . . When that state of things has arrived in which the community has fairly and fully discharged its duties to the creditor, and in which pursuing the debtor

any longer would destroy the one, without benefiting the other, must always be a question to be determined by the common guardian of the rights of both, and in this originates the power exercised by governments in favor of insolvents." *Ogden v. Saunders*, 25 U. S. 12 Wheat. 281-283, 6 L. ed. 629, 630. And then, after stating that his views thus expressed were as applicable to contracts prior to the enactment as to those subsequently made, he said: "Whenever an individual enters into a contract, I think his assent is to be inferred, to abide by those rules in the administration of justice which belong to the jurisprudence of the country of the contract. And when compelled to pursue his debtor in other states, he is equally bound to acquiesce in the law of the forum to which he subjects himself. The law of the contract remains the same everywhere, and it will be the same in every tribunal; but the remedy necessarily varies, and with it the effect of the constitutional pledge, which can only have relation to the laws of distributive justice known to the policy of each state severally. It is very true that inconveniences may occasionally grow out of irregularities in the administration of justice by the states. But the citizen of the same state is referred to his influence over his own institutions for his security, and the citizens of the other states have the institutions and powers of the general government to resort to. And this is all the security the Constitution ever intended to hold out against the undue exercise of the power of the states over their own contracts and their own jurisprudence." Id. 285, L. ed. 630. And so it was held by the same court, prior to that decision, that while a state statute could not discharge a debtor from liability on debts contracted before its passage, and thus destroy the creditor's right of satisfaction out of the debtor's subsequent acquisitions of property, yet that it might take away his remedy, given by statute, to imprison the debtor, since such imprisonment was no part of the contract, and hence the debtor's release therefrom did not impair the contract. *Sturges v. Crmonishield*, 17 U. S. 4 Wheat. 123, 4 L. ed. 529. Thus, it is held by the same court that a state may, by statute, "reduce the rate of interest upon judgments previously obtained in its courts," without impairing the obligation of contracts, since such interest is given by statute, and not by contract. *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925. So, where a statute gave a lien for labor and materials contracted for, it has been held that "the lien is no part of the contract, but a merely incidental accompaniment, deriving its vitality from positive enactment, and liable always to be controlled, modified, or taken away by subsequent enactment." *Frost v. Nisley*, 54 Me. 845. So it was held by this court nearly forty years ago that an act of the legislature extending the time to answer in actions to foreclose a bond and mortgage previously given, from twenty days to six months, and also enlarging the time required for notice of sale of the mortgaged premises, was a valid enactment; that "the legislature may alter or vary existing remedies as they please, provided that in so doing their nature and extent is not so changed as materially to impair the rights

and interests of the parties." *Von Baumbach v. Bade*, 9 Wis. 560, 76 Am. Dec. 283. This was held on the theory that a state statute may impair the remedy on an existing contract, without necessarily impairing the contract itself; that "the only limit or qualification to this power is, that the legislature must confine their action within the bounds of reason and justice, and not so prolong the time in which legal proceedings are to be had as to render them futile and useless in the hands of the creditor, or to seriously impair his rights or securities." *Ibid*.

In the case at bar the note and warrant of attorney were dated August 15, 1896. Chapter 884, Laws 1897, was published and went into effect April 30, 1897, and, among other things, provided that all attachments, levies, garnishments, or other process against an insolvent debtor, within ten days prior to an assignment for the benefit of creditors, made by such debtor, shall be dissolved, and the property attached or levied upon be turned over to the assignee. The judgment in question was entered upon the warrant of attorney May 4, 1897. On the same day execution was issued thereon and levied on certain personal property of the debtor. Six days thereafter the debtor made a voluntary assignment for the benefit of his creditors. It is conceded that the judgment was rightfully entered, because it was so expressly stipulated in the contract; but, although the contract released all intervening errors in the entering of the judgment or the issuing of the execution, yet the only right to execution was by existing remedial statutes, and not by virtue of the contract itself. The act does not undertake to discharge the debtor from subsequent debts,—much less from prior debts. In 1883 insolvent debtors were prohibited from giving preferences to one creditor over another in making assignments. Later statutes limited to a certain extent the right of creditors of such insolvent debtors to obtain preferences in certain ways, and within a specified time prior to the making of such assignment by the debtors. *Sanborn & Berryman*, Anno. Stat. § 1693a. The act in question was manifestly designed to narrow such limits still further, and to secure, at least to some extent, a more equal distribution of the estates of insolvent debtors. The insolvent laws of several states expressly provide for dissolving attachments and releasing levies on the property of insolvent debtors under certain conditions. It would seem that in some of them the question here presented, as to prior contracts, must have arisen and been adjudicated soon after such enactments; but we have been referred to no case, and I have not had the time to search for any. Upon general principles, and under the authorities cited, it seems to me that state legislatures have the power, by the enactment of general laws, to secure an equal distribution of the estate of an insolvent debtor, even as to prior debts or nonresident creditors. There is another line of cases supporting these views. It has been held by numerous decisions, state and Federal, that the discharge of the debtor under a state insolvent law in the state of his domicile will not release him from debts owing to nonresidents, even where such insolvent laws were

enacted prior to the contract, unless the nonresident creditor has proved his claim, or become a party to the proceedings. *Cook v. Moffat*, 46 U. S. 5 How. 295, 13 L. ed. 159; *Baldwin v. Hale*, 68 U. S. 1 Wall. 223, 17 L. ed. 531; *Gilman v. Lockwood*, 71 U. S. 4 Wall. 409, 18 L. ed. 432; *Stirn v. McQuade*, 66 N. H. 408; *Kelsey v. Drury*, 9 Allen, 27; *Guernsey v. Wood*, 180 Mass. 508; *Phanix Nat. Bank v. Batcheller*, 151 Mass. 589, 8 L. R. A. 644. In other words, such nonresident creditor, not proving his claim, nor becoming a party to the proceedings, is no more affected by the insolvency proceedings than a creditor whose debt was contracted prior to the enactment of the insolvent law. In *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491, Purdy & Co. sued Van Norman & Bro. in a state court of Minnesota, and attached a part of their goods December 31, 1883. On the same day Van Norman & Bro. made an assignment to Bennett, under the state law, for the benefit of such creditors as proved up their claims. On the same day Lopp & Flersham sued Van Norman & Bro. in the United States circuit court, and the United States marshal, Denny, attached a portion of their goods, but did not prove up their claim in the insolvency proceedings. Thereupon the assignee, Bennett, sued the United States marshal, Denny, for the value of the goods so taken by him, and obtained judgment in the state court, which was affirmed in the supreme court of Minnesota. [*Bennett v. Denny*] 38 Minn. 580. And that judgment was affirmed on writ of error by the Supreme Court of the United States, where it is held, in effect, that a discharge from debts under the insolvent laws of a state did not release debts due to a citizen of another state, who had not proved up his claim, nor submitted to the jurisdiction of the state court; that the assignee, Bennett, under the state law, was entitled to the property, against such foreign creditor so attaching the same in the United States circuit court, and the depriving of such foreign creditor of any remedy, as against the goods so attached and assigned, was permissible, and did not impair the obligations of such contract. Such lien by such attachment in a suit in favor of a nonresident in the Federal court was no more subject to be dissolved by the insolvency proceedings than an attachment or levy in the state court in favor of a resident creditor upon a contract made prior to the insolvent statute. The same court has since held in effect, that a deed of conveyance made by an insolvent debtor to a nonresident creditor by way of preference may be avoided by state insolvency proceedings within the time limited therein, notwithstanding such foreign creditors were not served with process, and could not have been compelled to become parties to the insolvency proceedings, even if they had been served. *Brown v. Smart*, 69 Md. 320. Affirmed 145 U. S. 454, 36 L. ed. 773. This was on the theory that the property and debtor were within the state, and the jurisdiction was *in rem*. As indicated, the act in question does not undertake to discharge the insolvent debtor, nor to exempt his subsequent acquisition of property, but merely to prevent preferences, to the extent mentioned, out of such of the insolvent's estate as existed at the time of

making the assignment. It merely suspends the ordinary effect of such levy during the ten days immediately preceding such assignment. In my judgment, and in view of the

adjudications cited, the act did not impair the obligation of contracts, even as to the debt previously contracted.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF WISCONSIN.

JOHN V. FARWELL COMPANY

v.

George HILTON, Assignee, etc., of M. Kruschke, et al.

(84 Fed. Rep. 298.)

Replevin for goods fraudulently purchased may be maintained without tendering back a partial payment of the consideration, if the purchaser has realized from sales more than the amount which he has paid.

(December 24, 1897.)

MOTION for judgment *non obstante veredicto* or for new trial after verdict in favor of defendant in an action to recover goods sold and delivered by plaintiff to defendant's assignors which were procured by them by fraudulent representations. *New trial granted.*

The facts are stated in the opinion.

Messrs. Thompson, Harshaw, & Thompson and D. K. Tenney, for plaintiff:

Where a person obtains goods fraudulently, and disposes of and receives the proceeds of the same, to an amount greater than his payments, the money so received by him is in reality the property of the plaintiff, and, he already having in his hands an amount of money greater than that which he has paid, he is not only theoretically, but practically, in a better position than at the time of the contract; he cannot be heard to say that he has not been restored by the plaintiff to the possession he was in at the time of the making of the contract.

Pearse v. Pettis, 47 Barb. 276; *Sisson v. Hill*, 18 R. I. 212, 21 L. R. A. 207; *Schoonmaker v. Kelly*, 42 Hun. 299; *Sloane v. Shiffer*, 156 Pa. 59; *Seafeld v. Shiffer*, 156 Pa. 65; *Munzer v. Stern*, 105 Mich. 523.

One who has rescinded a contract of settlement on the ground of fraud and illegality is not bound to tender what he has received in settlement, before bringing his action at law.

Springfield F. & M. Ins. Co. v. Hull, 51 Ohio St. 270, 25 L. R. A. 87; *Bebout v. Bodle*, 38 Ohio St. 500; *Allerton v. Allerton*, 50 N. Y. 670; *Smith v. Solomon*, 7 Daly, 216; *Baird v. Howard*, 51 Ohio St. 57, 22 L. R. A. 848; *Potter v. Taggart*, 59 Wis. 1.

Under the maxim that the law does not require a vain thing to be done, a tender before

bringing suit will not be deemed necessary if the vendee has parted with the goods in whole or in part, or in any way has put it beyond his power to make restitution.

Henry L. Crane Boot & Shoe Co. v. Trentman, 84 Fed. Rep. 620.

Where the right to rescind springs from discovery of fraud, there is an exception to the rule; the defrauded party does not lose his right to rescind because the contract has been partly executed, and the parties cannot be fully restored to their former position.

2. *Parsons, Contr.* *780.

American Wine Co. v. Brasher Bros. 18 Fed. Rep. 595; *Straus v. Herman*, 45 Ga. 222; *Onwego Starch Factory v. Lendrum*, 57 Iowa, 573, 43 Am. Rep. 53; *Farley v. Lincoln*, 51 N. H. 577, 13 Am. Rep. 182; *Sargent v. Sturm*, 28 Cal. 859, 88 Am. Dec. 118; *Bussing v. Rice*, 2 Cush. 48; *Carly v. McGonigal*, 58 Mich. 587; *Stevens v. Austin*, 1 Met. 557; *Kinney v. Kiernan*, 49 N. Y. 164. Approved in *Springport v. Teutonia Sav. Bank*, 84 N. Y. 408; *Powers v. Benedict*, 88 N. Y. 605.

Mr. F. W. Houghton, for defendants:

A judgment *non obstante veredicto* is rendered only when the plea confesses a cause of action and the matter relied upon in avoidance is insufficient, although found true, to constitute either a defense or a bar to the action.

1 Freeman, Judgm. ¶ 7, subdiv. 4, and cases cited in footnotes; *Sheehy v. Duffy*, 89 Wis. 6; *Morris v. Ziegler*, 71 Pa. 450; *Robinson v. Myers*, 67 Pa. 9; *Glading v. Frick*, 88 Pa. 460; *Lough v. Thornton*, 17 Minn. 253; *Lough v. Bragg*, 18 Minn. 121; 1 Chitty, Pl. p. 656; *Bellows v. Shannon*, 2 Hill, 86; 3 Wait, Pr. p. 566; *Whittemore v. Adams*, 3 Cow. 626; *Soper v. Soper*, 5 Wend. 112; *Smith v. Smith*, 2 Wend. 624; *Van Valen v. Lapham*, 18 How. Pr. 240, Affirmed 5 Duer, 689.

A vendor who was induced to sell the vendee by fraudulent representations cannot, after receiving payments from the vendee, rescind the sale and replevy the goods sold without returning to the vendee the payments so received, even though the vendee has sold goods of a greater value than the amount so paid to the vendor.

Weed v. Page, 7 Wis. 508; *Hollenback v. Shoyer*, 16 Wis. 499; *Tobey v. McAllister*, 9 Wis. 463; *Costigan v. Hawkins*, 22 Wis. 74, 94 Am. Dec. 538; *Grant v. Law*, 29 Wis. 99; *Hy-*

NOTE.—The above case is, as the opinion states, "one of the recognized exceptions" to the general rule that the *status quo* must be restored before rescission of a contract can be made operative. This is because the vendee had received as proceeds of the property fraudulently obtained more than he had paid to the vendor.

The intimation in the note to *Sisson v. Hill* (R. 39 L. R. A.

I.) 21 L. R. A. 208, that the case is opposed to the current of authority, although criticised in the opinion in the present case, seems to be fully justified by the decisions. That case did not come within the exception above stated, but that exception was recognized and clearly pointed out in the note to *Sisson v. Hill* on page 209.

slip v. French, 52 Wis. 518; *Somers v. McLaughlin*, 57 Wis. 358; *Hoffman v. King*, 70 Wis. 372; *McConnell v. Hughes*, 83 Wis. 25; Cobbey, Replevin, ¶¶ 258, 265, 279; *Stephenson v. Hart*, 4 Bing. 476; *Caldwell v. Bartlett*, 3 Duer, 841; *Tilcomb v. Wood*, 88 Me. 561; *Jennings v. Gage*, 18 Ill. 610, 56 Am. Dec. 476; *Williams v. Given*, 6 Gratt. 268; *Keyser v. Harbeck*, 3 Duer, 373; *Allison v. Matthieu*, 3 Johns. 235; *Malcom v. Loveridge*, 18 Barb. 372; *Andrews v. Dieterich*, 14 Wend. 82; *Welker v. Wolverkuehler*, 49 Mo. 36; *Hendricks v. Goodrich*, 15 Wis. 679; *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96; *Wilbur v. Flood*, 16 Mich. 40, 98 Am. Dec. 208; *Moriarty v. Stofferan*, 89 Ill. 528; *Thompson v. Peck*, 115 Ind. 512, 1 L. R. A. 201; *Powers v. Benedict*, 88 N. Y. 605; *Farwell v. Hanchett*, 120 Ill. 578; *Wells, Replevin*, ¶ 381; 2 Parsons, Contr. *780; *Ames v. Moir*, 180 Ill. 582; *Gould v. Cayuga Nat. Bank*, 86 N. Y. 82.

In all actions of trover or replevin to recover the property parted with, and in all actions based solely upon the original relations between the parties, the plaintiff must show that he rescinded the fraudulent contract before the commencement of the action.

Tisdale v. Buckmore, 83 Me. 461; *Stevens v. Hyde*, 32 Barb. 171; *Thompson v. Peck*, 115 Ind. 512, 1 L. R. A. 201; *Stuart v. Hayden*, 36 U. S. App. 463, 72 Fed. Rep. 402, 18 C. C. A. 618; *Pangborn v. Ruemenapp*, 74 Mich. 578.

The party electing to rescind must also place the other party as nearly as possible *in statu quo*. To do this, if he has received anything under the contract, whether it be property or securities, he must restore it. To this general rule there may be an exception of the case where that which was received was absolutely worthless. But the burden to show this would be on the party who had failed to restore it.

Cooley, Torts, p. 504.

If a party would rescind a contract of sale on the ground of fraud on the part of the vendee, it is his duty to return what he has received in payment before he can maintain an action for the goods sold.

Cushing v. Wyman, 38 Me. 589; *Bisbee v. Ham*, 47 Me. 543; *Potter v. Monmouth Mut. F. Ins. Co.* 63 Me. 440; *Downer v. Smith*, 32 Vt. 1, 76 Am. Dec. 148; *Coghill v. Boring*, 13 Cal. 213; *Jewett v. Petit*, 4 Mich. 508; *Wilbur v. Flood*, 16 Mich. 40, 98 Am. Dec. 208; *Andrews v. Hensler*, 73 U. S. 6 Wall. 254, 18 L. ed. 787; *Cahn v. Reid*, 18 Mo. App. 115; *Van Liew v. Johnson*, 4 Hun, 415; *Thompson v. Peck*, 115 Ind. 512, 1 L. R. A. 201; *Bowen v. Schuler*, 41 Ill. 196; *Thayer v. Turner*, 8 Met. 552; *Kimball v. Cunningham*, 4 Mass. 502, 3 Am. Dec. 280; *Fisher v. Conant*, 3 E. D. Smith, 199; *Wheaton v. Baker*, 14 Barb. 594.

A party must affirm or avoid the entire contract as a whole. He cannot treat it as good in part and void in part.

Higham v. Harris, 108 Ind. 246; *Hunt v. Silk*, 5 East, 449; *Jarrett v. Morton*, 44 Mo. 275; *Johnson v. Walker*, 25 Ark. 196; *Ellington v. King*, 49 Ill. 449; *Young v. Stevens*, 48 N. H. 183; *California Steam Nav. Co. v. Wright*, 8 Cal. 585; *Burg v. Cedar Rapids & M. R. Co.* 32 Iowa, 101; *Barrie v. Earle*, 148 Mass. 1, 58 Am. Rep. 126; *Dawson, Town & G. Co. v.* 39 L. R. A.

Woodhull, 82 U. S. App. 134, 14 C. C. A. 464, 67 Fed. Rep. 451; *Minah Consol. Min. Co. v. Briscoe*, 47 Fed. Rep. 376; *Bohall v. Diller*, 41 Cal. 535; *Latham v. Davis*, 44 Fed. Rep. 862; *Gay v. Alter*, 102 U. S. 79, 26 L. ed. 48.

Seaman, District Judge, delivered the following opinion:

The action is replevin for goods purchased by the assignor under fraudulent representations which induced the sale, and the verdict is special, rendered by direction of the court, finding in favor of the defendants for the value of all goods purchased on and prior to March 23, 1897, and in favor of the plaintiff for all the goods which were purchased after that date. The direction of alverdict in favor of the defendants for the value of the goods covered by the earlier purchases was founded wholly upon the view that replevin could not be maintained because payments had been made and accepted by the plaintiff to the amount of \$1,411,—which were made generally upon account and were clearly applicable to the first purchase of goods, embracing the invoices down to and including March 23, 1897,—and there was neither return nor tender of the amount so paid; and this, notwithstanding the undisputed fact that goods had been sold from such purchases by the assignor prior to his assignment in excess of the amount so paid. If this view of the law was correct, or even if it appears to be supported by the weight of authority, the verdict should not be disturbed, as I should deem it proper to leave it for determination on writ of error, if I entertained serious doubt as to the doctrine applicable in such case. But an examination of the authorities cited for and against the proposition, and consideration of the grounds which lie at the foundation of the general and well-settled rule that the *status quo* must be restored before rescission of the contract can be made operative, convince me that the case in that regard is within one of the recognized exceptions to the rule; and that tender of the amount paid on account of the purchases was not essential to rescission, the condition precedent for replevin of the goods remaining on hand, because it appears beyond dispute that goods included in the same purchase, and not found, had been sold by the vendee exceeding the aggregate of such payments, both in the invoice value and in the amount realized from such sales.

The general doctrine clearly prevails that a voidable contract cannot be rescinded in part while affirmed as to the residue; that the right to treat the transaction as though no contract were entered into does not allow the retention of any advantages derived under the contract relation. The authorities recognize exceptions to this rule, although the broad exception stated in Parsons on Contracts as to all cases in which fraud constitutes the ground for rescission does not appear to have found acceptance. But the transaction in question is, in my opinion, entitled to exception as a whole by reason of the sales by the vendee out of his fraudulent purchase, as the severance is his act, depriving the defrauded vendor of any opportunity to exercise his election to rescind as to such goods; and the remittances sent to

the vendor, being received before discovery of the fraud and within the invoice value, are justly applicable to the conversion by way of indemnity, and its retention will not, under the circumstances, be treated as ratification of the contract. Assuming, as it must be assumed here, that the purchase was effected through the fraudulent representations of the vendee, he made these sales in perpetuation of that fraud. To return to him the amount so paid over would operate as a premium upon fraud, giving him all the benefits at the expense of the defrauded party. Instead of restoring the *status quo*, such requirement would aggravate the injury and contravene the purposes of the rule. In *Sisson v. Hill*, 18 R. I. 212, 21 L. R. A. 207; *Sloane v. Shaffer*, 156 Pa. 59; *Schofield v. Shaffer*, 156 Pa. 65; *Henry L. Crane Boot & Shoe Co. v. Trentman*, 84 Fed. Rep. 620; and other cases cited on behalf of the plaintiff,—similar questions were clearly presented, and repayment or tender was held unnecessary to effect rescission; and I am of opinion that the conclusions there reached are within, and not opposed to, the current of authority, notwithstanding the *note* to that effect appended to *Sisson v. Hill* (R. I.) in 21 L. R. A. 207, 18 R.

I. 212. The case of *Thompson v. Peck*, 115 Ind. 512, 1 L. R. A. 201, cited as holding *contra*, is clearly distinguishable in the fact that the entire consideration which was paid or received upon two separate contracts was retained (the notes being held *prima facie* payment in that state), while the verdict gave recovery for goods derived under all the contracts of purchase indiscriminately. Clearly, no ground was established for the exception of such transactions from the rule. Neither *Stuart v. Hayden*, 86 U. S. App. 462, 18 C. C. A. 618, and 72 Fed. Rep. 403, nor the other authorities cited by defendants, seem to me applicable upon the state of facts shown in this case. I am constrained, therefore, to the opinion that *the verdict must be set aside*; and it is so ordered.

The motion for judgment *non obstante verdicto* must be denied, as the case is not, in my opinion, within the line to which such action is applicable. Neither is the verdict in such shape that the finding in question can be disregarded, and judgment be entered for the plaintiff as to the value of the goods in the first purchase. Let orders be entered accordingly.

CALIFORNIA SUPREME COURT (Department 1).

PEOPLE of the State of California, *Respt.*,
v.
TRUCKEE LUMBER COMPANY, *Appt.*
(116 Cal. 397.)

1. Pollution of the water of a river by means of refuse from a sawmill, so as to destroy the fish therein, is a nuisance.

NOTE.—Governmental control over right of fishery.

Some control over rights of fishery has always been exercised and upheld by the courts. Even in case of fisheries in the ocean the government may control the conduct of its own citizens, although, without treaty regulations, the modern rule seems to be that such control cannot be extended beyond the 3-mile line as against citizens of foreign states.

By 46 & 47 Vict. chap. 22, regulations are made for the exclusive fishery limits of the British islands and for British fishing-boats outside of such limits, and the jurisdiction of an offense is given to sea-fishery officers, and their jurisdiction is held to be exclusive. *Queen v. Cubitt*, L. R. 22 Q. B. Div. 622.

If the political branch of the government assumes jurisdiction over a certain water, the courts will not inquire into it, but will act upon the jurisdiction so assumed. *The Kodiak*, 53 Fed. Rep. 128.

By a convention between England and France regulations were made as to fishing upon the seas lying between the two countries. By the English act to enforce the convention, jurisdiction over violations of it is given to justices of the peace, and therefore no action can be maintained in the Queen's bench for injuries done by a violation of the act. *Marshall v. Nicholls*, 16 Jur. 1155, 21 L. J. Q. B. N. S. 343, 12 Q. B. 882.

The award of the arbitrators under the arbitration treaty between the United States and Great Britain concerning the seal fisheries determined 89 L. R. A.

2. The state has a right to protect fish in all streams through which they have freedom of passage to and from the public fishing grounds, although they flow over lands entirely subject to private ownership.

3. The source, course, and destination of the rivers of the state are a matter of judicial cognizance.

4. A riparian owner's exclusive right

that the United States had no exclusive jurisdiction over the waters of Behring sea beyond the 3-mile limit, and it cannot therefore prohibit the taking of seals beyond that point. *The La Nina*, 44 U. S. App. 648, 75 Fed. Rep. 513, 21 C. C. A. 434; *The Alexander*, 44 U. S. App. 650, 75 Fed. Rep. 519.

The seal fishery act of 1891 (54 & 55 Vict. chap. 19) provides that a person belonging to a British ship shall not kill, or take, or hunt, or attempt to kill or take, any seal within Behring sea during the period limited by the order, and places upon a person found within the sea the burden of showing that he was not violating the act. *The Oscar and Hattie v. Reg.* 23 Can. S. C. 396.

After the award of the arbitrators the United States passed a statute prohibiting its citizens from taking seals within 60 geographical miles of the Pribilof islands, which the courts will enforce. *The James G. Swan*, 77 Fed. Rep. 473.

Section 1956, Rev. Stat. of the United States, forbade the killing of seals within the limits of Alaska territory or the waters thereof, except by persons authorized to do so by the government. *The Kodiak*, 53 Fed. Rep. 128.

And all licensed vessels found within the prohibited zone are presumed to have been violating the act. *United States v. The Jane Gray*, 77 Fed. Rep. 908.

If the government contracts with an individual to permit his killing a certain number of seals each year in its fisheries, the contract will be broken so as to entitle the other party to damages

to fish in the water upon his own land does not include the right to destroy the fish, he does not take.

5. Making the unlawful destruction of fish a misdemeanor and punishable as such does not preclude a civil proceeding to enjoin it as a nuisance.

6. The attorney general may proceed, without the intervention of a private relator, to enjoin the unlawful destruction of fish.

(April 8, 1897.)

in case of an agreement by the government with a foreign nation to prevent the killing of any seals for a certain time. *United States v. North American Commercial Co.* 74 Fed. Rep. 145.

In *Queen v. The Ainoko*, 4 Can. Exch. 195, it was held that the mere presence of a ship within the zone prohibited by the act of regulating the seal fisheries owing to a bona fide mistake in the master's calculations will not justify a forfeiture of the vessel.

Under the British act of 1891, relating to the Behring seal fisheries, a vessel found within the prohibited limits in order to escape forfeiture was bound to show that fishing or shipping implements on board had not been used for illegal sealing during the voyage. *Queen v. The Oscar and Hattie*, 3 Can. Exch. 241.

As between governments.

If a body of water is wholly within the dominion of a country it may regulate the public right of fishing therein, and the regulations will apply to acts done more than 3 miles from the shore. *Mowat v. McFee*, 5 Can. S. C. 65.

In *The Grace*, 4 Can. Exch. 283, it is said that it is an axiom of international law that every state is entitled to declare that fishing on its coasts is an exclusive right of its own subjects.

In case a river forms the boundary between two states, each state has the power to exclude the citizens of the other state from fishing on its side of the middle line of the stream, and it has exclusive power to regulate the fisheries within such limits. *Re Mattson*, 69 Fed. Rep. 535.

By the compact between Maryland and Virginia, Virginia has the right to make such regulations, with the consent of Maryland, as may be necessary to protect its fisheries, and when the regulations are properly made and consented to they may be enforced in Virginia against citizens of Maryland. *Hendricks v. Com.* 75 Va. 384.

A body of water having well-defined shores and no current, lying entirely in the state of Iowa a quarter of a mile from the main channel of the Mississippi river and forming no part of that river for the purpose of navigation, is within the jurisdiction of Iowa, and within the provisions of a statute against the use of seines in the waters of that state, and not within an exception of boundary waters. *State v. Haug*, 95 Iowa, 413, 29 L. R. A. 390.

Under the treaty between the United States and Great Britain of 1818, and the British and Canadian laws to enforce it, a United States fishing vessel is liable to seizure and confiscation if after throwing its net into the sea it is permitted to drift within the 3-mile limit, and proceeds to secure the fish from the net there. *Queen v. The Frederick Gerring, Jr.* 5 Can. Exch. 164. Affirmed *The Frederick Gerring Jr., v. Queen*, 27 Can. S. C. 271.

The 3-mile limit does not apply to the great lakes but the sovereignty of the respective states reaches to the boundary line between them, and a foreign vessel may be condemned if it is found fishing over the boundary line contrary to the laws of the 89 L. R. A.

A PPEAL by defendant from an order of the Superior Court for Nevada County refusing to vacate a preliminary injunction restraining defendant from polluting the waters of a river. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. F. McGlashan and Thomas S. Ford, for appellant:

The allegation of the complaint that the dumping of sawdust, etc., in the Truckee river is a public nuisance, is a mere erroneous conclusion of law.

state, without a license. *The Grace*, 4 Can. Exch. 283.

As between governments and their subdivisions.

An act regulating the time and manner of taking fish in the sea within the territorial limits of a state is binding on citizens of other states, and upon vessels licensed as fishing vessels under the laws of the United States. *Dunham v. Lamphere*, 2 Gray, 268.

As against the general government, the state may make regulations for the protection of fisheries within bays upon its coast which are not more than 6 miles wide at the mouth, and such regulations may be enforced against vessels licensed under the laws of the general government. *Manchester v. Massachusetts*, 189 U. S. 240, 35 L. ed. 159, Affirming *Com. v. Manchester*, 152 Mass. 230, 9 L. R. A. 238.

The dominion parliament in Canada has the right to legislate on the subject of fishery regulations. *Queen v. Robertson*, 6 Can. S. C. 52.

The dominion has no authority over the question of the right to take fish from particular waters. And it therefore has no right to lease private rights of fishery in the waters. This right belongs to the province. *Queen v. Robertson*, 6 Can. S. C. 52.

The dominion Parliament has the right to control in such manner as in its discretion shall seem expedient all deep-sea fishing, and the right to take all fish ordinarily caught either on the sea coast or in the great lakes or in the rivers of the dominion, and such as are valuable for food within the dominion, or for exportation for that purpose, or for any other purpose of trade and commerce, and must include as well the right to catch fish as the designation and control of the places where the fish may be caught and the times and manner of catching them. *Queen v. Robertson*, 6 Can. S. C. 52.

General right to regulate fishery.

The legislature has the authority to regulate the taking of fish within the state, and to inflict penalties for a violation of their regulations. *Burnham v. Webster*, 5 Mass. 206.

This is particularly true so far as the public rights are concerned. These have always been held to be under the control of the government.

The fishing which the public has in any public or private river or creek, fresh or salt, is subject to the laws for the conservation of fish and fry, which are many. *Haile, de Jure Maris*, 23.

The state has authority over fisheries so far as the public or common rights are concerned. *Donnell v. Joy*, 85 Me. 118.

It is within the power of the legislature to authorize such use of a stream which is not navigable as will wholly destroy a public fishery. *Hovess v. Grush*, 181 Mass. 207.

The rights of fishing to which the people of Rhode Island are entitled, under the Constitution guaranteeing continuance of the rights previously existing, are not violated by filling a cove covered by tide water under the authority of a state statute if the fisheries have ceased to have a substantial

The allegation of an erroneous conclusion of law cannot be considered of any force, or govern the legal effect of the specific facts alleged.

Byrum v. Stockton Combined Harvester & Agri. Works, 91 Cal. 657; *Savings & L. Soc. v. Burnett*, 106 Cal. 539.

Conclusions of law are surplusage, and tender no issue, and are not admitted by demurrer.

Johnson v. Kirby, 65 Cal. 487; *Kent v. Snyder*, 80 Cal. 674; *Stokes v. Geddes*, 46 Cal. 17; *Brooks v. Haslam*, 65 Cal. 421; *Triscony v. Orr*,

49 Cal. 612; *Poorman v. Mills*, 85 Cal. 119, 95 Am. Dec. 90.

The facts showing the injury must be set forth in detail, and such an averment is a mere conclusion, not entitled to any weight.

Merced Min. Co. v. Fremont, 7 Cal. 322, 68 Am. Dec. 262; *Branch Turnp. Co. v. Yuba County Supers.* 18 Cal. 190; *Burnett v. Whitesides*, 18 Cal. 157; *Waldron v. Marsh*, 5 Cal. 119.

It is not unlawful in this state to poison or kill fish, and is not a public nuisance.

value. *Clarke v. Providence*, 18 R. I. 387, 1 L. R. A. 726.

Power to grant rights to individual.

The effect of the rule that the government has control over the public rights of fishery is that it may take away the public right and vest it in an individual.

Prior to Magna Charta the Crown had the right to create a several fishery in tidal water which be could grant to a private individual even after the adoption of that statute. *Malcolmson v. O'Dea*, 10 H. L. Cas. 568, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178.

Where the provisions of Magna Charta are not in force, as in the province of Quebec, the Crown in right of the province may grant exclusive rights of fishing in tidal water. *Re Jurisdiction over Provincial Fisheries*, 26 Can. S. C. 444.

Although the power of the Crown to grant private fisheries in tidal waters was restrained by Magna Charta the right of Parliament to do so is undoubted. *Queen v. Robertson*, 6 Can. S. C. 52.

A several salmon fishery granted by the Crown to a subject before Magna Charta does not merge if it reverts to the Crown, but may be granted by it to another subject. *Duke Northumberland v. Houghton*, 39 L. J. Exch. N. S. 66, L. R. 5 Exch. 127, 22 L. T. N. S. 491, 18 Week. Rep. 495.

The presumption is that a grant of land on a river above the ebb and flow of the tide passes the right of fishery to the grantee. If the right is expressly reserved the Crown may grant the right of fishery to another person, and there is no common right of fishery in the public. *Queen v. Robertson*, 6 Can. S. C. 52.

In *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250, it is said that the state may grant a private right of fishery in a public river.

The California act of 1859 gave the owner of land fronting on Eel river the right of exclusive fishing privileges, and the court held that although the streams and shores to high-water mark were in the public the legislature might grant qualified rights therein to individuals so far as they are not inconsistent with the principal use. *Heckman v. Swett*, 99 Cal. 309.

Michigan How. Stat. § 2172, protects the rights of riparian owners along the lakes and in the adjacent bays and inlets to the exclusive fishing with stationary nets for 1 mile from low-water mark. *Lincoln v. Davis*, 58 Mich. 375, 51 Am. Rep. 116.

A statute providing that the one who first makes a weir for catching fish on any flat shall not be interrupted in its enjoyment will apply to pounds when they come into use. *Stannard v. Hubbard*, 34 Conn. 370.

Under a statute providing that when any person shall have been at the expense of clearing a fishing place in a river, and has used the right to take fish there in the season thereof, he shall have the right of enjoyment of the fishing place; the right cannot be assigned to another person. *Munson v. Baldwin*, 7 Conn. 168.

The Washington act of 1898 provides for the 39 L. R. A.

licensing of persons wishing to fish in waters of Puget sound. *State, Curry, v. Crawford*, 14 Wash. 373; *Morris v. Graham*, 16 Wash. 348.

Under the Washington statutes a licensee of a fishing right may maintain a bill to enjoin a person from constructing a pound within a specified distance of his nets contrary to the provisions of the statute. *Walker v. Stone*, 17 Wash. 578.

Some of the states have recently exercised this power for the purpose of promoting the cultivation of food fish. The statutes make provision for the exclusive occupation of waters by persons who will cultivate fish in them.

A statute permitting the flowing of land for the purpose of raising a pond for the cultivation of useful fishes is constitutional. *Turner v. Nye*, 154 Mass. 579, 14 L. R. A. 487.

The Pennsylvania act of June 3, 1878, permits the owner of a pond to make of it a private fish-pond upon which no trespassing shall be allowed, by stocking it with fish and posting certain notices. *Com., Glenburn Fish & G. Protective Assn., v. Singer*, 19 Pa. Co. Ct. 627.

The Maryland statute for the protection of fish in artificial ponds has no application to ooves of a navigable water. *Soilers v. Sollers*, 77 Md. 148, 20 L. R. A. 94.

To make a body of water private so as to enable the owner to exclude other persons from fishing in it under the act of 1878, after he had stocked it with fish, it must be wholly on his land so that the fish with which it is stocked may be confined there. *Reynolds v. Com.* 96 Pa. 458.

And the same is true under the act of 1878. *Benscoter v. Long*, 157 Pa. 208.

In *People v. Hall*, 8 App. Div. 15, the question was raised, but not decided, whether a pond could be protected as a private propagating ground which was not wholly on the land of the one claiming it.

The mere fact that one who cultivates fish in a pond does not own the whole pond, and there is nothing to prevent the fish from going over land of another person, will not give strangers a right to fish in the pond of the one cultivating the fish without his permission. *Com. v. Skatt*, 162 Mass. 219.

The New Hampshire laws forbid the taking of fish from any pond wholly within the control of a person who owns the land around it and has expended money and labor in stocking it with fish for his own use. *State v. Welch*, 66 N. H. 178.

The act of 1871 gave the proprietor of an unnavigable tidal stream where it emptied into salt water, who encloses it for the purpose of cultivating fishes, control of the stream within his own premises and around the mouth of the stream. *Eastham v. Anderson*, 119 Mass. 528.

No notice of an intention to lease a pond lying wholly within one township need be given where the application is made by the town and the lease is made to it. *Com. v. Elliot*, 146 Mass. 5.

The licensee of a great pond for the purpose of cultivating useful fishes under the statute of 1869 has the exclusive right of fishing in the whole pond, although he has not occupied any part of it

There is no cause of action, for the reason that the plaintiff is not entitled to sue, and this action cannot be maintained in the name of the people.

People v. Haggin, 57 Cal. 587.

The protection of fish in private streams is exclusively intrusted to the fish commissioners and the criminal courts.

Cal. Pol. Code, § 848; Pol. Code, §§ 470, 642, sub. 1; Stat. 1895, p. 169.

An injunction against a public nuisance is not favored and will not be exercised where

with inclosures or appliances to carry out the purposes of the lease. *Com. v. Weatherhead*, 110 Mass. 175.

Under the Massachusetts statutes the fish commissioners may lease a great pond for the cultivation of useful fishes and prohibit other persons from catching fish therein, even those which are migratory and come in from the sea. *Com. v. Vincent*, 108 Mass. 447.

The legislature may lawfully give the right to take fish for propagation during a time that they cannot be taken for other purposes. *People v. Brooks*, 101 Mich. 88.

Right of individual.

The general rule has been that in non-navigable waters the riparian owner had, as incident to his ownership of the soil, a right to fish in the water which was exclusive of all other persons.

The right of a riparian owner to fish in the water of a private river is not a riparian right in the nature of an easement, but is strictly a right of property. *Queen v. Robertson*, 6 Can. S. C. 52.

But the King had the right to royal fish, and no subject can have them without the King's special grant. *Royal Fishery of the Banne's Case*, Davies Rep. 149, Cited in Angell, *Tidewaters*, p. 35 Appx.

But in Massachusetts the right of the individual has never been recognized. The rights of fishery, even in non-navigable waters, have been held to be public so that the state could dispose of them at its pleasure.

In *Cottrill v. Myrick*, 12 Me. 222, it is said that in Massachusetts, from its earliest settlement, the common-law rule that fisheries in streams not navigable belong to the riparian proprietors has been modified. It was deemed most conducive to the public good to subject salmon, shad, and alewife fisheries to public control whenever the legislature thought proper to interfere.

In *Vinton v. Welsh*, 9 Pick. 87, it is said to be the rule of Massachusetts that the legislature having always exercised the right of regulating fisheries in rivers not navigable, the common-law right of fishery in the riparian proprietors is subject to such regulations as the legislature may make.

The legislature may give to a town the right to improve a great pond for public fishing without making compensation to a riparian owner of the stream connecting with it whose fishery rights are destroyed thereby. *Cole v. Eastham*, 133 Mass. 65.

Part of the proprietors of a pond cannot give an exclusive lease of the right of fishing therein. *Com. v. Parley*, 130 Mass. 469.

If a grant of land is made to certain persons as trustees for settlers on it who have a right to take fish in the adjoining waters, the fishery is common to all the settlers and cannot be exclusively claimed by the trustees, and regulations may be made for the taking of fish which will exclude the trustees, although they have the title to the land bordering on the fishing place. *Nickerson v. Brackett*, 10 Mass. 212.

In *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 383, it is said that the legislature in establishing the right to occupy fresh-water streams not connected 89 L. R. A.

the object sought may be as well obtained in the ordinary tribunals.

2 Beach, Inj. § 1078; 1 Spelling, Extraordinary Relief, § 398; *Broomhead v. Grant*, 88 Ga. 451; *Yolo County v. Sacramento*, 86 Cal. 196; *Lawson, Rights, Rem. & Pr.* § 2941.

Where the statute creates a new liability, gives a penalty, and designates the mode and form of proceeding for its recovery, including the enforcing tribunal, all other modes of proceeding and jurisdiction are excluded.

Penal Statutes, 7 Coke, 87a; *Smith v. Drew*,

with the sea for the use of mills, made no provision in regard to fish. And that the right of fishery in such streams was exclusive in the owner of the banks.

And the same rule was followed in Maine.

The Maine Constitution does not prohibit the interference by the legislature with fisheries in streams not navigable, since such power was reserved by the legislature of Massachusetts before the separation of Maine from it, and the common-law right of the riparian owner made subject to the public control. And therefore the legislature may give to a stranger a right of fishing in a certain stream to the exclusion of the riparian owner. *Lunt v. Hunter*, 16 Me. 9.

But under the Maine statutes no weir can be placed below low-water mark in front of the shore or flats of a riparian owner so as to interfere with the approach of fish to a weir which he may locate on his own land. *Donnell v. Joy*, 86 Me. 118.

Under the New Hampshire laws the owner of a pond which is entirely out off from other waters of the state may take trout from it at any time, the legislature not having attempted to interfere with such right. *State v. Roberts*, 59 N. H. 250, 47 Am. Rep. 199.

Under the Tennessee act making it a misdemeanor to catch fish otherwise than by hook and line, making an exception in favor of owners of private waters, a person acting under license of the owner may fish with a net in private water properly inclosed as required by the statute. *Maney v. State*, 6 Lea, 218.

Power to interfere with private right.

Notwithstanding the individual may have a right to fish in streams passing over his land, the state may for the common good regulate the time and manner of taking fish so that the general interests may not be diminished.

Laws for the regulation of the time and appliances for catching fish may prohibit a landowner from fishing in a small stream running through his own land. *Com. v. Bender*, 7 Pa. Co. Ct. 624.

The owner of a lake has no constitutional right to fish therein which is unwarrantably interfered with by prohibiting them to be taken except in a specified manner. *Peters v. State*, 96 Tenn. 682, 38 L. R. A. 114.

If a private lake connects with a public body of water like Lake Ontario, the owners of the private lake will be subject to the regulations which the legislature makes for the control of the fishing for the public good. *People v. Doxtater*, 75 Hun. 472.

A state may prohibit the taking of fish by means of artificial lights and spears over a man's own lands, if the water there is connected with other bodies of water through which fish migrate. *People v. Collison*, 85 Mich. 105.

The Massachusetts statute prohibited the owner of land on a stream from taking trout with a net from the stream of his own land as well as prohibited other persons from doing so. *Com. v. Follett*, 164 Mass. 477.

The Massachusetts Public Statutes, chap. 91, § 53, imposing a penalty for selling trout, extends to the

5 Mass. 514; *Andover & M. Turnp. Corp. v. Gould*, 6 Mass. 44, 4 Am. Dec. 80; *Com. v. Howes*, 15 Pick. 282; *Clark v. Brown*, 18 Wend. 220; *Ree v. Robinson*, 2 Burr. 808; *Millar v. Taylor*, 4 Burr. 2319; *Elder v. Bemis*, 2 Met. 599; *Wiley v. Yale*, 1 Met. 553; *Reed v. Omnibus R. Co.* 83 Cal. 218; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

The attorney general has no authority to sustain the present action.

People v. Equity Gaslight Co. 141 N. Y. 282; *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515,

sale of trout artificially propagated and maintained, and is valid. *Com. v. Gilbert*, 160 Mass. 157, 22 L. R. A. 439.

The legislature may regulate fisheries which by the common law would be private property. *Peables v. Hannaford*, 18 Me. 106.

The legislature may prohibit the taking of fish during certain seasons of the year or with certain implements, even on the part of a private individual, if such waters connect with the public waters of the state. *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, *Reversing Bridges v. People*, 89 Ill. App. 650.

The state, by virtue of its sovereignty, has authority to regulate fisheries within its boundaries, and may prescribe the places as well as the times in which fish may be taken, and may make exclusive grants of fisheries in designated waters as far as the same do not impair private rights already vested. *Heckman v. Swett*, 107 Cal. 276.

A complaint is not sufficient which does not show that the attempted catching of fish was within the prohibited space. *State v. Cottle*, 70 Me. 196.

A person is not illegally deprived of his property by a law which restricts the right of fishing because his land and fishing tackle will be of less value. *People v. Brooks*, 101 Mich. 98.

The legislature may regulate fisheries by prohibiting the exercise of a common-law right unless it is secured by contract or by the Constitution. *Bennett v. Boggs*, *Baldw.* 60.

The legislature cannot give a right of passage over private property to reach public waters for the purpose of fishing. *New England Trout & S. Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569.

Under the Canadian act of 31 Vict. chap. 60, §§ 2 and 19, giving the minister of marine and fisheries the right to issue licenses when the exclusive right of fishing does not already exist, and to forbid fishing except under authority of license, there is no right to forbid salmon fishing on private property without a license. No statute should be construed to give a right to license the right of fishing on private property unless the power is given in clear and unequivocal language or irresistible inference. *Venning v. Steadman*, 9 Can. S. C. 206.

Boatable waters, within the meaning of a constitutional provision giving the right to fish in all boatable and other waters, not private property, are waters that are of common passage as highways for business or pleasure, and do not include all waters that may be boatable in fact. *New England Trout & S. Club v. Mather*, 68 Vt. 338, 33 L. R. A. 569.

Close time.

The state may prescribe a time during which fish cannot be taken.

The legislature has power to pass laws for the preservation of fish by limiting the time and mode of taking them. *Gentile v. State*, 29 Ind. 409; *State v. Hockett*, 29 Ind. 302; *State v. Boone*, 30 Ind. 225; *Stuttsman v. State*, 57 Ind. 119.

By 24 & 25 Vict. chap. 109, it was enacted that no person shall fish for, catch, or kill, by any means other than by a rod and line, between 12 o'clock noon on Saturday and 6 o'clock on Monday morning. 39 L. R. A.

28 Am. Rep. 264; *Atty. Gen. v. Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227; *District Atty. v. Lynn & B. R. Co.* 16 Gray, 242; *Atty. Gen. v. Bay State Brick Co.* 115 Mass. 431; *Atty. Gen. v. Sheffield Gas Consumers' Co.* 3 De G. M. & G. 304.

The facts alleged in the complaint do not constitute such a public nuisance as to justify the interference of a court of equity jurisdiction, and the attorney general has no power to sustain the action.

Atty. Gen. v. Consumers' Gas Co. 142 Mass.

ing, and it was held that a net used for salmon fishing was forfeited, although no fish were caught. *Ruther v. Harris*, L. R. 1 Exch. Div. 97, 45 L. J. M. C. N. S. 103, 38 L. T. N. S. 825.

The act of 41 & 42 Vict. chap. 39, forbade any person fishing for any fresh-water fish between certain days, but made an exception of persons fishing in a private fishery with the leave of the owner, and it was held that to be within the exception the fishing must be with leave of the owner, and not merely the occupier of the land. *Swanwick v. Varney*, 45 L. T. N. S. 716, 30 Week. Rep. 79, 46 J. P. 613.

Under a statute forbidding persons to take fish or to impede their passage in weirs from sundown Saturday until sunrise Monday, fish cannot be taken from the weir after sundown Saturday, although they entered before that time, and could not be secured because of the state of the tide. *Baker v. Wentworth*, 17 Me. 347.

A statute making a close time from the 15th day of July to the 1st day of April following does not repeal a prior statute making a close time in each week of four days from Sunday morning until Thursday night. *State v. Thompson*, 70 Me. 196.

The serving by an innkeeper of trout on the regular bill of fare during the close time is a sale within the meaning of a statute prohibiting sales within such times. *State v. Beal*, 75 Me. 289.

By Maine Special Laws 1885, chap. 453, all persons are prohibited from taking bass from certain waters of the state during all seasons of the year except in the months of January and February. *State v. Adams*, 78 Me. 466.

By the statute of 1806, the fisheries of Orrington were placed under control of a committee to be chosen by the town, but it was held that a subsequent act of 1813, which prohibited the taking of fish on certain days of each week, was applicable to that town. *Com. v. Wentworth*, 15 Mass. 183.

The state may prohibit even owners of land on unnavigable streams from taking fish during the spawning season. *Com. v. Look*, 108 Mass. 452.

By the act of 1872, catching trout during certain times was prohibited under a penalty of \$10 for each one caught. *Purinton v. Ladd*, 58 N. H. 566.

The New York act of 1815 prohibited fishing in the Hudson river from sunset on Saturday to sunrise on the Monday following of each week. *Sickles v. Sharp*, 13 Johns. 497.

The legislature has power to prevent the taking of fish within the waters of the state at certain seasons of the year. *People v. Reed*, 47 Barb. 285.

The Nevada statute forbids the taking of trout from October until June. *Ex parte Hewlett* (Nev.) 40 Pac. 96.

The Vermont statute prohibited the taking or catching of pond pickerel from any waters of the state, public or private, between certain dates. *State v. Smith*, 61 Vt. 346.

The Maine statutes prohibit the taking of bass except during January and February. *State v. Adams*, 78 Me. 466.

Method of taking fish.

It is within the power of the state to preserve

417; *Atty. Gen. v. Sheffield Gas Consumers' Co.*, 8 DeG. M. & G. 804; *Memphis Gayoso Gas Co. v. Williamson*, 9 Heisk. 814; *People v. Horton*, 64 N. Y. 610; *Com. v. Passmore*, 1 Serg. & R. 219; *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222; *Queen v. Longton Gas Co.* 2 El. & El. 651; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 539; *People v. Stratton*, 25 Cal. 249.

It is customary and proper that such an action be brought and carried on upon the relation of some private person.

People, Schnell, v. Sausalito Land & F. Co. 106 Cal. 621.

from extinction fisheries in waters within its jurisdiction, by prohibiting exhaustive methods of fishing or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish. *Lawton v. Steele*, 152 U. S. 183, 38 L. ed. 385.

Taking fish by means of numerous single-baited hooks and lines set in holes through the ice and tended by one person is a violation of a statute prohibiting the taking of fish in any other manner than by the ordinary process of angling with a single-baited hook and line. *State v. Skolfield*, 63 Me. 266.

A purse or drag net cannot be used on the Maine coast in a small indentation between headlands which are not 3 nautical miles apart, although the depth of the bay is slight so that a cove above is formed rather than a bay. *State v. Murray*, 84 Me. 135.

There may be inlets and inner harbors within a large bay to which the statute will apply. *State v. Thompson*, 85 Me. 189.

Legislative authority to construct a dam across a tidal river does not exempt it from the general statute for the protection of fisheries so as to permit the use of nets for fishing above the dam, if fish still migrate up and down the river past the dam. *Oliver v. Bailey*, 85 Me. 161.

Where the statute prohibits the setting of a net except when the owner is actually drawing or dragging a net for fish, a person engaged in dragging for fish cannot set his net in such a way as to prevent the passage of fish up the river, and keep it set for several hours while he is engaged in dragging another net; but the stationery net and drag net must both be put into the water at the same time. *Hanscomb v. Russell*, 15 Gray, 162.

By the Massachusetts statute it is made an offense to take smelt otherwise than by hook and line. *Com. v. Prescott*, 151 Mass. 60.

The Michigan act of 1885 prohibits the taking of fish by means of nets in waters of the state except the great lakes and their connecting rivers. *People v. Kirsch*, 87 Mich. 539.

A statute forbidding the taking of fish by any other means than by hook and line is valid. *State v. Mrozinski*, 59 Minn. 465, 27 L. R. A. 76.

The acts for the regulation of the right of fishing in the Hackensack river do not prevent the use of nets during certain seasons of the year provided they do not extend more than one fifth across the stream. *Budd v. Sip*, 13 N. J. L. 348.

If suckers are excepted from a prohibition of taking fish with nets the court will not strike out the exception because other sections of the statute expressly mention suckers as fish which may be taken with nets in certain specified waters. *People v. Tanner*, 128 N. Y. 416, Affirming 88 N. Y. S. R. 349.

The legislature has the right to control and regulate the right of fishing in the public waters of the state, and may prohibit the taking of fish with nets in specified waters. *Lawton v. Steele*, 119 N. Y. 228, 7 L. R. A. 184.

Indians on a reservation within a state are bound 89 L. R. A.

In the present case no injunction bond is required,—the complaint is not sworn to. The defendant may be put to hundreds or thousands of dollars expense. There is no remedy against the sovereign.

Sharp v. Contra Costa County, 84 Cal. 284.

It is only in cases where the nuisance should be immediately suppressed, as in the case of a powder house, slaughter house, or chemical laboratory, that equity will interfere, until the slower process by indictment can be put in motion.

People v. Davidson, 30 Cal. 388.

to obey the laws of the state against killing fish with explosives. *People v. Pierce*, 18 Misc. 83.

The legislature may lawfully forbid fishing with pod-nets in specified waters. *Rea v. Hampton*, 101 N. C. 51.

In *Drew v. Hilliker*, 56 Vt. 641, it was held that a statute prohibiting fishing with nets in Lake Champlain and the rivers emptying into it was a proper regulation.

An exception of private ponds from a statutory provision making it unlawful to take fish in any way except by rod or line does not extend to a so-called lake covering an area of 1,040 acres of which one person owns 1,000 acres and another the remainder. *Peters v. State*, 96 Tenn. 682, 33 L. R. A. 114.

The possession of a gill net or seine except it is for use in certain waters specified by statute in which the use thereof is permitted may be made by statute a criminal offense. *State v. Lewis*, 124 Ind. 250, 20 L. R. A. 62; *Lewis v. State* (Ind.) 47 N. E. 675.

Under the English act of 1878, forbidding the fishing for trout with rod and line without a license, a person licensed to fish with rod and line will be subject to the penalty if he attempts to use three rods and lines at the same time while having only one license. *Combridge v. Harrison*, 64 L. J. M. C. N. S. 175.

By the North Carolina statutes persons fishing with pod-nets are made subservient to those fishing with seine drawn from the shore. *Hettrick v. Page*, 82 N. C. 65.

The New York act of 1892, chap. 488, § 135, prohibits the use of purse-nets in Long Island sound. *People, Huntington, v. Crennan*, 141 N. Y. 229.

Under the act of 1882, drawing a seine with intent to catch blue fish is prohibited. *Com. v. Pease*, 137 Mass. 676.

The act of 1887 prohibits the taking during certain months of fish by the use of nets or seines from the Damariscotta river as far up as the tide waters extend. *Thompson v. Lewis*, 83 Me. 223.

Under the Maine act of 1885, chap. 281, prohibiting the use of purse or drag nets for taking menhaden in a bay having an entrance of not more than 3 nautical miles, the test of the width of the entrance is not from headland to headland at the extremities of the bay, but from island to island lying between the headlands. *McClain v. Tillson*, 82 Me. 281.

By Maine Rev. Stat. chap. 40, § 70, the use of a net other than a dip net was forbidden in the fresh waters of the state, and it was held applicable to the great pond in Kennebec county. *State v. Towle*, 40 Me. 349.

The Washington statute provides that any person owning, operating, or using any pound-net or trap shall conspicuously show at night a bright, white light, under penalty of fine. *McGowan v. Larsen*, 29 U. S. App. 55, 66 Fed. Rep. 910, 14 C. C. A. 178.

In *State v. Goodwin*, 62 Vt. 191, two acts for the regulation of fishing were construed together, and it was held that taking fish with a hook and line in a certain lake was lawful at any time.

The facts alleged do not constitute a public nuisance.

A public nuisance must be a substantial injury to the public at large, and the discomforts must be physical, not such as depend upon taste or imagination.

Cleveland v. Citizens' Gaslight Co. 20 N. J. Eq. 201; 1 Spelling, Extraordinary Relief, § 410; *Babcock v. New Jersey Stockyard Co.* 20 N. J. Eq. 296.

The complaint does not set forth any facts showing the infringement of a public right.

1 Wood, Nuisances, 8d ed. § 428; *Lillywhite*

v. Trimmer, 16 L. T. N. S. 818; *Pearce v. Scotcher*, L. R. 9 Q. B. Div. 162; 8 Am. & Eng. Enc. Law, p. 26.

The owner of the soil has a special property in fish so long as they are in the water which flows over his land.

Fleet v. Hegeman, 14 Wend. 42; *Angell, Watercourses*, 7th ed. 68, 70, 65; *Adams v. Pense*, 2 Conn. 481; *Lewis v. Keeling*, 46 N. C. (1 Jones, L.) 299.

But his ownership is subject to legislative control and regulations.

Vinton v. Welsh, 9 Pick. 87.

Regulation of stream because of fish.

The preservation of fish in the streams of the state is a proper function of government. *West Point Water Power & L. Improv. Co. v. State*, Moodle, 49 Neb. 218.

As far as the waters of a state are common passageways for fish, they are of public character and subject to legislative control. *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199.

The state has a right by common law to protect fish in streams not navigable. *State, Weller, v. Snover*, 42 N. J. L. 341.

Streams in which alewives and other fish have been accustomed to ascend are subject to the regulations of the legislature. No individual can prescribe against this right which belongs to the public. *Cottrill v. Myrick*, 12 Me. 222.

Right to prevent obstruction of stream.

At common law a riparian owner could not interfere with the passage of fish up the stream. *Weld v. Hornby*, 7 East, 195, 8 Smith, 244.

In *Murphy v. Ryan*, 2 Ir. C. L. Rep. 143, 16 Week. Rep. 678, it is said that the law precludes the riparian proprietors from preventing the passage of fish through the river.

By the Massachusetts colonial statute of 15 Geo. II. chap. 6, persons who build a dam across a stream where salmon, shad, or other fish usually pass up into natural ponds to cast their spawn, were required to make sufficient passageway for the fish. At least where no provision has been made for compensation for the destruction of the fish below the dam, which will result from the stoppage of the passage of the fish in the stream. *Holyoke Water-Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 133.

Where a dam was authorized across a river with the proviso that a fishway should be erected, and if it should prove inadequate, compensation should be made to owners of fisheries above the dam, it was held that if the fishway should prove inadequate the owner should have an opportunity to make it adequate before suit brought, and if the statute provided a way for assessment of damages that was exclusive. *Bristol v. Ousatonie Water Co.* 42 Conn. 410.

No prescriptive right to maintain a dam without fishways can be acquired against the public. *Parker v. People*, 111 Ill. 581.

The statute may require everyone who constructs or maintains a dam to place suitable fishways in it. *Parker v. People*, 111 Ill. 581.

Under the Illinois act of 1885, forbidding the placing of anything in a stream which would substantially and materially interfere with the passage of the fish up and down the stream, a net cannot be maintained with wings which reach nearly to the banks on either side. *Summers v. People*, 29 Ill. App. 170.

Under a statute providing that no person shall place across any stream, any line in such a manner as to obstruct the free passage of fish up, down, or through the watercourse, a set line will 89 L. R. A.

not be unlawful unless it obstructs the free navigation of the stream. *Collins v. Bankers' Accl. Ins. Co.* 96 Iowa, 216.

Under the Illinois act of 1889, no net can be placed in any stream which would in any manner obstruct the free passage of fish up and down, or through the watercourse; and it was held that a person was liable for the acts of his employees if they pursued his general directions and he knew substantially what had been done. *Smith v. People*, 48 Ill. App. 130.

Notice of time when passageways shall be open for the running of fish must be given before an action can be maintained for the penalty for refusing to keep the stream open. *Hancock County v. Eastern River Look & Sluice Co.* 16 Me. 303.

Every owner of a mill dam holds it under the limitation that a sufficient and reasonable passageway shall be allowed for the fish, and this limitation is not extinguished by any neglect of the government in compelling the owner to comply with it. *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236.

The setting of a net in a river is not within the province law of 8 Anne, chap. 3, for preventing obstructions to the passage of fish in rivers. *Com. v. Ruggles*, 10 Mass. 391.

Where a town was given by statute the right of disposing of the privilege of taking certain kinds of fish in the river within its limits, and a penalty was prescribed for obstructing the passage of fish, it was held that the penalty was merely cumulative, and that a common-law action might be maintained against a person obstructing the passage of the fish. *Barden v. Crocker*, 10 Pick. 383.

In a river not navigable the riparian owner has the exclusive right of fishing to the thread of the stream except so far as this right has been qualified by legislative regulations. But this right does not include the right to prevent the passage of fish to the lakes and ponds for the multiplication of their species. *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

By the act of 1788, chap. 68, to prevent the destruction of fish in Mystic river, obstructions to the passage of fish up the river were prohibited. *Hyde v. Russell*, 2 Cush. 251.

In *Cleveland v. Norton*, 6 Cush. 380, it was held that the act of 1783, chap. 5, which imposed a penalty on a person who should, without liberty from the proper authorities, use any net or engine in any part of the creeks or ponds adjacent to a great pond where fish usually cast their spawn so as to take and obstruct the fish that pass up and down the creeks, did not apply to the taking of fish by such means in the arms, coves, or bays in the great pond itself.

The statute of 1818, chap. 109, provided a penalty for placing any net, seine, or obstruction in or across Charles river which would interfere with the free passage of fish up and down the river. *Watertown v. Draper*, 4 Pick. 165.

Where a corporation is chartered with power to build a dam, and authority is reserved to amend the charter, and the corporation is required to, and does, make compensation to the owners of fisheries

All statutes pertaining to the rights to take fish are in derogation of the common law.

8 Am. & Eng. Enc. Law, p. 89.

It would be sufficient to show that there was a public right by showing that at such a particular place it was a navigable river.

Ward v. Oreswell, Willes Rep. 268; *Tenant v. Goldwin*, 2 Ld. Raym. 1091.

The right to take fish in fresh-water streams belongs to the owners of the soil under them, to the exclusion of the public.

above the dam, but nothing is done as to rights below it, while the charter says nothing as to fishways a subsequent statute may require the maintenance of a fishway. *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 446.

In *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513, it is said that the maintenance of dams without fishways in an unnavigable river which is the outlet of a large inland lake, thereby obstructing the passage of migratory fish from the sea to the lake, is an indictable offense at common law.

By the Nebraska statute the owners of milldams are obliged to maintain proper fishways for the passage of fish from the lower to the higher level of the streams. *West Point Water Power & L. Improv. Co. v. State*, Moodie, 49 Neb. 218.

The New Hampshire statutes require the maintenance of fishways in dams. *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513.

After a dam has been maintained for twenty-one years, the legislature cannot require the owner to construct a passway through it for fish without making him compensation. *Woolever v. Stewart*, 36 Ohio St. 146, 38 Am. Rep. 569.

The common-law remedy for abatement of a nuisance does not apply to the erection of a dam without a fishway, under a statute providing that fishways shall be constructed, and that if upon inspection by the commissioners the ways shall be found inadequate the supervisors of highways shall make them conform to the provisions of the statute. *Criswell v. Clugh*, 3 Watts, 330.

In *Com. v. Pennsylvania Canal Co.* 66 Pa. 41, 5 Am. Rep. 329, it was held that purchasers of the state's rights in the canals could not be compelled by the legislature to maintain sluices in the dams for the passage of fish.

The Missouri statute requires persons building dams to maintain aprons on them in such a way that fish can pass over them in either direction whenever the stream is swollen beyond its normal capacity. *State v. Griffin*, 39 Mo. 49.

If the statute prohibits weirs without openings only in certain portions of the stream a complaint for violation of the statute must show that the weir was in the prohibited portion of the stream in case it alleges absence of an opening. *State v. Turnbull*, 78 Me. 362.

By the law of Massachusetts the rights of fishery in such rivers as the Connecticut are public rights, and unless there is some express provision to the contrary are subject to such reasonable regulations as the state may make for their protection; including the right to require of persons who own or build dams that they construct fishways therein. The payment of damages to the owners of fishing rights above a dam erected by a manufacturing corporation in a public stream will not, in case its charter is subject to amendment at any time, prevent the legislature from requiring it to construct a fishway to the satisfaction of the fish commissioners at any time it sees fit to do so. *Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 133.

But if permission is given to erect a dam on condition that compensation be made to the owners of fishery rights which will be injured by it, the 39 L. R. A.

6 Lawson, Rights, Rem. & Pr. § 2938.

There is no property in wild animals until subjected to the control of man.

Amory v. Flynn, 10 Johns. 102, 6 Am. Dec. 318; *Com. v. Chase*, 9 Pick. 15, 19 Am. Dec. 348.

In England and the United States (where the common law prevails) there is a special property in fish, and the exclusive right to fish belongs to the owner of the land (in non-navigable streams).

legislature cannot, after such compensation has been made, and the dam erected with fishways which the commissioners held to be sufficient, require it to be altered at large expense so as to provide for a fishway through it. *Com. v. Essex Co.* 18 Gray, 247.

The legislature has no power to compel the opening of a passageway for fish in a dam on private property where the river is not navigable and has passed to private persons. The court says the legislature has no greater right to pass laws directing how the waters of that river shall be used than they would have to regulate the use of the most inconsiderable stream in the state which has been granted by the state. And the statement in *Shaw v. Crawford*, 10 Johns. 236, to the contrary was held to be a dictum. *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382.

In *People v. Dextater*, 75 Hun. 472, it is said that the rule of *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382, was considered to be consistent with *Hooker v. Cummings*, 20 Johns. 91, 11 Am. Dec. 249, in which it is said the legislature has confessedly the right of regulating the taking of fish in private waters.

In *State v. Glen*, 52 N. C. (7 Jones, L.) 321, the court held, on the authority of *People v. Platt*, that after the legislature had granted to a private individual the bed of a river, and he had erected a dam and mills thereon, he could not, without compensation, be compelled to open a passageway for fish through it.

And that ruling was followed in *Cornelius v. Glen*, 52 N. C. (7 Jones L.) 512.

Preservation of fish in public waters.

The regulation of the right of fishery in the navigable streams of the state is a proper subject of legislation by the legislature. *Skinner v. Hettrick*, 73 N. C. 53.

In *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, it is said that the right to regulate fishing in public waters has been exercised from the earliest period of the common law, citing statute 2 Hen. VI. chap. 15.

It is competent for the legislature to appropriate and regulate fisheries in navigable as well as in private waters. *Fuller v. Spear*, 14 Me. 417; *Spear v. Robinson*, 29 Me. 531.

In *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 239, the court, speaking of the title of the state to the soil under the navigable waters, says the state holds the propriety of this soil for the conservation of the public rights of fishery therein and may regulate the mode of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether.

A bayou extending back from a public body of water and into which fish have free access from such water, and not wholly on the premises of a private individual, is "waters of the state" within the meaning of a statute prohibiting seines, nets, or traps in waters of the state. *State v. Blount*, 35 Mo. 543.

In *Com. v. Lohman*, 8 Kulp, 485, the court says

Beckman v. Kraemer, 48 Ill. 447, 92 Am. Dec. 146; *Fleet v. Hegeman*, 14 Wend. 42.

The Truckee river is not a navigable stream nor public highway.

1 Spelling, Extraordinary Relief, § 419.

Capacity of a stream to float logs does not make it a public way.

American River Water Co. v. Amsden, 6 Cal. 448.

Courts take judicial notice of the navigability of the Sacramento river.

that, so far as it has been able to ascertain, the authority of the legislature to protect food fish has not been questioned for years past.

Acts for the preservation of fish are public acts which will be taken notice of by the court. *Com. v. McCurdy*, 5 Mass. 324.

Statutes which have been passed.

The Vermont statutes provide for punishment for illegal fishing. *State v. Houghton*, 65 Vt. 323.

The Vermont statute prescribed a fine for fishing with a set line in the waters of the state. *State v. Stevens*, 69 Vt. 411.

The New York act of 1879 prohibited fishing with nets in waters which were held to include the American waters of Niagara river below the Falls. *People v. Gillette*, 38 N. Y. S. R. 352.

A Connecticut statute provided that no person should use a bush seine in the Ousatounick river or obstruct the drawing of seines and taking of fish there; and it was held that the statute applied to the whole river, and not to certain parts of it only. *Eastman v. Curtis*, 1 Conn. 323.

In *Spear v. Robinson*, 29 Me. 531, it was held that the Massachusetts act of 1803, to regulate the shad and alewife fisheries in Warren, was still in force.

Under the Maine statutes the offender cannot be taken for trial beyond the county adjoining the one where he was found. *Stiphen v. Ulmer*, 88 Me. 211.

In *State v. Sturgess*, 9 Or. 537, it was held that the Oregon act of October 25, 1880, to protect salmon, did not apply to the Colorado river.

The Pennsylvania legislature, as early as 1761, passed laws for the regulation of fisheries. *Hart v. Hill*, 1 Whart. 132.

The Washington act of 1893 regulated the method of catching salmon in certain waters of the state. *State, Alaska Packers Assn., v. Crawford*, 13 Wash. 633.

Powers of local authorities.

A town may be given the power to enact by-laws regulating the fisheries within its boundaries, and impose for its violation a penalty to be collected in a civil suit. *State v. Decker*, 46 Conn. 241.

By the statute of 1797 towns were authorized to keep open the course of streams through which fish pass to and from the sea. *Swift v. Falmouth*, 107 Mass. 115.

The Maine act of February 3, 1824, authorized the town of Dennyville to appoint committees whose duty it should be to attend to the preservation of the salmon and alewives in the streams in their districts. *Stephenson v. Gooch*, 7 Me. 152.

By the statute of 1797 the towns of Watertown, Waltham, and Weston were authorized to sell the right of taking fish within its borders, and to regulate the times, places, and manner of taking fish. *Watertown v. White*, 13 Mass. 477.

The statute of 1855, chap. 401, regulating the fisheries in Taunton great river, was not affected by the statute of 1856, chap. 50, giving the proper authorities of a city lying on tide water the right to license weirs in the water within its limits. *Hathaway v. Thomas*, 16 Gray, 290.

By the charter of the city of St. John the right of 89 L. R. A.

People v. Gold Run Ditch & Min. Co. 66 Cal. 146, 56 Am. Rep. 80.

It follows that they must take judicial notice of the non-navigability of the Truckee river.

The cases in the Federal courts, wherein the deposit of *débris* in the streams has been enjoined, are all based on the theory that they interfere with the public highways of the state, and are an impediment to navigation.

Woodruff v. North Bloomfield Gravel Min. Co. 18 Fed. Rep. 753; *Hardt v. Liberty Hill*

fishing was granted to the inhabitants of that city. *Wilson v. Codyre*, 27 N. B. 320.

If the legislature has expressly legislated on the subject of fishery regulations a board of supervisors of a county cannot make and enforce inconsistent regulations. *People v. Fish*, 89 Hun, 168.

A lessee from a town of the right of fishing in a brook cannot deny the right of the town to make the lease to avoid payment of the rent unless he is evicted. *Eastham v. Anderson*, 119 Mass. 523.

Powers of fish officers.

Under the act of 36 & 37 Vict. chap. 71, power was given to the conservators to make by-laws for the protection of the salmon fisheries, but it was held that under that act they had no power to make a by-law which prohibited the use of nets for catching other fish within the salmon grounds if they could be used without damage to the salmon fishery. *Pidler v. Berry*, 59 L. T. N. S. 230.

Where a statute provides for the appointment by each of three counties of a fish warden who shall see to the preservation of fish, and provides that upon failure in appointment or refusal of others to act one may do so, there will be no presumption of non-appointment or refusal to act, but one who attempts to act alone must show that he has authority to do so. *Hancock County v. Eastern River Lock & Sluice Co.* 20 Me. 72.

By the Maine act of March 4, 1826, to regulate the alewife fishery in Bristol, so long as the fish committee act within the sphere of their duty they are not trespassers, and no one has a right to oppose them in the performance of their duties. *Fossett v. Bearce*, 27 Me. 117.

Since the act of 1826, regulating the alewife fishery in Bristol, no power can reside in any persons except the fish committee to adjudicate upon the sufficiency of any sluiceway, or to open any sluiceway in another's dam, or to abate any dam as a nuisance for the absence of a sluice. *Bearce v. Fossett*, 34 Me. 575.

The fish committee cannot maintain an action for the penalty provided by the act of 1826, unless they have taken the oath required by the act. *Fossett v. Geyer*, 55 Me. 160.

Where the statute authorized the fish committee to require openings to be made in dams on the river, their decision is conclusive, unless it is shown that they acted corruptly or under unjustifiable motives. *Briggs v. Murdock*, 13 Pick. 306.

If a fish warden takes a net and keeps it for an unlawful time without instituting proceedings for its condemnation, he will be a trespasser *ab initio*. *Russell v. Hanscomb*, 15 Gray, 166.

If the statute creates a board of commissioners to designate the fish sluices in the river, and to protect them by indictment, there will be no authority to destroy a fish trap as a nuisance which is not in a fish sluice. *Boatwright v. Bookman*, Rice, L. 447.

Pollution of water.

The Washington statute makes it a misdemeanor to cast sawdust into streams where fish resort to spawn. *State v. Kroenert*, 13 Wash. 644.

Consol. Min. & W. Co. 27 Fed. Rep. 788; *United States v. Lawrence*, 58 Fed. Rep. 682; *Yuba County v. Cloke*, 79 Cal. 289.

It is a good defense to an action brought by the attorney general, though on the relation of a private party, to show that the public has no interest in the *locus in quo*, and that the injury is not to the public at large.

1 Spelling, Extraordinary Relief, § 882.

Annoyances to bridges, highways, and public rivers are public nuisances.

4 Bl. Com. p. 167.

A declaration under a statute imposing a penalty for permitting the refuse from the manufacture of gas or oil from white fish or other substance deleterious to fish to flow into any water of the state need not allege that the substance is deleterious to fish if the substance is alleged to be refuse from the manufacture of oil and manure of fish, since the statute implies that such substances are deleterious. *Blydenburgh v. Miles*, 36 Conn. 484.

Regulation of lobster fishing.

The Maine statute requires the liberation of all lobsters which are females, or are under 9 inches in length. *State v. Bennett*, 79 Me. 55.

The fact that certain lobsters were taken more than a marine league from the shore does not prevent the infliction of the penalty for their destruction within the state. *State v. Craig*, 80 Me. 85.

Under a statute providing a penalty for taking young lobsters less than 9 inches long, the fact that the lobsters are less than 9 inches long raises the presumption that they are young, and the latter fact need not be proved. *Thompson v. Smith*, 79 Me. 160.

The Maine act of 1887 permitting the seizure of barrels of lobsters in which short ones were found was repealed by the act of 1889 covering the same general subject-matter of regulation of the lobster fisheries. *Staples v. Peabody*, 83 Me. 207.

Conviction may be had on complaint without the necessity of an indictment under the Maine statute against the possession of short lobsters. *State v. Sinnott*, 89 Me. 41.

A statute prohibiting the possession of short lobsters applies to lobsters taken out of the state. *Com. v. Young*, 155 Mass. 393.

A statute declaring that whoever sells, or offers for sale, or has in possession, a short lobster shall forfeit \$5, and that the possession of the lobster shall be prima facie evidence to convict, will be construed so as to be upheld, and the latter clause will not render it meaningless. *Com. v. Barber*, 143 Mass. 560.

If a statute prohibits the having in possession of short lobsters, it will apply as well to lobsters taken out of the state as to those taken within the state. *Com. v. Savage*, 155 Mass. 278.

A common carrier who does not know or have good reason to know that barrels received by him for shipment contain short lobsters, is not liable for receiving them under a statute making it unlawful to possess for any purpose short lobsters between certain dates. *State v. Swett*, 87 Me. 99, 29 L. R. A. 714.

A charge of having in possession certain short lobsters is not sufficient without showing that there was no intention of liberating them. *State v. Bennett*, 79 Me. 55; *State v. Trefethen* (Me.) 3 New Eng. Rep. 842.

Penalty and its infliction.

A statute authorizing a confiscation "on view" of the implements used in drifting for salmon contrary to the provisions of the statute, does not require the net to be seen in the water to justify the confiscation. It is sufficient if the complainant acting "on view" himself sees what, if testified to by 89 L. R. A.

Actions to enjoin a nuisance vested in this court as a special and not as an equitable tribunal.

Learned v. Castle, 67 Cal. 41, 78 Cal. 454.

Private nuisance cannot become a public nuisance without an allegation that a considerable number of persons having property rights are so affected.

2 Story, Eq. Jur. 6th ed. §§ 921-925; *Bowen v. Wendt*, 103 Cal. 287; *Wood, Nuisances*, §§ 796, 797; 10 Am. & Eng. Enc. Law, p. 882, notes.

him, would be sufficient to convict of the offense charged. So, if complainant upon receiving notice that a boat is going out to drift for salmon goes to the beach when the boat comes in and finds the net, which is a drifting net, wet, and that it has taken fish, and is told by the men that they have been drifting, a seizure may be made. *Mowat v. McFee*, 5 Can. S. C. 66.

A vessel equipped for hunting sea otter, and cruising in Alaskan waters for that purpose, is liable to forfeiture under U. S. Rev. Stat. § 1956, although the animals have been captured by boats sent out to a considerable distance by the vessels. *The Alexander*, 60 Fed. Rep. 814.

Violation of the Pennsylvania act of 1878 cannot be tried in the criminal court of the court of sessions unless the defendant enters into a recognition to answer to the charge of the misdemeanor. *Com. v. Owens*, 7 Montgomery Co. L. Rep. 144.

The state may provide for the summary destruction of nets used for fishing contrary to the provisions of the statute. *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385.

Under the English salmon fisheries act, any person has the right to take possession of and destroy an engine placed or used for catching salmon contrary to the provisions of the statute. *Williams v. Blackwall*, 2 Hurlst. & C. 83, 32 L. J. Exch. N. S. 174, 9 Jur. N. S. 579, 8 L. T. N. S. 252, 11 Week. Rep. 621.

Seizure and destruction of nets by officers, in obedience to a statute, in abating a nuisance caused by their voluntary use by the owner in violation of the fishery laws, does not deprive the owner of his property without due process of law, or of a certain remedy in the laws for all injuries to his property, or make an unconstitutional distinction as to the possession, enjoyment, and descent of property. *Bittenhaus v. Johnston*, 92 Wis. 568, 32 L. R. A. 380.

The legislature may authorize the seizure of nets found in use in violation of the law to be disposed of as directed by the court before whom the offense is tried. *Osborn v. Charlevoix Circuit Judge* (Mich.) 4 Det. L. N. 731.

The New Jersey statutes provide for the seizure of nets used for fishing in the Delaware river. *Shoemaker v. State*, 20 N. J. L. 183.

But it has been held that a state cannot provide for the confiscation of a fish net in such a way as to deprive the owner of his property without due process of law. *State v. Owen*, 1 Ohio L. D. 168.

A statute providing that nets used in taking fish in violation of law shall be forfeited, and may be seized by the public officer of the county, is void as being without due process of law, and without judicial hearing and judgment. *Jeck v. Anderson*, 57 Cal. 251, 40 Am. Rep. 115.

Under the fishery acts of 31 Vict. chap. 60, a warrant of commitment may issue in the first instance without the execution of a distress warrant, although the statute makes provision for the latter. *Arnott v. Brady*, 23 U. C. C. P. 1.

Joint offense.

If two or more persons join in drawing a bush seine in a river where the act is prohibited, it is a

The enactment of laws for the protection of fish and game belongs to the police power of the government.

8 Am. & Eng. Enc. Law, p. 1028.

The police power of a state may be exercised by the prohibition of a particular business, but is more commonly exercised by imposing taxes or penalties to discourage the practices deemed injurious.

18 Am. & Eng. Enc. Law, p. 747; *State*,

several offense in each, and each is separately liable to the penalty. *Curtis v. Hurlburt*, 2 Conn. 303.

If the statute provides a penalty for each fish illegally taken to be recovered by a *qui tam* action in case several persons join in the fishing, a recovery of the penalty against one will bar an action against the others. *Boutelle v. Nourse*, 4 Mass. 451.

Intent.

Violation of the fish laws will subject the guilty person to the penalty, although he was advised by the fish commissioner and a lawyer that the act would be lawful. *State v. Huff*, 89 Me. 521.

A statute prohibiting the taking of smelt at certain times, but providing that it shall not apply to any person catching smelt while fishing for other kinds of fish, will not prevent a prosecution if the intention was to catch the smelt, although there was also an intention to catch the other fish. *Com. v. Look*, 108 Mass. 432.

Setting nets for turtles does not violate the provisions of a statute making it unlawful to take fish in any waters by means of nets, although fish become entangled in the net, if they are returned to the water as far as possible. *People v. Deremo*, 106 Mich. 621.

Under a statute making it unlawful to be knowingly possessed of fish taken in a net, a person fishing with a troll line which becomes entangled in a net which he takes into the boat finding fish caught in it, and rows 100 yards to the shore without releasing the fish, is guilty. *People v. McMasters*, 74 Hun, 226.

Constitutional provisions.

Several different constitutional provisions have been invoked to defeat statutes which have been passed for the regulation of fisheries.

Either general or special laws, as the legislature may deem proper, can be enacted respecting the preservation of fish, under a Constitution giving power to enact such laws, and adding that they may be enacted or enforced in particular counties or geographical districts designated by the general assembly. *Peters v. State*, 96 Tenn. 682, 33 L. R. A. 114.

The title of an act, "An Act to Consolidate and Amend the Several Acts Relating to Game Fish," is not broad enough to cover provisions prohibiting the use of explosives in killing fish. *Com. v. Nihil*, 4 Pa. Dist. R. 532.

In *People v. Miller*, 88 Mich. 383, it was held that the provisions of an act to prevent the killing of fish in Klinger lake by other means than by hook and line were within the title.

The fact that no maximum fine is fixed for the offense does not render the statute void under a constitutional provision forbidding excessive fines. *Re Yell*, 107 Mich. 228.

A statute prohibiting aliens, incapable of becoming electors of the state, from fishing in its waters, violates the 14th Amendment of the United States Constitution. *Re Ah Chong*, 6 Sawy. 451.

The state has the exclusive jurisdiction to regulate and control the fisheries in its waters, both tidal and fresh, and the right to fish is not given to citizens of other states by the amendments to the 89 L. R. A.

Vance, v. Crawford, 28 Kan. 726, 42 Am. Rep. 182; 6 Lawson, Rights, Rem. & Pr. p. 4857.

Where an action is brought on behalf of the state, or by the attorney general to enjoin the continuance of a public nuisance, the proper method of proceeding is upon the relation of a private party.

People, Schnell, v. Sausalito Land & F. Co. 106 Cal. 621; *Atty. Gen. v. Tarr*, 148 Mass.

Federal Constitution, nor is the state prohibited from discriminating against them. *State v. Tower*, 84 Me. 444.

A statute regulating the fisheries throughout the state is not unconstitutional merely because it makes penal the use of nets only in certain counties. *Doughty v. Conover*, 42 N. J. L. 193.

The statute of Virginia which forbids nonresidents to catch fish in the waters of the state for the manufacture of manure and oil does not violate the United States Constitution. *Chambers v. Church*, 14 R. I. 368, 51 Am. Rep. 410.

A statute as to fisheries making different regulations for different localities or water, is not void as class legislation, in the absence of a constitutional provision against it. *Bittenhaus v. Johnston*, 92 Wis. 588, 32 L. R. A. 380.

A statute discriminating between different kinds of fish, and between different localities and waters in regulating fisheries, does not deny to any person the equal protection of the laws. *Bittenhaus v. Johnston*, 92 Wis. 588, 32 L. R. A. 380.

The legislature may make a close season, and may make it shorter in some counties than in others. *Osborn v. Charlevoix Circuit Judge (Mich.)* 4 Det. L. N. 781.

The prohibition of citizens of other counties from fishing in the waters of two counties of the state, without anything to prevent residents of those counties from fishing in the waters of the other counties, is an unlawful discrimination. *State v. Higgins (S. C.)* 38 L. R. A. 561.

The exception of lakes having an area of 15 square miles and over, and subject to overflow and backwater from the Mississippi river, which is made in a statute prohibiting the taking of fish except by rod or line, is not an arbitrary and unnatural exception, but rests upon the idea that such lakes, being periodically replenished from the river, are not liable to suffer a material waste or destruction of their stock of fish as lesser lakes or streams would. *Peters v. State*, 96 Tenn. 682, 33 L. R. A. 114.

The commerce clause of the United States Constitution does not prohibit the state from forbidding the exportation of fish from the state. The court says the ownership of fish is in the state for the benefit of the people in common, and the legislature has a right to permit individuals to catch them upon such terms and conditions as it may impose. *Organ v. State*, 56 Ark. 267.

A legislature may for the purpose of protecting fish absolutely prohibit its sale within the state during the close season or during the entire year, although the effect of the statute is to prohibit the sale of fish caught in other states. *People v. O'Neill (Mich.)* 33 L. R. A. 696.

The state may prohibit the exportation of fish from the state. *State v. Northern Pacific Exp. Co.* 58 Minn. 408.

But in Idaho it was held that a state cannot, because of the commerce clause of the United States Constitution, prohibit the exportation of fish. *Territory v. Evans*, 2 Idaho. 634, 7 L. R. A. 288.

So it has been held that it is not a violation of the fish laws of Oregon to have in possession during the close season fish caught out of the state. *State v. McGuire*, 24 Or. 363, 21 L. R. A. 478. H. P. F.

809, 2 L. R. A. 87; *Demopolis v. Webb*, 87 Ala. 659; *Broomhead v. Grant*, 88 Ga. 451.

Messrs. W. F. Fitzgerald, Attorney General, and *Henry E. Carter*, for respondent:

By the common law, all fish within the waters of the realm, and all animals *fera natura*, belong to the King. The right of taking game, and free fishery, was a royal privilege—a franchise granted by the King to certain of his subjects.

People v. Bridges, 142 Ill. 40, 16 L. R. A. 684; *Woolrych, Waters*, 99; 2 Bl. Com. *39, *40, *415.

The sovereign power in the United States is in the people.

Moore v. Smaw, 17 Cal. 200, 79 Am. Dec. 128; *Chisholm v. Georgia*, 2 U. S. 2 Dall. 471, 1 L. ed. 463.

They, in their sovereign power, have the right to regulate the manner and method by which fish shall be taken, and may even prohibit the catching entirely, if they so elect, or may do any act in reference thereto.

The state holds the fisheries within its territory in trust for the public.

Heckman v. Swett, 99 Cal. 809.

A trustee is a party in interest, and may maintain an action for an infraction of the rights of a beneficiary or damage to the property held in trust.

Cal. Code Civ. Proc. § 369; *Winters v. Rush*, 84 Cal. 186; *Tyler v. Houghton*, 25 Cal. 29; *West v. Crawford*, 80 Cal. 19; *Walker v. Mosker*, 71 Cal. 594; *Anson v. Townsend*, 78 Cal. 419.

If the owners along the stream have a special property in the fish while in the water on their land, then the acts of the defendant constitute a public nuisance, it affecting a considerable number of persons.

People, Ricks Water Co., v. Elk River Mill & L. Co. 107 Cal. 219.

Even though the acts complained of do not come within the definition of nuisance in the Code, yet the Code is not exclusive.

8 Bl. Com. *216; 16 Am. & Eng. Enc. Law, pp. 924, 943; 1 Wood, Nuisances, 8d ed. § 27.

An owner of property must not use it, even in a lawful business, in such a manner as to interfere with another in the legitimate use of its property.

Tuebner v. California Street R. Co. 66 Cal. 171.

Injunction will lie.

Yolo County v. Sacramento, 36 Cal. 198; *People v. Davidson*, 30 Cal. 880; *People v. Gold Run Ditch & Min. Co.* 66 Cal. 150, 56 Am. Rep. 80; 16 Am. & Eng. Enc. Law, p. 940; Story, Eq. Jur. §§ 921-924.

Fish commission has no authority to abate a nuisance.

The Truckee river is not a private stream. It is one of the public rivers of this state.

The attorney general is authorized to maintain actions of this character in the name of the people.

People v. Davidson, 30 Cal. 388; *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, 56 Am. Rep. 80; *People v. Pope*, 53 Cal. 437; *People v. Blake*, 60 Cal. 497; *People v. Reed*, 81 Cal. 70; *People v. Hibernia Sav. & Loan Soc.* 84 Cal. 684; *People, Ricks Water Co., v. Elk River Mill & L. Co.* 107 Cal. 215; *People, Rob-*
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arts, v. Beaudry, 91 Cal. 220; *Atty. Gen. v. Shrewsbury (Kingsland) Bridge Co.* L. R. 21 Ch. Div. 752; Brice, *Ultra Vires*, 8d ed. p. 761.

The riparian owner has exclusive right to the fishery in the waters which flow over his territory.

Murphy v. Ryan, 2 Ir. C. L. Rep. 143; *Carlisle v. Graham*, L. R. 4 Exch. 861; 8 Kent, Com. § 412; *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 383; *Chalker v. Dickinson*, 1 Conn. 882, 6 Am. Dec. 250; *McFarlin v. Essex Co.* 10 Cush. 804; *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382; *Beckman v. Kreamer*, 43 Ill. 448, 92 Am. Dec. 146.

Riparian proprietorship is a property right of value, and to it are attached rights and privileges conferred by law, of which the owner cannot be deprived by illegal proceedings.

Fuller v. Shedd, 161 Ill. 492, 33 L. R. A. 146.

A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction at a suit of the attorney general.

3 Pom. Eq. Jur. 2d ed. pp. 1849, 2078; *Woolrych, Waters*, 280; *Coburn v. Ames*, 52 Cal. 887, 28 Am. Rep. 684.

Van Fleet, J., delivered the opinion of the court:

The action is in the name of the people, on the information of the attorney general, to restrain the commission of an alleged nuisance, the complaint alleging, in substance, that defendant, a corporation, maintains and operates a sawmill and box factory on the bank of the Truckee river, at the town of Truckee, in this state, in which it cuts and manufactures lumber and boxes; that said river is a fresh-water stream, having its source in the state of California and flowing into the state of Nevada, and is now, and for a long time prior hereto has been, stocked with fish; that defendant, in operating its mill and factory, has heretofore and does now place and allow to pass into the waters of said river large quantities of refuse matter, consisting of sawdust, shavings, slabs, edgings, waste, and other deleterious substances, the effect of which has been and is to pollute said stream and the waters thereof, and render the same unfit for use, and which substances are poisonous and deleterious to the fish in said stream, and are killing, destroying, and exterminating them, all of which is alleged to be in violation of the rights of the people, and a public nuisance; that defendant threatens to, and, unless restrained, will, continue to commit said wrongful acts, to plaintiff's irreparable injury. A preliminary injunction was granted *ex parte* on the filing of the complaint, which defendant subsequently moved to vacate. The motion was made upon the complaint alone, based upon the objection that the facts alleged made no case for relief. The motion being denied, this appeal ensued.

The sole question is whether the complaint states a cause of action, and this is to be determined precisely as if the pleading were subjected to a general demurrer.

The first point made against the complaint is that the facts alleged do not constitute a public nuisance, within the definition of our Code.

But this objection would seem to overlook the most material feature of the complaint. It is alleged that the acts of defendant have the effect of polluting and poisoning the waters of the river, and thereby killing and destroying the fish therein. Anything which is "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or any considerable number of persons," is a public nuisance. Penal Code, § 870; Civ. Code, §§ 8479, 8480. The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which are in the people of the state (*Ex parte Master*, 103 Cal. 476, 488), as in England it was in the King; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union. The complaint shows that, by the repeated and continuing acts of defendant, this public property right is being, and will continue to be, greatly interfered with and impaired; and that such acts constitute a nuisance, both under our statute and at common law, is not open to serious question. *People, Ricks Water Co., v. Elk River Mill & L. Co.* 107 Cal. 219.

But defendant urges that the facts do not show the infringement of any public right, in that the right, if any, shown to be interfered with, is solely that of fishery, or the privilege to take fish; that this is a public right only so far as it pertains to navigable waters, while, as to all other waters, it is exclusively in the riparian proprietor; that, as the Truckee river is not a navigable stream, the destruction of the fish therein is not an injury to the public for which the people can complain, there being no allegation that the riparian proprietors thereon have been injured. In the first place, the common right to take fish extends, not alone to navigable waters, but exists as to all waters the lands underlying which are not in private ownership,—in other words, to all lakes, ponds, or streams, navigable or otherwise, upon the public lands of this state or the United States not protected by reservation; and, since there is no averment that the lands along the Truckee river are held in private proprietorship, we think the presumption must be that the title remains in the government. But, in the next place, if this is not the presumption the case would not be different. The dominion of the state, for the purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, is not confined within the narrow limits suggested by defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habituated or accustomed to resort for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. To the extent that waters are the common passageway for fish, although

flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery. *Cottrill v. Myrick*, 12 Me. 222; *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199, and 59 N. H. 484.

For the purposes of the right involved in this action, then, the Truckee river, so far as it flows within this state, is a part of the waters to which the jurisdiction of the state in the protection of its fish supply extends. This court will take judicial cognizance of the fact that the river has its source in Lake Tahoe, a large navigable body of water lying partly in this state, and that it flows thence into the state of Nevada, and empties into Pyramid lake, also navigable; and the court may also take notice of a fact so common and notorious that between these two bodies of water the river affords, and has from time immemorial, a natural and free highway for the passage of the fish inhabiting these lakes. Even, therefore, if, as contended by defendant, the lands through which the stream flows are to be presumed, in the absence of contrary averment, to be owned in private proprietorship, it can make no difference as to the right here asserted. While the right of fishery upon his own land is exclusively in the riparian proprietor, this does not imply or carry the right to destroy what he does not take. He does not own the fish in the stream. His right of property attaches only to those he reduces to actual possession, and he cannot lawfully kill or obstruct the free passage of those not taken. "This right in the owner of the land must be regarded as qualified to a certain extent by the universal principle that all property is held subject to those general regulations which are necessary to the common good and general welfare, and to that extent it is subject to legislative control. It is a well established principle that every person shall so use and enjoy his own property, however absolute and unqualified his title, that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the public. Hence, while the riparian owner has the exclusive right of fishery upon his own land, he must so exercise that right as not to injure others in the enjoyment of a similar right upon their lands upon the stream above and below." *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199.

The mere fact, therefore, that the interference or obstruction complained of may in fact be in a stream where the right of fishery is exclusively in private riparian owners, does not make the acts here complained of any less an invasion of the public right, nor prevent the state from protecting its general interest in the property.

The fact that acts of the character alleged are by the Penal Code made a misdemeanor, and punishable as such, does not make them less a nuisance, nor imply that the legislature intended to make the criminal remedy exclusive of the civil. Nor is there anything in the objection that the attorney general is not privileged to maintain the action upon his own information, without the intervention of a pri-

vate relator. *People v. Davidson*, 80 Cal. 888; *People v. Stratton*, 25 Cal. 242; *People v. Gold Run Ditch & Min. Co.* 66 Cal. 138, 56 Am. Rep. 80.

The other objections made do not call for particular notice.

Order affirmed.

We concur: **Beatty**, Ch. J.; **Harrison**, J.

WYOMING SUPREME COURT.

John KELLEY

v.

Oliver F. RHODES, County Assessor.

(..... Wyo.....)

1. A herd of sheep driven through the state is not exempt from taxation as personal property in transit if the purpose of driving is not merely transportation, but comprehends also that of grazing and feeding them upon the natural grasses, not as a mere necessary incident of the travel, but as one of the purposes of the movement.
2. The existence of a purpose to obtain grazing for sheep, united with the purpose of transportation, is to be determined from all the facts in each case, including the course, the character of the territory grazed upon, the time employed, the subsequent method of intended shipment, the ordinary facilities for transportation by other means, the place selected for commencing other transportation, and perhaps the time of year and the eventual purpose of their shipment.
3. A return of property for taxation in another state does not exempt it from taxation in the absence of a statute to that effect, if the property is otherwise legally taxable under the laws.
4. Uniformity in an assessment for taxes, and in the mode thereof, exists if the same basis of valuation is taken as to all property of like character.
5. Hearing and opportunity for review of an assessment for a tax on sheep under act of 1895 is not denied, since a provision therefor under Rev. Stat. § 8846, is applicable in such cases.
6. A payment of a tax on sheep is not voluntary when made after first refusing to pay it and because the collector declares either that he can or that he will take enough sheep to pay the tax.
7. A county is a "municipal corporation" within the meaning of the proviso of Rev. Stat. § 8065, respecting actions against municipal corporations to recover back taxes actually paid over to such corporation.
8. State and school-district taxes are collected for the "use and benefit" of the county within the meaning of the proviso of Rev. Stat. § 8065, authorizing action to recover back a tax actually paid over to any municipal corporation for whose use and benefit it was levied or collected.

(January 6, 1896.)

RESERVATION by the District Court for Laramie County for the opinion of the

NOTE.—As to taxation of livestock of cattle dealers, see *Myers v. Baltimore County Comrs.* (Md.) 84 L. R. A. 309.

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Supreme Court of questions arising in an action brought to compel a return to plaintiff of money which he had paid as taxes levied upon a herd of sheep which he was driving through the state.

The facts are stated in the opinion.

Messrs. Van Orsdel & Burdick, for plaintiff:

No state can in any manner interfere with or obstruct interstate commerce.

Rorer, *Interstate Law*, p. 311; *Cooley*, *Taxn.* p. 62; *Black*, *Constitutional Law*, 167-186.

An animal being driven from Utah to Nebraska is no less an article of interstate commerce because of its ability to walk than is the same animal when carried on the car of some railroad company, or than is a log floating down a stream.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

Before it can be taxed, the property must become identified and incorporated with the property of the state.

Brown v. Maryland, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Brown v. Houston*, 114 U. S. 623, 29 L. ed. 257; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 4 L. ed. 579; *Woodruff v. Parham*, 75 U. S. 8 Wall. 123, 19 L. ed. 382; *Orandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 744; *Almy v. California*, 65 U. S. 24 How. 169, 16 L. ed. 644.

If the subject is one that admits of one uniform system or plan of regulation, then no state can by taxing or other legislation interfere.

Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347; *Brown v. Houston*, 114 U. S. 623, 29 L. ed. 257; *St. Louis v. Wiggins Ferry Co.* 78 U. S. 11 Wall. 423, 20 L. ed. 192; *Hays v. Pacific Mail S. S. Co.* 58 U. S. 17 How. 596, 15 L. ed. 254.

Where Congress has made no regulation, its inaction or failure to act is equivalent to a declaration that the commerce shall be free and unrestricted by any state regulation.

Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694; *Leisy v. Hardin*, 185 U. S. 150, 34 L. ed. 146, 3 Inters. Com. Rep. 36; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Bozman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Sinnot v. Davenport*, 63 U. S. 22 How. 227, 16 L. ed. 243; *Harmon v. Chicago*, 147 U. S. 396, 37 L. ed. 216; *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653; *The Bird of Paradise v. Heyneman*, 72 U. S. 5 Wall. 557, 18 L. ed. 665; *United States v. The Montello* ("The Montello"), 87 U. S. 20 Wall. 430, 22 L.

ed. 391; *Pacific Coast S. S. Co. v. Railroad Comrs.* 18 Fed. Rep. 10; *Guy v. Baltimore*, 100 U. S. 484, 25 L. ed. 748; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Western U. Tele. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Western U. Tele. Co. v. Seay* ("Western U. Tele. Co. v. Alabama Board of Assessment"), 182 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726; *Re Pennsylvania Teleph. Co.* 48 N. J. Eq. 91.

The means or method of transportation is immaterial so long as the subject is a factor or incident of interstate commerce.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 62 N. H. 303.

Custom has created an implied license to the full use of the grasses growing on the public domain, and the nonresident owner of live stock availing himself of that privilege incidentally to the transportation of his property across the state cannot for that reason be taxed.

Opa. Atty. Gen. 1895-96, pp. 82, 88; *Buford v. Houtz*, 138 U. S. 320, 33 L. ed. 618.

Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid upon domestic commerce, or that carried on in the state.

Simmons Hardware Co. v. McGuire, 89 La. Ann. 848; *Philadelphia & R. R. Co. v. Pennsylvania* ("Case of The State Freight Tax"), 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694.

Nor is double taxation favored by the courts.

Northern C. R. Co. v. Jackson, 74 U. S. 7 Wall. 262, 19 L. ed. 88; *Frontier Land & Cattle Co. v. Baldwin*, 8 Wyo. 771; *Taggart v. Sanilac County Supers.* 71 Mich. 16.

The phrase "all taxation shall be equal and uniform," § 28, art. 1, has been held to refer to equality and uniformity in the rate, but it has also been held to mean uniformity in the mode of assessment. It implies equality in the burden, and this equality of the burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation.

Fletcher v. Oliver, 25 Ark. 289; *Railroad Tax Cases*, 13 Fed. Rep. 735; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Desty, Taxn.* p. 175; *Chicago & N. W. R. Co. v. Boone County Supers.* 44 Ill. 240; *State, Lydecker v. Englewood Drainage & W. Comrs.* 41 N. J. L. 154.

The act of the legislature of 1895 makes no provision for readjustment or correction of the peremptory tax authorized to be collected by the assessor, and in that respect is not uniform or in harmony with the general law.

Exchange Bank v. Hines, 3 Ohio St. 1.

Some form of notice, together with an opportunity to be heard before a board of review, was essential to a valid assessment, and to have brought the tax levy in the present case within the rule of uniformity, some notice should have been given and some opportunity for protest afforded the owner of the property assessed, before the tax became a charge against his property.

Lyon County Comrs. v. Sergeant, 24 Kan. 572; *Leavenworth County Comrs. v. Lang*, 8 Kan. 284; *Philadelphia v. Miller*, 49 Pa. 449; *Sligh v. Grand Rapids*, 84 Mich. 497; *Three Rivers v. Smith*, 99 Mich. 507; *Thomas v. Gain*, 89 L. R. A.

85 Mich. 165, 24 Am. Rep. 585; *Davidson v. New Orleans*, 96 U. S. 104, 24 L. ed. 619.

Where an assessment has been returned by an assessor or owner of property, and subsequently raised by a board of equalization without notice to the owner, such raised assessment is void.

Patten v. Green, 18 Cal. 325; *Leavenworth County Comrs. v. Lang*, 8 Kan. 284; *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 43; *South Platte Land Co. v. Buffalo County Comrs.* 7 Neb. 253; *State, Rosenblatt, v. Lindell Hotel Co.* 9 Mo. App. 455; *State, Hoboken Land & Improv. Co., v. Anderson*, 88 N. J. L. 83; *Desty, Taxn.* p. 600; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Scott v. Toledo*, 36 Fed. Rep. 885, 1 L. R. A. 688; *Murdock v. Cincinnati*, 39 Fed. Rep. 891; *Cooley, Taxn.* p. 266; *Santa Clara County v. Southern P. R. Co.* 18 Fed. Rep. 411; *San Mateo County v. Southern P. R. Co.* 18 Fed. Rep. 147; *Mc-Twiggan v. Hunter*, 18 R. I. 776.

The collecting officer is the proper party defendant.

Powder River Cattle Co. v. Johnson County Comrs. 8 Wyo. 598; *Johnson County Comrs. v. Searight Cattle Co.* 8 Wyo. 777.

Mr. R. W. Breckons, for defendant:

In determining whether the act itself is contrary to the commerce clause of the Constitution, the question is whether the taxation of live stock brought into the state for the purpose of grazing is an interference with commerce among the several states.

The taxing power of a state is one of its attributes of sovereignty. It exists independent of the Constitution of the United States, and may be exercised to an unlimited extent, except so far as it has been surrendered to the Federal government.

Gilman v. Sheboygan, 67 U. S. 2 Black, 510, 17 L. ed. 305; *Union P. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5, 21 L. ed. 787.

A state may, so long as it does not trench on the Constitution of the United States, tax all persons, property, or business within its jurisdiction or reach, and whether any person, property, or business is within its jurisdiction is not a Federal question, but must be determined by the state for itself.

Dundee Mortg. Trust Invest. Co. v. Parrish, 24 Fed. Rep. 200; *Dundee Mortg. & Trust Invest. Co. v. School Dist. No. 1*, 21 Fed. Rep. 151.

The practice of driving sheep across the different states, and the purpose with which they are so driven, are so well known that the court will judicially notice it.

Michigan S. & N. I. R. Co. v. McDonough, 21 Mich. 194, 4 Am. Rep. 466; *Sohman v. State*, 81 Ind. 15; *White v. Phoenix Ins. Co.* 83 Me. 279; *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 556; *Jones, Ev.* § 183.

The main object and purpose were to take advantage of the range afforded by the state of Wyoming to maintain their sheep in the state of Wyoming, and to increase the value of the sheep by driving them across the state.

The custom of trailing cattle to market has passed into disuse. When, therefore, we find cattle started across the country on hoof it must be apparent that the object with which such live stock are so started is not one of shipment; and when live stock are so started and we find

them maintained by the grasses on the open range, and find them increase in value while so shipped, it is evident that they are trailed across the country for the sole purpose of grazing.

The summary method in which the tax is collected, and the unusual power given to the assessor, do not make the statute void as being in conflict with either the Federal or the state Constitutions.

To hold that property could not be taxed unless an opportunity should be given the property owner to appear before the board of equalization would be to hold that no property brought into the state after the meeting of the board of equalization could be taxed.

McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 885; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Lent v. Tillson*, 140 U. S. 816, 35 L. ed. 419; *Cincinnati, N. O. & T. P. R. Co. v. Kentucky* ("Ky. R. R. Tax Cases"), 115 U. S. 321, 29 L. ed. 414; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 768; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 116, 41 L. ed. 370.

The statute cannot be held unconstitutional because it established a different mode of assessment, levy, and collection.

People v. Central P. R. Co. 48 Cal. 398; *Louisville & N. A. R. Co. v. State*, *McCarty*, 25 Ind. 177, 87 Am. Dec. 858; *Dubuque v. Chicago, D. & M. R. Co.* 47 Iowa, 196; *Francis v. Atchinson*, *T. & S. F. R. Co.* 19 Kan. 808; *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210; *Ottawa County Comrs. v. Nelson*, 19 Kan. 284, 27 Am. Rep. 101; *Langhorne v. Robinson*, 20 Gratt. 661; *Wisconsin C. R. Co. v. Lincoln County*, 57 Wis. 187; *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 425, 38 L. ed. 1086; *Frontier Land & Cattle Co. v. Baldwin*, 8 Wyo. 764.

The fact that the said sheep were returned by plaintiff for taxation, and assessed by the assessor and collector of taxes for the year 1895, in the county of Juab, territory of Utah, does not exempt such property from taxation in this state for that year.

Cooley, Taxn. pp. 37, 219; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *Hilgenberg v. Wilson*, 55 Ind. 210; *Gordon v. Baltimore*, 5 Gill, 281; *People, Westchester F. Ins. Co. v. Davenport*, 35 Hun, 680; *People, Eastern Transp. Line, v. New York Tax & A. Comrs.* 26 Hun, 446; *St. Joseph v. Hannibal & St. J. R. Co.* 39 Mo. 476; *Dyer v. Osborne*, 11 R. I. 321, 28 Am. Rep. 460.

A tax voluntarily paid cannot be recovered back.

Cooley, Taxn. pp. 809-815; *Mays v. Cincinnati*, 1 Ohio St. 268; *Baker v. Cincinnati*, 11 Ohio St. 584; *Wilson v. Pelton*, 40 Ohio St. 811.

The presumption is that the payment of the tax is voluntary.

Cooley, Taxn. pp. 810, 814; *Guy v. Washburn*, 28 Cal. 111; *Atwell v. Zelluff*, 26 Mich. 121; *Powell v. St. Croix County Supers.* 46 Wis. 213; *Parcher v. Marathon County*, 52 Wis. 391, 38 Am. Rep. 745; *Ruggles v. Fond du Lac*, 53 Wis. 443; *Bucknall v. Story*, 46 Cal. 600, 18 Am. Rep. 220; *Bank of Santa Rosa v. Chal-39 L. R. A.*

fant, 52 Cal. 170; *Merrill v. Austin*, 58 Cal. 379; *De Fremery v. Austin*, 58 Cal. 380; *Younger v. Santa Cruz County Supers.* 68 Cal. 241; *Grinley v. Santa Clara County*, 68 Cal. 575; *Tatum v. Trenton*, 85 Ga. 468; *McGehee v. Columbus*, 69 Ga. 581; *Taylor v. Philadelphia Bd. of Health*, 31 Pa. 78, 72 Am. Dec. 724; *Howard v. Augusta*, 74 Me. 79; *Lyon v. Guthard*, 52 Mich. 271; *Galveston Gas Co. v. Galveston County*, 54 Tex. 287; *Allen v. Burlington*, 45 Vt. 208; *Sowles v. Soule*, 59 Vt. 131; *Barrett v. Cambridge*, 10 Allen, 48; *Vanderbeck v. Rochester*, 46 Hun, 87; *Holder v. Galena*, 19 Ill. App. 409; *Union P. R. Co. v. Dodge County Comrs.* 98 U. S. 541, 25 L. ed. 196; *Bailey v. Buell*, 50 N. Y. 662.

A suit by or against the governor of a state, as such, in his official character, is a suit by or against the state.

Kentucky v. Dennison, 65 U. S. 24 How. 66, 16 L. ed. 717; *Georgia v. Sundry African Slaves*, 26 U. S. 1 Pet. 110, 7 L. ed. 78.

Potter, Ch. J., delivered the opinion of the court:

Plaintiff having brought this action against the defendant, as county assessor, to recover certain taxes collected upon a herd of sheep belonging to him, upon issue having been joined, the parties agreed upon a statement of facts in substance as follows: The defendant was the duly elected, qualified, and acting county assessor from the 7th day of January, 1895, until the 4th day of January, 1897. The plaintiff, who was a resident and citizen of the state of Kansas, was the owner of certain sheep, numbering about 10,000 head, which, on or about October 29, 1895, were in the county of Laramie, in charge of an agent, who was driving and transporting them through the state of Wyoming from Utah to Nebraska. In driving said sheep it was the practice to permit them to spread out at times in the neighborhood of a quarter of a mile, and while being so driven to graze over land of that width. In some instances they were driven through large pastures, in other instances through the public domain, and in other instances through pastures inclosed by fences; and while being so driven from the western boundary of the state to Pine Bluffs station (which is located near the eastern boundary), they were maintained solely by grazing along the route of travel. Said sheep were duly returned by plaintiff for taxation, and were assessed for 1895 in the county of Juab, Utah. On October 29, 1895, the defendant, in company with the deputy sheriff of the county of Laramie, collected \$250 from said agent, alleged to be tax as due for the current year, 1895. Before said collection, upon demand therefor, payment was refused by plaintiff's agent, whereupon defendant stated to him that he "could" or "would" take enough sheep, and sell them, to pay the said taxes, with costs. Thereupon, to prevent the seizure and sale of such sheep, and the damages which must thereby accrue, said agent paid said sum of money to the defendant. It was a fact, and defendant was notified thereof, that said herd of sheep was driven across this state for the purpose of shipment, and that the same were not brought into the state for the purpose of being maintained perma-

nently therein. At the time of the regular assessment of property for taxation for 1895 the plaintiff had no property in the state. At the time of such assessment plaintiff had no notice of the time or place of the meeting of the board of equalization, or that any assessment had been made against him in said county or state; and he had no property within the state at the time the 1895 taxes were regularly and legally levied in the county of Laramie. Plaintiff demanded from defendant a return of the amount of tax so collected, which was refused. The time consumed in driving said sheep through Wyoming was from six to eight weeks, and by the route traveled the distance was about 500 miles. Said taxes were assessed, levied, and collected by defendant without the action, authority, or assistance of the board of county commissioners or any other officer of said Laramie county. Said property was not regularly assessed in any other county of the state for that year, and no taxes thereon had been paid in any other county of the state. For shipment purposes, it was not necessary that the sheep should be driven into Wyoming, and the railroad over which they were shipped could be reached from the point from which they were first driven by traveling a less distance than was required to drive them to any point in this state. The tax was paid without any protest other than appears above. The amount collected was, prior to the commencement of the suit, paid over by defendant to the county treasurer, and by the latter distributed in the manner provided by law,—part to the state, part to the school district in which the sheep were found, and part to the county. There is now pending in the same district court an action by plaintiff against the defendant individually for the recovery of the same money.

Upon the submission of the cause upon the facts agreed to as aforesaid, the district court reserved to this court for its decision, as important and difficult questions, the following: (1) Was live stock driven and transported in the manner plaintiff's sheep were subject to taxation in the year 1895? (2) Were these sheep driven in Wyoming for the purpose of being grazed within the meaning of the law authorizing the taxation of such property? (3) Does the fact that the said sheep were returned by the said plaintiff for taxation, as assessed by the assessor and collector of taxes for the year 1895, in the county of Juab, territory of Utah, exempt such property from taxation in this state for that year? (4) Was the payment of the tax by the plaintiff, under the evidence in this case, a voluntary or involuntary payment, and was the payment so made that the plaintiff would be authorized, under the law, to recover the taxes so paid? (5) Does the fact the plaintiff was never given a hearing before the board of county commissioners as a board of equalization, or was never given any notice of the assessment and levy of said taxes, render said taxes illegal so far as plaintiff is concerned? (6) Is chapter 61, Sess. Laws 1895, authorizing county assessors to assess, levy, and collect taxes upon live stock brought into their respective counties to graze, constitutional? (7) For the recovery of taxes as paid in the manner set forth in this case,

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against whom should a suit be brought; and, in this case, is the suit brought against the proper person? (8) What judgment should be entered by this court in this case?

Section 8776 of the Revised Statutes, as amended January 8, 1891 (Laws 1891, chap. 86), prescribes what property shall be taxable, and sheep are designated therein. The county assessors commence the annual assessment as soon as they are furnished with the assessment roll, with which they are required to be provided by the county commissioners on the 1st Monday in April in each year. Generally, all personal property is required to be listed in the county where it may be on the 1st day of April of the current year, and, if the owner resides out of the state, it shall be listed and assessed where it may then be. The board of county commissioners of each county is constituted a board of equalization for the correction and completion of the annual assessment roll, and they are required to hold, as such, two regular meetings in each year, at the office of the county clerk. The first meeting commences on the 4th Monday in June, and may continue not exceeding fifteen days. The second is required to commence on the 4th Monday in July, and may continue not less than three nor more than six consecutive days. At the first meeting the board is authorized to add to the roll any omitted taxable property, and to hear and determine the complaints of all parties feeling aggrieved by the assessment of their property as returned by the assessor; and may increase, diminish, or otherwise alter and correct any assessment or valuation. It is made the duty of the county clerk to notify each person whose assessment has been raised or increased by the board of the amount thereof. Such persons may appear before the board at either meeting, and be heard respecting the same. Section 8801, Rev. Stat., as amended by chapter 86, Laws 1890-91. The annual levy is required to be made by the board of county commissioners on or before the 1st Monday in September in each year, and thereafter the county clerk is required to prepare a tax list and deliver the same to the collector (who is, and has for many years been, the county treasurer) by the 8d Monday of September, upon receipt of which the last-named officer is required to proceed with the collection. Rev. Stat. §§ 8806, 8808. No notice or demand on any taxpayer is enjoined, but, after the date last above mentioned all such taxes, which include state, county, and school-district taxes, are due and payable at the office of the collector. Laws 1890-91, p. 163. After the tax list has been committed to the collector, if he ascertains that any property has been omitted, upon his reporting the fact to the assessor, the latter is authorized to enter it upon the assessment roll, and assess the value, and the collector to enter it upon the tax list, and collect the tax, as in other cases. Rev. Stat. § 8817. General provision is also made for the taxation of any personal property "brought, driven, or coming" into the state at any time prior to the last day of each year, and which shall remain for a period of not less than thirty days. Rev. Stat. § 8845. It is made the duty of the proper officers to assess such property at any time after the annual assessment, and the taxes

thereon becomes due and collectible at the same time, and in the same manner, as the annual taxes; and, if assessed after such annual taxes are payable, they become due as soon as assessed and levied. As to such property, however, it is provided that, in case it shall have been in the state, before such assessment more than thirty days, but less than six months, there shall be collected but a half year's tax, the same to be computed at one half the tax levied against other like property for the current year. From the provisions of this section, merchants and dealers are excepted as to goods and merchandise brought in to replenish their respective stocks, and to keep them up to the amount at which they were respectively originally assessed, provided such merchants have been assessed on their stocks for the current year. This law was upheld in *Frontier Land & Cattle Co. v. Baldwin*, 3 Wyo. 764. The above outline of the laws in force prior to 1895 will assist in a proper understanding and construction of the act of February 16, 1895, in pursuance and by authority of which the taxes involved in this suit were collected. That act, which has since been repealed by the act of March 1, 1897 (Laws 1897, p. 113), was as follows:

"Sec. 1. All live stock brought into this state for the purpose of being grazed shall be taxed for the fiscal year during which it shall have been brought into the state.

"Sec. 2. Assessors are, for the purpose of enforcing this act, hereby vested with the powers, and charged with the duties vested in and conferred upon other officers for the collection of taxes.

"Sec. 3. It shall be the duty of the assessors in the several counties to levy and immediately collect the taxes provided for in this act, as soon as any live stock is brought into their counties to graze; and to pay without delay such amounts to the treasurers of their respective counties.

"Sec. 4. Whenever the owner of any live stock upon which a tax has been levied, as provided in this act, shall refuse to immediately pay the amount of such tax to the assessor who levied it, such assessor shall proceed forthwith to collect such tax as provided by law for the collection of delinquent taxes on other kinds of personal property."

Laws 1895, chap. 61.

This statute is assailed by counsel for plaintiff as being in conflict with that provision of the Federal Constitution which grants to Congress the power to regulate commerce with foreign nations and among the several states and with the Indian tribes, and also that provision of the same Constitution which reserves to the citizens of each state all the immunities and privileges of the citizens in the several states, and to that portion of the 14th Amendment providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is further contended that by the act in question a person may be deprived of his property without "due process of law" which is prohibited by § 6 of article 1 of the state Constitution, and that it violates the constitutional requirement of uniformity in taxation. Const. art. 1, § 28; Id. art. 15, § 11. The

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provisions of the state Constitution invoked are as follows: "No person shall be deprived of life, liberty, or property without due process of law." "All taxation shall be equal and uniform." All property, except as in the Constitution otherwise provided, shall be uniformly assessed for taxation, and the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal." The facts in the case, and the question submitted for our decision, involve a consideration of the above-mentioned propositions. Touching the provisions of the Federal Constitution, the greater reliance appears to be placed by counsel upon the one affecting interstate commerce. It has been discussed, and is, perhaps, necessary to be considered in its effect upon the law, and also in its relation to the facts of the present case. It is conceded by counsel for defendant that a statute which, in terms, provides for the taxation of property in transit from one state to another, or which, by its terms, seeks to impose more onerous burdens upon property shipped from a foreign jurisdiction to the state imposing the burden than are borne by like property in such state, would be void, as in conflict with the Federal Constitution. It is urged, however, that the act in question is not such a statute. It is argued that live stock brought into the state for the purpose of being grazed is not engaged in interstate commerce. It is further conceded that, if live stock should be brought into the state from Utah on the way to eastern markets, the purpose of the owner being solely to pass through the state on his way to such markets, it would not have been brought here to be grazed, and would not be taxable. It is too well settled to admit of controversy that property engaged in interstate commerce, by being transported through a state on its journey from one state to another, would not be subject to taxation in the state through which it is passing. The only question to be considered, so far as the law is concerned, is whether its necessary result is the taxation of such property. The proposition is maintained, and is undoubtedly correct, that, before property can be taxed, it must have become identified and incorporated with the general mass of property in the state. Live stock in this state is, in the greater part, maintained by feeding or grazing upon the natural grasses of the soil. In the case of some kinds of live stock, they are largely allowed to roam at will, but over territory more or less confined in extent. With sheep the custom is to keep them in convenient flocks or herds, intrusted to herders, and to direct them from place to place, generally as to a particular herd, in some certain locality, but covering in most cases a rather large and indeterminate territory. They are thus maintained until in proper condition for disposition, shipment, or other purposes of the owner. The only way in which such property becomes identified and incorporated with the other property of the state is by being turned at large or herded, to be maintained by grazing. Whether the purpose is that they shall remain in the state permanently or not is not a determining factor. Such a purpose does not exist in the case of the greater proportion of all the live stock in the state. The object of a cattle grower is to

ship out of the state his cattle, as soon as they arrive at the proper age, size, or condition. To some extent that is also the purpose which the sheep owner has in view. When live stock are brought into this state to graze they are here to be maintained. While here for that purpose, they are as fully identified and incorporated with the other property of the state as it is possible for most of our live stock to become. The length of time that such property remains cuts no figure, if the purpose aforesaid is present. No question of interstate commerce is involved in such case which militates against the exercise by the state of its power of taxation. Neither, in that event, is a citizen of another state deprived of any of the immunities or privileges of a citizen of this state, nor is the state attempting to make or enforce a law which abridges the rights of a citizen of the United States. We observe no distinction, in respect to the matter under consideration, between the case of a sheep owner of Utah or some other state driving or bringing his sheep into this state for the purpose of and permitting them to graze here, and an owner of like property residing in this state, who brings in from another state other sheep for the same purpose. In our judgment, the act did not encroach upon the exclusive right of Congress to regulate commerce between the several states. Similar statutes have engaged the attention of the courts in other states, and none, so far as we are aware, have been adjudged void as an interference with interstate commerce. Some of them have been pronounced invalid for lack of uniformity in taxation, and as violating constitutional provisions of the state in which they were enacted; but that is a subject for subsequent consideration in this case. A statute of Washington taxing live stock brought into that state to graze was upheld in all respects, but the question was apparently not presented, nor was it discussed in the opinion of the court whether any provision of the Federal Constitution was infringed upon. *Wright v. Stinson*, 16 Wash. 388.

A much more serious question is encountered upon a consideration of the peculiar circumstances connected with the presence of plaintiff's sheep in this state. It is well settled that personal property merely in transit through a state upon its journey from one state to another acquires no situs within the state through which it passes on such journey, and is, therefore, not subject to taxation therein. None of the cases cited or coming to our attention disclose facts entirely similar to those existing in the case at bar. The case of *Coe v. Errol*, 62 N. H. 308, partly involved the legality of a tax assessed by a town in New Hampshire upon a lot of logs which had been cut in Maine, and driven through certain lakes and rivers into the Androscoggin river, in New Hampshire, on their way to mills in Lewiston, Maine, but on account of low water, were left in the town aforesaid during the summer. Said river was a public highway for the floating of timber and logs from the lakes and rivers in Maine down that river to Lewiston, and had been so used by the owners of the logs for more than twenty years. It was held that, as the logs were brought into New Hampshire in the usual course of transportation, and re-

mained there no longer than was necessary under the circumstances, they were merely passing through the state, and were not taxable in that jurisdiction. It thus appears from the facts in that case that there existed no other design with respect to the logs than to convey them, on the course of their transportation, which had started in Maine, along and through regular highways for that purpose. The only cause for their delay and stoppage in the town levying the tax was insufficient water to permit their floating further down the river. A similar instance on principle, though not covering such a length of time, would be the case of goods in transit through the state by cars, or freight wagons, and by some natural or accidental cause further progress of the means of transportation be delayed for a time. In *State, Detmold, v. Engle*, 84 N. J. L. 425, the property assessed was a lot of coal lying on a pier at Elizabethport, which had been mined in Pennsylvania, and sent by rail to Elizabethport, to be thence shipped by water to other markets for the purpose of sale. That town was the terminus of the railroad on tide water. It was the custom to separate the coal at that place according to sizes, and, when a cargo of one size was obtained, to ship it to points in New England, or up the Hudson river, as soon as a vessel could be chartered to carry it. None of the coal was sold for consumption at Elizabethport. The coal assessed was lying on the wharf awaiting shipment. It was held that, as the coal was in transit to market in other states, and delayed in New Jersey, not for the purpose of sale, but merely for separation and assortment for the convenience of shipment to its destination, a tax thereon would amount to a tax on commerce; and with regard to goods in course of transit the court said: "Delay within the state, which is no longer than is necessary for the convenience of transshipment for its transportation to its destination, will not make it property within the state for the purposes of taxation." And further: "Property in transit through the state, or which has been sent within the state, simply for the purpose of sale, is not to be considered as having a situs within such state for purposes of taxation." The case of *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286, is somewhat similar in its facts to *Coe v. Errol*, 62 N. H. 308. A Connecticut corporation, doing business in that state, contracted for spruce logs to be drawn from Vermont, and delivered on the banks of the Connecticut river and on the river in season for the spring drive of 1879, to be marked with the company's mark. There was no other provision for delivery. The logs were cut upon land in Vermont, and were on the ice in said river in the town of Columbia, in New Hampshire, when the tax was assessed, having been delivered there from day to day during the winter of 1878-79. They were there for the purpose of being transported by the river to the company's mills at Hartford, in Connecticut, as soon as the season would permit, there to be manufactured. The court said: "Upon the facts stated, the logs upon which this tax was assessed were in transit, at the time of the assessment, from Vermont, through this state and Massachusetts, to Connecticut. They were not brought into the state

and were not in the state for sale, profit, manufacture, employment, or for any other purpose except that of transportation, and, having been detained here so long only as was reasonably necessary in the use of the Connecticut river as a natural highway, they had no situs in this state for the purpose of taxation. They were here temporarily, and for a purpose wholly excluding the idea of a permanent lodgment in the state, or of becoming incorporated with and forming a part of the personal property of the state." Now, in the cases above adverted to, it appears that the property was within the state for the sole purpose of transportation, which had already commenced, and the delay was not unreasonable, but was in each instance only such as was necessary. A somewhat different case is presented in *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257. Certain coal was mined in Pennsylvania, exported therefrom, and imported into the state of Louisiana, and when the assessment was made by the authorities of the latter state the coal was afloat in the Mississippi river in the original condition in which it was exported. It had just arrived by flatboats, and was held for sale by the boat load, and thereafter more than half of it had been exported by foreign steamships, and the balance sold into the interior of the state by the flatboat load. Taxes thereon had been paid in Pennsylvania. It was held that, being in New Orleans, and held there for sale, without reference to the destination or use which the purchasers might wish to make of it, the tax thereon was not a tax on either imports or exports, nor upon commerce. After asserting that the taxing of goods coming from other states, as such, by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, the court, in the opinion, said: "But if, after their arrival within the state,—that being their place of destination for use or trade,—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to."

The dissenting opinion of Mr. Justice Bradley in the case of *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 80, 35 L. ed. 619, 8 Inters. Com. Rep. 595, has been cited by counsel for plaintiff as containing some expressions applicable to the case at bar. The majority opinion upholds the right of the state to impose a tax upon the capital stock of corporations engaged in transportation within the state, and having at all times a large number of cars in the state, by taking as a basis of assessment such proportion of its capital stock as the number of miles of railroad over which it runs its cars in this state bears to the whole number of miles of the road. In announcing the reasons of himself and two other members of the court for a dissent, the learned justice used the following language, by way, evidently, of illustration: "Certainly; property merely carried through a state cannot be taxed by the state. Such a tax would be a duty,—which a state cannot impose. If a drove of cattle is driven through Pennsylvania, from Illinois to New York, for the purpose of being sold in New York, whilst in Pennsylvania it may be sub-

ject to the police regulations of the state, but it is not subject to taxation there." The majority opinion clearly points out the distinction between a tax upon the right to carry on a business and a tax upon the property employed therein, and it was there said: "The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders." The case of *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, was followed in *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 588, in which case it was contended that the coal and barges moored in the Mississippi river awaiting orders for their further movement had not reached any destination. The coal was brought down the river for the purposes of sale. The principle may be deduced from these authorities that personal property merely in transit through a state is not subject to taxation therein, as it is not to be considered as having acquired a situs in such state. The decisions have been usually qualified by adding, "unless the property is there for use or sale," or some other equivalent language. Respecting the reference of Mr. Justice Bradley to the driving of cattle through the state of Pennsylvania, it must appear evident that, even if he had said "sheep," instead of "cattle," such a driving through the eastern state he mentioned and Wyoming would not necessarily consist of the same qualities. Live stock is not maintained in the eastern states by grazing upon the natural grasses, as is the case in this region. If driven through such a state as Pennsylvania, we apprehend the cattle or sheep would be detained at convenient places for feeding, and thus such delays would be only such as would be necessary to properly care for the stock, and the feeding would be merely an incident of the transit; but with the sheep in the case at bar they grazed, and were thus maintained, as they traveled, going slowly enough to permit that, and to accomplish such purpose, were allowed to spread out over an area a quarter of a mile in width, travel through pastures fenced and unfenced, or across the public domain; and they were maintained, while on the journey, in the same manner as if they had not been in course of transit at all. The question, therefore, arises whether the sheep of plaintiff were brought into the state for use, or, in the language of the statute, to graze; for we assume that, if driven into the state for the purpose of being grazed, that is such a "use" as would come within the exception noted in the cases which have been referred to. We do not understand that an ultimate design to transport sheep out of the state is at all inconsistent with a purpose of bringing them into the state to graze. The time of the contemplated shipment may be uncertain, or it may be extended for a considerable period into the future. Incidentally, no doubt, that intention should be taken into account, but we do not conceive it to be a conclusive circumstance in determining the situs of the property, or the purpose of its presence within the state.

It is altogether clear that in case of herd sheep in this county they must, according to custom, be maintained somewhere by grazing,

until the time fixed upon has arrived for starting them upon their journey to some final destination. It may well be that, if it is not desired that they shall reach such destination before a certain time, and that in the meantime the necessity of allowing them to graze and obtain the benefits therefrom is recognized places therefor may be selected by the owner, which will subserve the latter purpose, and at the same time facilitate their final transportation when the occasion therefor shall occur. Such property is migratory. They are almost constantly moving. The character of the natural grasses, and the effect thereon by the grazing of sheep, is such that such movement is necessary. They cannot be permitted to remain stationary, and feed in the same place a very long period of time. Therefore it follows that, as they must move, their course can be readily directed along the direction in which they are eventually to be taken. In such a case the purpose of grazing is not inconsistent with the idea of a driving or transportation to some distant place. Nevertheless, the mere fact that in such driving they are also permitted to graze upon the way will not determine, at all hazards, the character of the purpose in bringing them into the state. Each case must, it would seem, depend upon its own facts. It will not do to say that in every case, because an owner brings his sheep into the state to drive them through it to some other jurisdiction for purposes of sale or otherwise, they are therefore merely in transit, for the reason that such a course might be selected which would consume quite a time in getting out of the state, and at the same time the animals would be maintained by grazing, the same as if kept in the state from which they came, or if they had originally been within this state, and all the benefits would be derived that would accrue in the absence of any such intended transportation. The sheep would thus be used here in the same and only manner in which during the same time they would be used anywhere. We are of the opinion, therefore, that in determining the purpose and the situs, the course and method of travel is a proper subject and one of the elements for consideration. We do not dispute the proposition that an owner of live stock, if not otherwise disobedient to the law, and observant of the police regulations of the state, has the right to transport them to market by driving on foot as well as by rail. Strictly speaking, they will be in transit by the one method as much as by the other. If, however, the purpose of such owner is not alone that of transportation, but comprehends also that of grazing and feeding them upon the natural grasses, which is their natural source of sustenance, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they would not come within the rule which exempts personal property in transit from taxation. To determine the existence or nonexistence of such a joint purpose, all the facts must be considered, the course taken; the character of the territory grazed upon; the time employed; the subsequent method of intended shipment; the ordinary facilities for transportation by other means; the place selected for the commencement of the journey by rail, if that is in contempla-

tion; possibly the time of the year, and the eventual purpose of their shipment; the character of the live stock, and the manner in which said stock is customarily kept, maintained, and grown; and in general every competent fact which will tend to explain the purpose in view. These considerations seem to us to involve a mixed question of law and fact, and upon reserved questions this court should not decide questions of fact. A direct decision upon the second reserved question is, therefore, not proper for us to render. We have indicated such legal principles, as, in our judgment, should control the determination of that matter. In addition to the observations already made, we might say that, whether or not the sheep were intended to remain here "permanently" is of little consequence, as that term is possible to be understood. Such property may properly acquire a situs in the state for the purposes of taxation, and yet remain here a comparatively short time. If it shall be found, as a fact, reasonably deducible from the agreed statement in the case at bar, that the sheep had been, in the first instance, brought into the state for use or to graze, and had, on that account, acquired a situs within the state, the observations of the court in the case of *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, would be pertinent. The court had under consideration the right of a town in New Hampshire to tax certain logs which had been brought down the winter before from some point in that state, and placed in the stream, and on the banks thereof in said town, to be from thence floated down the Androscoggin river to the state of Maine, to be there manufactured and sold. It was clear that the logs could not be taxed by reason of their intended exportation, as that would amount to laying a duty on exports which would be an infraction of the Federal Constitution. Mr. Justice Bradley, speaking for the court, in the opinion said: "Such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. . . . It seems to us untenable to hold that a crop or herd is exempt from taxation merely because it is, by its owner, intended for exportation." And in discussing the subject when the journey must be considered as begun, the learned justice said: "But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot, is only an interior movement of the property,

entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing." Hence, in the case before us, if it should be a fact that the property had already been incorporated with the general mass of personal property in the state, its shipment would not be deemed to have commenced until started on its final journey out of the state, which occurred at the time it was sent by rail from Pine Bluffs station. That station is located on the line of the Union Pacific Railway which traverses from east to west the entire state. Sheep driven from the western part of the state from any point in the vicinity of Utah in an easterly direction would pass numerous stations on that railway, any one of many of which might be selected as a place of shipment.

The third certified question relates to the fact that plaintiff returned his sheep for assessment and taxation for the same year in Utah. If plaintiff's property was otherwise legally taxable under the revenue laws of this state, the fact above mentioned would not exempt it, in the absence of a statute to that effect. We regard that proposition as too well sanctioned by the authorities to require discussion. *Brown v. Houston*, 38 La. Ann. 843, 114 U. S. 622, 29 L. ed. 257; *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 80, 35 L. ed. 619, 8 Inters. Com. Rep. 595, dissenting opinion; *Cooley*, Taxn. 37, 219-221; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460.

Our own constitutional provisions, quoted in an earlier part of this opinion, are invoked in opposition to the law of 1895, and the tax collected from the plaintiff. The proposition contended for is that, under the statute in question, the assessor was required to proceed at once; and that such peremptory action would be a violation of the constitutional rules relating to uniformity, equality, and due process of law. To sustain the proposition contended for, it is argued that uniformity and equality of taxation means equality and uniformity in the rate and also in the mode of assessment; that, as there is implied equality in the burden, that cannot exist without uniformity in the mode of assessment, it is then urged as the sole ground for the claim that there is an absence of uniformity in the mode of assessment, that no provision is made for notice, or for a hearing, or a correction of the assessment or tax, as in case of property embraced in the regular annual assessment. An examination of the authorities cited discloses that reference to the mode of assessment as concerns the rule of uniformity does not mean that, in the case of the assessment of all kinds of taxable property, the same officers shall act, or that the proceedings touching the assessment shall be the same. There is uniformity in the assessment and in the mode thereof if the same basis of valuation is taken as to all property of like character. The Constitution itself provides for the assessment of railroads and other common carriers upon their fran-

chises, roadway, rails, rolling stock, and all other property used in their operation, except machine shops, rolling mills, and hotels, by a state board, for all state, county, and school-district taxes; and also that such board shall fix the valuation each year for the assessment of all live stock. Const. art. 15, § 10. Property other than that owned by common carriers is assessed by county officials, and the value of all personal property, except live stock, is determined by them. But is it true that the statutes provide for no hearing or review? It is evident that the law of 1895 must be construed together with other laws relating to the same subject. It seems to have been assumed that the property of plaintiff was assessed and taxed only in pursuance of that statute, but we are unable to assent to that theory. Sections 8845-8849, Rev. Stat., brought into the revision from the Laws of 1884, provide for and regulate the assessment and collection of taxes on all personal property brought, driven, or coming into the state prior to the last day of the year. Those provisions were before the court in the case of *Frontier Land & Cattle Co. v. Baldwin*, 8 Wyo. 764, and were held not to contravene any of the congressional enactments which constitute the fundamental law of the territory, and their validity under the state Constitution has not been questioned, so far as we are aware. Except as far as they may have been in conflict with the act of 1895, they were in full force during that year. It is required by § 8846 that personal property coming into the state after the annual assessment shall be assessed at the same value as property of like kind and character is appraised and valued for the current year, and that the levy shall be the same as that made upon like property for the current year. The assessor is required to assess such property as soon as possible after he shall obtain knowledge of the existence of such property in the county, and the assessment is to be made in the same manner as other assessments. The county clerk is required to levy the tax thereon and enter the same upon the tax list for the current year. The duty of collecting the tax devolves upon the regular county collector of taxes. Section 8847. The statute of 1895 changed these provisions somewhat in respect to the levy and collection as to live stock brought into the state to graze. The assessor was substituted for the county clerk and collector, in regard to the levy and collection; but it seems entirely clear that the restrictions upon the manner of the assessment and rate of the levy mentioned in § 8846 would have controlled the action of the assessor in taxing live stock coming in to graze after the annual assessment. Such provisions are general, covering the case of any kind of personal property which is brought into the state subsequent to such annual assessment. The act of 1895 was silent concerning the basis of valuation and rate of levy, and therefore did not repeal the former statutory regulations controlling that matter. The assessable value of all live stock is fixed by the state board in March of each year. It is true that § 8845 provides that the taxes so assessed become due and payable at the same time as other taxes, unless assessed after the regular annual taxes are payable,

in which event they become due and payable upon demand. It is, however, also provided by § 8847 that, if there is danger of removal, the collector may levy upon and detain sufficient of the property, and hold the same until the taxes thereon are due, unless a sufficient deposit is made with him to cover the taxes and costs. Although the statutes of 1895 require immediate collection, we do not think, in view of the migratory character of the property, and other provisions of the law, which will be adverted to, that any principle of uniformity was thereby infringed upon. The courts have gone to great lengths in upholding the authority of the legislature to classify property for purposes of taxation, and establish such rules, according to the nature and habits of the property, as will insure its bearing its due and proper burden of government. In Wisconsin the statute was held valid which required the assessors to assess all logs and lumber of nonresidents piled upon the banks of streams for shipment in April, although other personal property was not assessed until the 1st of May. This provision was evidently enacted to guard against the removal of such property prior to May, and thereby escape taxation. *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54. The further fact is also pertinent that the interval between the completion of the annual assessment and levy and the time when taxes are regularly payable is so short that a requirement of earlier payment of a tax upon migratory animals could hardly be considered unjust or inequitable. Now, in regard to hearing and opportunity for review, it is further provided in § 8846, that any person aggrieved by any proceedings under it and the preceding and subsequent sections may apply to the board of county commissioners at any general or special meeting, to have the assessment equalized or corrected in any just particular; and the duty is enjoined upon the board to equalize and correct the same as justice may require, and, if the party complaining has paid an unjust tax, to refund to him the amount he has paid in excess of what he ought to have paid. We perceive no reason why that regulation was not open to any person in the situation of plaintiff, or anyone whose property had been taxed by the assessor under the provisions of the act of 1895, after the annual assessment. Such person would not have been taxed solely in pursuance of the last above-mentioned act, but under all the provisions and regulations affecting the taxation of such property as they existed, taken together, modifying and controlling each other. If such live stock was covered by the act of 1895 had been assessed prior to the determination of the rate of levy for the current year by the proper officials, the requirement for immediate collection would have been inoperative in its strict sense, as delay on the part of the assessor for purposes of collection would have been necessary until the rate had been fixed. In such case the command for immediate collection would have been understood to mean as soon as practicable, or immediately after the rate had been determined upon. In that case, moreover, the person taxed would have had the same opportunities that all other taxpayers were given to appear before the

board of equalization. As long as the rate and method of valuation are the same as in case of other property, we are unable to conceive of any valid reason why a statute affecting the taxation of a peculiar class of property may not be enacted to guard against its escape therefrom. Absolute equality in taxation is an impossibility. The late Mr. Justice Miller of the Federal Supreme Court said in one of the opinions of that court that it was an "unrealized dream." In the case of *Com. v. Brush Electric Light Co.* 145 Pa. 147, the court said: "Where the measure of value and the rate are uniform and applicable to all the members of the given class, the incidental hardships and inequalities must be borne." And the supreme court of Texas expressed itself as follows: "Taxes are said, within the meaning of the Constitution, to be 'equal and uniform,' when no person or class of persons in the taxing district, whether a state, county, or other municipal corporation, is taxed at a different rate than are other persons in the same district upon the same value or the same thing, and where the objects of taxation are the same by whomsoever owned, or whatever they be." *Norris v. Waco*, 57 Tex. 685. The difficulty is so apparent that we shall not attempt to formulate a general definition of equality and uniformity in taxation applicable to all cases, as such words are used in the Constitution. Neither is it requisite in this case that we should do so. In 1895 the legislature of the state of Washington enacted a law very similar to our statute of the same year. It was provided thereby that when any cattle, horses, sheep, or goats are driven into any county, of the state for the purpose of grazing at any time after the 1st Monday in April in any year, they shall be liable to be assessed for all taxes leviable in that county for that year, the same as if they had been in the county at the time of the annual assessment; and it was made the duty of the assessor to assess the same, and the taxes became due upon such assessment. The sheriff was required to collect such taxes at once in the manner provided for the collection of delinquent taxes. Laws 1895, p. 105. That statute came before the court in *Wright v. Stinson*, 16 Wash. 368, and was assailed as unconstitutional. It was held that no constitutional right was invaded by the act. Such statutes, in some other states, have been declared invalid, on the ground that there existed no provisions for taxing other kinds of personal property coming in after the annual assessment. As in Washington, so in this state, there is no discrimination in that respect.

The fourth question reserved for our decision is, in substance, whether the payment of the tax by plaintiff, under the evidence, was voluntary or otherwise, and whether it was so made as would authorize its recovery, if illegal. The facts as agreed to are that the money was paid after a refusal to pay the same upon a demand, and to prevent the seizure and sale of plaintiff's property, and the damages which would thereby accrue to the plaintiff. If that is true, we do not perceive what difference it makes whether the threat made by the collector was that he could take enough sheep or that he would do so. The concession that the payment was made to prevent the seizure implies

that seizure was intended or imminent, and that both parties so understood it. Under such a statute as that of 1895, requiring the same officer to assess, levy, and collect the taxes, giving him all the power of collecting officers, and applying to property of the character upon which these taxes were paid, it would not take very strong evidence of force to show a payment of the tax to be involuntary, particularly so when the statute, as in § 8846, enjoins upon the commissioners the duty of refunding such an amount as they should discover to be unjust. In our judgment the payment was made under such circumstances as would authorize the recovery if the tax should prove to be illegal.

The seventh certified question is, "For the recovery of taxes paid in the manner set forth in this case, against whom should a suit be brought; and, in this case, is the suit brought against the proper persons?" Plaintiff relies upon the cases of *Powder River Cattle Co. v. Johnson County Comrs.* 8 Wyo. 598, 603, and 638; *Johnson County Comrs. v. Searight Cattle Co.* 8 Wyo. 777,—wherein it was held that actions to recover back taxes collected by the county collector of taxes on account of state, county, and school-district taxes can only be maintained against the officer making the collection. It is clear that, unless manifest error has crept into a former decision of the court, and works injustice, it should not be departed from. A mere doubt on our part concerning its correctness is not sufficient to require a review thereof. It is equally well settled that, if it appears to be radically unsound, and subverts no useful purpose, but, on the contrary, establishes a hardship which is not within the manifest contemplation of the law, and, moreover, if no injurious results will be likely to follow a reversal, no principle of *stare decisis* interferes with a reconsideration of the principle involved and a reversal of the doctrine formerly announced. In consequence of a deep feeling that nothing but hardship and injustice flow from the law as construed in those cases, and especially as the late chief justice dissented there from in vigorous opinions, we deem it wise and expedient to examine the question anew, in the endeavor to discover whether the statutes are reasonably susceptible of the construction given them in the cases aforesaid. It may be premised that no provision has ever been made by law for a reimbursement to the collecting officer should a recovery be maintained against him, and that the invalidity which may require the return of a tax to the one paying it may have been the result of the action of other taxing officials, and even of the board itself in ordering the levy. The statute, then, which imposes such onerous responsibilities upon the public servant which obeys the mandates of the tax warrant should be unmistakable. It would be far better, and more consonant with equity, that the taxpayer should suffer in a single instance than that one officer, possibly without fault, should bear the burden in many; or that the loss should be distributed among several than borne entirely by a single individual, in case the law has permitted such a loss to fall upon anyone. These observations are suggested merely as incidental to an examination of the statutes themselves. They must control. They should receive such con-

struction, however, as shall harmonize them with the general policy of our laws and institutions, should their language permit it.

The statute providing the method of legal procedure to recover back taxes which may have been illegally collected is § 9055, Rev. Stat., and that part relating to such subject reads as follows: "Actions to recover back taxes and assessments must be brought against the officer who made the collection, or, if he is dead, against his personal representative; and when they were not collected on the tax list the corporation which made the levy must be joined in the action: provided, that when the money derived from said taxes or assessment has been actually paid over to any municipal corporation for whose use and benefit it was levied or collected, then an action shall be brought against said municipal corporation to recover said taxes or assessments." That part of the section preceding the proviso was taken from Ohio, in which state the action was in all cases to be brought against the collecting officer, unless not collected on the tax duplicate. The only taxes in this state, and possibly in Ohio, which would not be placed on the tax list, would be local taxes for improvements, such as assessments to construct sewers in the city of Cheyenne, and in other instances where taxes are assessed according to benefits. It is evident that no taxes are collected for state or county purposes except on the tax list, but the party to be joined in an action for the recovery of taxes not on the list is described as the "corporation," without the qualifying word "municipal." Yet it is only such a corporation as a city or town which could possibly be embraced within the provision. When, however, a municipal corporation is mentioned in the proviso, it has been thought to refer only to such a corporation in its most limited sense. I mention this at this time to show that it is entirely probable that the legislature did not intend, by the use of said respective designations, to confine itself to the precise use of language in legal acceptance. The difficulty supposed to arise in the construction of this section of the statute is in the reference to a "municipal corporation" in the proviso; and a majority of the court in the cases above cited concluded that a corporation such as a "county" would not be included therein. The first portion of the section having been imported from Ohio, it will be well to notice some of the other relative provisions of the statutes of that state then in force. In the first place, all the regular taxes which go upon any tax list of the state, county, school district, and of any city, village, or hamlet, within the county, go upon one list prepared by the county auditor, and all such taxes are collected by the county treasurer. The auditor is required to open an account with each township, city, hamlet, and school district, and, after each semiannual settlement which he makes with the treasurer, to credit each with the net amount collected for its use, and, on the application of the treasurer of each such subordinate corporation, to give him a warrant on the county treasurer for the amount then due. Ohio Rev. Stat. 1880, § 1047. It seems that the treasurer is charged with the taxes upon the list, and he may remain charged

with an uncollected tax (§ 1108), but the auditor may deduct an erroneous tax, and give a certificate thereof to the taxpayer for presentation to the treasurer (§ 1088). The treasurer may return an account of uncollected taxes with his reasons therefor. Section 1101. Finally, it is provided that, in case of any recovery from him on account of the collection of the public revenue, he shall be allowed and paid out of the county treasury counsel fees and other expenses of his defense in the suit and the amount of any damages and costs adjudged against him, all of which is required to be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and deducted from the shares or portions of the revenue at any time payable to each, including as one of said parties the state, as well as the counties, townships, cities, villages, and school districts, and other organizations entitled. Section 2862. It will be thus observed that in Ohio the system is made plain and harmonious. The treasurer collects for all taxing authorities, and, in case of damages recovered against him, is given a sure indemnity. At the same time a convenient method is provided, whereby a taxpayer who has been unlawfully assessed may secure a return of his money. At the time our legislature adopted the provision in respect to actions to recover taxes illegally collected, it was undoubtedly perceived that the revenue laws were somewhat dissimilar to those in Ohio, that a treasurer was not given indemnity when he had dispensed the funds collected by him; and not desired to interfere, or alter the provisions already in force concerning the collection of the public revenue, devised the more simple method of adding the proviso to the effect that, after the municipal corporation for whose use and benefit it had been collected, had received the tax, it should be made the respondent in an action for a recovery of such tax. We think a county is included in the designation "municipal corporation" as used in the proviso. While it is true that, in a restricted sense, and possibly by way of distinction, the term "municipal," as applied to a corporation, is generally understood to refer to such subordinate organizations as a city or town, nevertheless it is not improper, nor at all uncommon in legal parlance, to include a county within the designation "municipal corporation." That was conceded in the majority opinion in the *Powder River Cattle Co. Case*.

A further obstacle to declaring that the county is embraced within the meaning of the proviso was deemed to arise from the words, "for whose use and benefit it was levied and collected." It was thought that state and school district taxes were not collected for the use and benefit of the county. If that were so, we are unable to perceive why the statute would not authorize an action against the county for the money which was actually received for its use and benefit, and why it should be allowed, as to them, to hide behind the fact that there might be other money which was not held for its benefit. The words quoted, however, must receive a reasonable construction. In view of other statutory provisions, to which reference will be made, we are not inclined to apply to such words any narrow

and confined meaning. As to state taxes, the county is made responsible for all which are levied, and it is not permitted to receive credit except for such assessments as are certified to be double or erroneous. A particular tax is not returned itemized to the state, but payments are made on account of the county's actual statutory liability. Such taxes are, in a certain sense, collected for the use and benefit of the county. It could not escape settlement with the state by an absolute refusal to collect the taxes. To relieve itself from the burden imposed upon it by law, it must collect and pay over the taxes. Whatever may be the regulations existing between the county as an organization and the school districts within its boundaries, it levies taxes for the support of all the schools, and the special district taxes which have been legally voted by each district. The treasurer collects them, and is the custodian thereof until lawfully paid out to the district treasurers upon the apportionment and order of the county superintendent as to the common-school tax, and according to law as to the special district taxes. Before school-district treasurers are entitled to receive any of the money, they are required to furnish bonds, to be approved by the board of county commissioners in each case, who also fix the amount thereof. The school money is referred to in the statutes as in the county treasury. Laws 1895, chap. 44. For its use and benefit, in accordance with law, the school moneys are collected and received for the county. Not, it is true, to assist in carrying on the ordinary functions of county government, but, as an agency of the state, to levy and collect taxes to support and maintain the school organizations located within its limits. In that sense we conceive that the language was used in the proviso. Such a construction does no violence to the words employed, but recognizes the various capacities in which the county acts, and the duties devolving upon it, as well as the power with which it is clothed. Neither does that construction work harshly upon the county corporation, as we shall attempt to show. Section 8821, Rev. Stat., was thought to be in conflict with the statute above considered. We are not of that opinion, but believe that it harmonizes with it, and tends to explain it. The two sections should be so construed that both shall stand, if possible. That section is as follows: "In all cases where any person shall pay any tax, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer, or, in case any real property subject to taxation shall be sold for the payment of such erroneous tax, the error in tax may at any time be corrected as above provided, and shall not affect the validity of the sale, but such property shall be redeemed by the county as hereinafter set forth." The provision for redemption referred to is found in § 8883, which, in substance, requires the county to repay to a purchaser at tax sale of any land sold by mistake or unlawfully the amount to which he would have been entitled had the sale been legal; and the treasurer, unless the invalidity is not his fault, is made liable to the

county for the amount. These two sections, 8821 and 8833, must be construed together. The former impresses upon the county board the absolute duty to direct the treasurer to refund any tax found to be erroneous, and, in case land has been sold for such erroneous tax, the same may be corrected in the same manner, or "as above provided," which means by directing the treasurer to refund the same. If sold, then the one entitled to payment is the purchaser, and the amount to be refunded is specified and fixed by the provisions of § 8833. Now, it is reasonably clear that the thing to be refunded is the tax. The statute does not say that the same shall be returned by a payment out of the general fund of the county, or out of any particular fund. The tax is to be refunded. That tax will have gone into various funds. The command, therefore, as I understand it, is to take the proportionate amounts from each fund. This conclusion was reached in Iowa under a similar statute. *Lauman v. Des Moines County*, 29 Iowa, 810; *Stone v. Woodbury County*, 51 Iowa, 522. See also *George's Creek Coal & I. Co. v. Allegany County Comrs.* 59 Md. 255.

The erroneous character of the tax may be adjudged by the courts in a suit for a recovery of the amount paid, or by some other authorized proceedings, or the board itself may discover that it is invalid. In either event, it is to be refunded to the person entitled thereto. The legislature having constituted the county authorities and officers the agency to assess, levy, and collect the tax, and having designated the county treasurer the custodian of the proceeds, at least temporarily in all cases, it was certainly entirely competent for the lawmaking power to confer upon the board the authority—nay, more, to impose upon it the duty—of directing the custodian to return the tax, and in doing so to take it from the respective funds into which it had gone. It might have been expressed by language more in detail, but we think it has done so by the general terms employed. Suppose the requirement had been that the treasurer refund the tax. Could there be any question but that he should take it from the funds of which it formed a part? Where is the distinction if the legislative command is that the action of the treasurer shall be directed by the board? Part of the tax collected being for state purposes, the statute requires it to be refunded. The treasurer, by direction of the board, is made the agency to return it. It is not to be expected that the identical moneys received shall be refunded in any event, or under whatever construction § 8821 might receive. There is, at all times, more or less money in the various funds which are to be dispensed to other organizations. If not, the repayment can be made when any such fund shall be replenished. Whether the amount of interest, and costs which may be paid to a purchaser of lands at tax sales, and which is required to be paid to him by the county on discovery of the illegality of the sale, is to come out of the different funds, or is to be paid by the county itself, to be reimbursed by the liability of the treasurer, if it exists is a question which need not now be determined. It is not clear to us upon what theory it can be truly said that, as to state taxes, the county

should not be compelled, if illegally exacted, to refund them. The county is a debtor to the state for such taxes, but for all erroneous taxes charged against it the law requires that it shall be credited; and this court has held that such credit shall be extended upon its account, whenever it is certified to the proper state officer. *State v. Laramie County Comrs.* (Wyo.) 38 Pac. 992, 35 Pac. 929. It is therefore manifest that, should the county refund such erroneous tax, it would be entitled to a credit upon its account with the state.

Under the decisions in the *Powder River Cattle Co.* and *Searight Cattle Co. Cases* a person who has paid an unlawful state and county tax is granted a remedy, but one which consists in pursuing an officer individually, who may only have done his duty skillfully and faithfully; and, if that official is unable to respond, the taxpayer is still remediless, and the right given to him is an empty one. If the amount is collected from the officer or his representative, they are caused to bear a loss which belongs in justice to the public. Thus the remedy would often be without advantage to anyone, and unjust whenever it should possess any merit. Under the construction which we believe to be the only true and correct one, all those disadvantages depart, all the provisions become harmonious, and without any straining of language. It enforces the manifest legislative design. For the reasons aforesaid, it is our opinion that an action to recover back taxes, when they have been paid by the collecting officer into the county treasury, should be brought against the county in its corporate name. In the cases where the action is to be brought against the collecting officer, he must be sued individually. That seems to be the plain meaning of the statute, and it was so held in Ohio. 13 Bull. 334; *Ratterman v. State*, 44 Ohio St. 641.

The effect of a decision of the supreme court construing a statute renders it the law for the time being as so construed. Parties have a right to act upon such a decision, and no injury ought to be allowed to result, by reason of a dependence thereon, if the decision is subsequently changed, any more than in case of a repeal of a statute. *Hollinshead v. Van Glahn*, 4 Minn. 190 (Gil. 181). Until the decision now rendered, since the announcement of the court in the cases heretofore referred to, the law of the state has been as set forth and adjudged in those cases, at least to the extent that no one should be injured by relying thereon. Consequently, any case which has been brought against the collecting officer in his individual capacity should be permitted to proceed without objection on that ground. This case is not against the officer individually.

We have not arrived at the conclusion to depart from the rule heretofore announced except after mature reflection and a profound sense of an imperative necessity. This disposes of all the questions except the eighth, which, under our former decisions, is not a proper one for reservation.

To the first question, we answer that, if the sheep of the plaintiff were brought into this state for the purpose of being grazed, they were subject to taxation in the year 1895. To

the second question: We have stated in this opinion the legal principles which should apply to a consideration of the fact whether or not the animals were driven in for grazing purposes. It is not proper for us to determine the fact itself in this kind of proceeding. To the third question, our answer is in the negative. To the fourth question: The payment was involuntary. To the fifth question: The

plaintiff was afforded by law an opportunity to be heard, as set forth in this opinion. The taxes were not illegal for any reason mentioned in such question. To the sixth question: Chapter 61, Sess. Laws 1895, was constitutional. Our answer to the seventh question has been given above.

Corn, J., concurs. Knight, J., did not sit.

GEORGIA SUPREME COURT.

R. H. SMITH, *Plff. in Err.*,
v.
CLARKE HARDWARE COMPANY.

(.....Ga.....)

***To a declaration substantially alleging that the plaintiff sought to purchase a particular kind of loaded cartridges, and was negligently given by defendant's agent to sell certain loaded cartridges which were represented to be of the kind asked for, and which were alleged to be very similar in size, make, and mark to those desired, but were in reality of different caliber, and that on account of such difference in caliber the plaintiff (he being without fault or negligence in handling the cartridges so purchased, and while using the same properly) was injured by the premature explosion of one of them,—Held: (1) That it was error to sustain a demurrer for want of a cause of action. (2) That the allegations in the declaration authorized a submission of the case to a jury to determine the facts involved,—among them whether or not the injury could have been avoided by the plaintiff in the exercise of ordinary care.**

(January 21, 1897.)

ERROR to the City Court of Atlanta to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Glenn & Rountree and J. A. Noyes, for plaintiff in error:

It appearing from the allegations in the declaration that the damage resulted directly and proximately from defendant's breach of duty to, and implied contract with, plaintiff, the damages suffered are not too remote to be recovered.

Ga. Code, 8073, 2944, 2946; 1 Sutherland, Damages, pp. 22, 47, 61; *Burrows v. March Gas & C. Co.* 89 L. J. Exch. N. S. 33, L. R. 5 Exch. 67; *Lannen v. Albany Gaslight Co.* 44 N. Y. 459; *Gilson v. Delaware & H. Canal Co.* (Vt.) 86 Am St. Rep. 807, note.

The declaration makes out a case of liability precisely similar to those cases in the books,

***Headnote by LITTLE, J.**

NOTE.—As to liability for negligence in sale of dangerous articles, see *Lewis v. Terry* (Cal.) 81 L. R. A. 220, and cases cited in note thereto. 89 L. R. A.

where a manufacturer or a vendor of dangerous articles, guns, pistols, explosives, drugs, poisons, etc., are held liable to the vendee, or even to a third person, for damages arising from the negligent manufacture or sale of such articles.

Schubert v. J. R. Clark Co. 49 Minn. 381, 15 L. R. A. 818; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Rep. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Elkins v. McKean*, 79 Pa. 493; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Bishop v. Weber*, 189 Mass. 411, 52 Am. Rep. 715; *George v. Skivington*, L. R. 5 Exch. 1; *Marsh v. Webber*, 13 Minn. 109; *State, Hartlove, v. Fox*, 79 Md. 514, 24 L. R. A. 679; *Jeffrey v. Bigelow*, 18 Wend. 518, 28 Am. Dec. 476; *French v. Vining*, 102 Mass. 182, 3 Am. Rep. 440; *Heaven v. Pender*, L. R. 11 Q. B. Div. 508; *Bishop, Non-Cont. L.* § 418; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Lewis v. Terry*, 111 Cal. 39, 81 L. R. A. 220.

Messrs. Rosser & Carter for defendant in error.

Little, J., delivered the opinion of the court:

Smith brought an action against the Clarke Hardware Company to recover damages for personal injuries alleged to have been sustained by him by reason of the explosion in his face of a cartridge purchased from said company. In his declaration the plaintiff alleges, substantially, that he applied to an employee of the defendant company for a particular kind of loaded cartridges, to wit, No. 38 caliber, for a Winchester rifle, and that defendant's agent to sell negligently gave to plaintiff certain loaded cartridges, which were represented to be of the kind and caliber asked for, and which were in fact very similar in size, make, and mark to those desired, but were in reality of different caliber, and manufactured and intended for use in altogether a different firearm. It is alleged that notwithstanding the cartridges actually sold to plaintiff were marked on the end "S. & W." and the cartridges desired were marked "W. S.," yet the letters on the end of each were of the same size, and both kinds of cartridges very nearly the same size, differing only in the fact that the spread of the ball in the cartridges sold to plaintiff was broader than that in the cartridges asked for, in consequence whereof plaintiff did not detect the difference until after he

was injured; that petitioner was in no way negligent in the purchase of said cartridges, nor in failing to detect that they were not the right kind of cartridges, nor in his use of said cartridges in his rifle at the time the injury occurred; nor was he in any way to blame for such injury. To this action the defendant demurred upon the grounds (1) that no cause of action is set up in said petition; (2) the petition shows upon its face that the negligence of the plaintiff caused the damage complained of in said petition; (3) the petition shows upon its face that by the exercise of ordinary care the plaintiff could have avoided the injury which he complains of in said petition. This demurrer was sustained by the court below, and the action dismissed, to which ruling the plaintiff excepts.

The second and third grounds of the demurrer were obviously untenable. It is inconsistent to admit all the allegations of the plaintiff's petition, as the demurrer does, and yet contend that the petition shows on its face that the negligence of plaintiff caused the damage, or that the injury could have been avoided by the exercise of ordinary care on the part of the plaintiff. It is manifest from the allegations contained in the petition that it cannot be adjudged, as matter of law, that the plaintiff was negligent. The character of his allegations is such that, with defendant's liability in other respects established, the points raised by the second and third grounds of the demurrer are questions of fact, which should be submitted to and determined by a jury. We therefore come to consider the single question, Does the petition set forth a cause of action? Has the plaintiff suffered at the hands of the defendant the consequences of a tort arising by reason of the negligence of the latter? Inasmuch as there can be no actionable negligence in the absence of the existence of a duty, and inasmuch as there can be no tort unless in a transaction of this character the law imposed upon the defendant the duty of exercising ordinary care in the sale of such goods to purchasers, it becomes material only to consider whether there was a duty imposed by law upon the defendant to exercise such care relatively to the plaintiff. As stated, there can be no case of the negligent injury of one person by another in the absence of a legal duty from the person inflicting the injury to the person on whom it is inflicted. 16 Am. & Eng. Enc. Law, p. 415, ¶ 8, and authorities there cited. It must be a duty implied by law, although it may arise out of contract. Bishop, Non-Cont. L. §§ 132, 133. In actions of tort no duty is considered in law except a legal duty, and all legal duties exist from implication of law. A contract merely creates this implication. Whart. Neg. § 24. In his treatise on Negligence (§ 24) Dr. Wharton has well defined a legal duty to be "that which the law requires to be done or forborne to a determinate person, or to the public at large, and is correlative to a right vested in such determinate person, or in the public." The obligation involved is not a moral obligation, but it is the obligation imposed on every member of society by law so to conduct himself and use his property as not to injure others. *Sic utere, tuo ut alienum non laedas.* 1 Am. & Eng. Enc. Law, p. 417. In every un-

dertaking there arise by implication of law certain rights and duties. The duty incumbent upon the party engaged in the undertaking is to so conduct it that no injury will result to others; and upon every person holding himself out to the public as willing to act in a certain capacity, professional or otherwise, and who has induced persons to commit themselves or their property to his care, there is, by implication of law, a duty to use proper care in his conduct towards them, and, as a consequence of this duty, there is a liability to answer for injuries caused by a breach of it. Id. p. 420, and authorities there cited. Thus, an attorney is liable for negligently giving improper advice (*Moorman v. Wood*, 117 Ind. 144); a physician, for negligence in the treatment of his patient (*Babbitt v. Bumpus*, 78 Mich. 881). It has been held that a caterer is liable for injuries caused by poisonous food negligently furnished by him at a public entertainment; the court holding that since he assumed to act as a caterer, and was employed as such, a duty was implied to him by law to perform with due care that which he had undertaken. *Bishop v. Weber*, 189 Mass. 411, 52 Am. Rep. 715. So, also, an apothecary who, by his servant, negligently sold, as and for tincture of rhubarb, two ounces of laudanum, was held liable for damages resulting from such negligent sale. *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298. In the case of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, it was held that a dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it, so labeled, into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label; the court further holding that the liability in such case arises, not out of any contract or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. The imminent danger attending the sale and use of such drugs, and the great difficulty of detecting their poisonous character, impose upon dealers the duty of exercising the highest degree of care known among practical men to prevent injury from the use thereof. 2 Shearm. & Redf. Neg. § 691. While, in the sale of cartridges, ammunition, and other devices to be used in firearms, the degree of care required may not be so great, nor the scope of liability so far-reaching, as in the sale of poisonous drugs, by reason of the fact that the dangers attending the former are not so imminent as those attending the latter, there being in all probability much less difficulty in detecting the real kind and character of the one than would be true as to the other, yet it will not be contended that cartridges and kindred devices are not dangerous explosives; and, being such, they cannot be blindly and indifferently distributed to purchasers, without regard to the purpose for which they are to be used, or the age and discretion of the person to whom they are sold. One holding himself out to the public as dealing in such articles at least owes to purchasers the duty of exercising ordinary care in the matter of placing into their hands the kind and character of goods for which they

contract. This duty, of course, exists in a higher degree with respect to latent dangers which are hidden from the eye of the nonexpert, and without the knowledge of the uninformed. In the present case we think the defendant owed to the plaintiff the duty of exercising ordinary care in the matter of selecting and selling to him the kind of cartridges asked for. It is claimed that there was a breach of this duty, by reason of the fact that the defendant negligently sold to plaintiff a different cartridge, which was dangerous to be used in the rifle for which he endeavored to buy the cartridges. The demurrer admits the negligent sale, and, holding as we do that such negligence constituted a breach of duty due by

the defendant to the plaintiff, and further holding that it is a question of fact, and not of law, as to whether the plaintiff could, by the exercise of ordinary care, have detected the real character of the cartridge, or otherwise avoided the injury of which he complains, it follows that the court erred in sustaining the demurrer and dismissing the plaintiff's action. We think the allegations in the declaration authorized the submission of the case to a jury, to determine the facts involved,—among them, whether or not the injury could have been avoided by the plaintiff in the exercise of ordinary care.

Judgment reversed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

City of CAPE MAY, *Plff. in Err.*,

v.

CAPE MAY, DELAWARE BAY, & SEWELL'S POINT RAILROAD COMPANY.

(60 N. J. L. 224.)

*1. The city council of Cape May by an ordinance granted permission to a

*Headnotes by NIXON, J.

NOTE.—Municipal control over public nuisances upon public streets and highways created by street railroads and other electrical companies.

I. Street railroads.

II. Telegraph and electrical poles, etc.

III. Steam and electricity.

Upon the question of municipal control over nuisances in highways and streets in general, see note to *Hagerstown v. Witmer* (Md.)—L. R. A. —.

Cases in which the power of a municipality to proceed in equity for the abatement of public nuisances created by street railroads and electrical companies will be found specifically treated of in a later note.

I. Street railroads.

Generally it may be said that the municipal authorities have a right, under their police power, to pass all necessary laws for the purpose of regulating the use of the streets by railroad companies, and that all such laws and regulations are valid as being for the benefit of the public safety and general welfare, so long as they do not contravene any constitutional provisions. It is not, however, within the province of this note to consider or define the extent of such power, except in so far as it relates to the question of nuisances relating to the operation of such roads.

In the principal case of *CAPE MAY v. CAPE MAY, D. B. & S. P. R. Co.* turnouts, built pursuant to an ordinance giving the company power to lay tracks on certain streets in the city, are not such obstructions as will justify their summary and forcible removal by the police without notice, and notice should be given before any ordinance interfering with such city rights can be adopted, although a resolution declaring such a turnout an obstruction, and directing the employment of counsel to take legal measures to compel its removal, is not objectionable.

Where the lawmaking power has given railroad

railway company to lay its tracks on certain streets (naming them), and also to construct all necessary switches and turnouts. *Held*, that turnouts built in pursuance of such authority, unless it clearly appears that the authority has been exceeded, are not such an obstruction of the streets as to warrant their summary and forcible removal by police intervention without notice or a hearing.

2. Notice, either actual or constructive,

companies the right to construct their railroads upon the streets, and invested the local government of such cities both with the fee of the soil and the exclusive control over the streets, and if, in the exercise of their proprietary rights and police regulations over such streets, the authorities should determine that iron rails and their use are a legitimate street improvement, the court cannot control their authority in that respect, as both the city and company derive their rights and privileges from the sovereign power of the state, which cannot be supposed to authorize that which amounts to a nuisance. *Milburn v. Cedar Rapids*, 12 Iowa, 246.

Under such circumstances such railroads cannot be adjudged obstructions or annoyances which can be declared nuisances. *Milburn v. Cedar Rapids*, 12 Iowa, 246.

To the same effect are the following cases: *Illinois & M. Canal v. Haven*, 11 Ill. 554; *Moses v. Pittsburgh, Ft. W. & C. R. Co.* 21 Ill. 513; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 298, 33 Am. Dec. 497; *Hamilton v. New York & H. R. Co.* 9 Paige, 171; *Drake v. Hudson River R. Co.* 7 Barb. 508; *Chapman v. Albany & S. R. Co.* 10 Barb. 360; *Heutz v. Long Island R. Co.* 13 Barb. 646; *Wetmore v. Story*, 22 Barb. 414.

The legislature have power to authorize the building of a railroad upon a public road, and such power is indubitable. *Danville, H. & W. R. Co. v. Com.* 73 Pa. 29, 38; *Philadelphia & T. R. Co.'s Case*, 6 Whart. 25, 36 Am. Dec. 302; *Green v. Reading*, 9 Watts, 382; *Henry v. Pittsburgh & A. Bridge Co.* 8 Watts & S. 85; *O'Connor v. Pittsburgh*, 18 Pa. 189.

And as the legislature has, under the general police power, the constitutional right to authorize a city to grant the right to construct a railroad track, upon which steam engines are operated, across and through the streets, it cannot be said that the obstruction of the street in such a manner is a nuisance *per se*. *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 119; *Perry v. New Orleans, M. & C. R. Co.* 55 Ala. 413, 23 Am. Rep. 740.

should be given to all who are interested, before the adoption of an ordinance which affects and practically adjudicates property rights. An unreasonable ordinance will not be sustained.

3. A resolution by a city council declaring the turnout of a street railway to be an unlawful obstruction, and directing the street committee to employ counsel and take legal measures to remove it, is not objectionable.

(July 1, 1897.)

ERROR to the Supreme Court to review a judgment setting aside on certiorari a res-

In *Geiger v. Filor*, 8 Fla. 325, 332, it is stated that railroads in cities or towns cannot with propriety be termed nuisances, neither are wharves necessarily nuisances, although both may be converted into injuries or subjects of offense, and so become public nuisances.

A railroad in a city is not necessarily a nuisance. *New Albany & S. R. Co. v. O'Dally*, 12 Ind. 551.

So, as a railroad in the streets of a city is not in itself a nuisance, it cannot be inferred from the occupancy of the streets for that purpose that a nuisance is created. *State v. Louisville, N. A. & C. R. Co.* 86 Ind. 114, 116.

And this is so for the reason that that cannot be a nuisance which is permitted by competent authority. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

If a street railroad is laid under the sanction of a competent legal authority, it cannot constitute a nuisance, but if it is not so laid it does constitute a nuisance abatable by the public authorities. *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

So, if such a road is bona fide laid under the provisions of its charter, and is not injurious to public health or safety, it cannot be summarily abated by a forcible destruction or removal thereof by the municipality as a public nuisance, although it may obstruct the street and so become a nuisance, and in such a case resort may be had to legal proceedings. *Easton, S. E. & W. E. Pass. R. Co. v. Easton*, 133 Pa. 505.

And under the general power to prevent and abate nuisances such authorities have no power to interfere with the tracks or business of such a road at a specified point when the road is laid by legislative authority. *Brooklyn City R. Co. v. Furey*, 4 Abb. Pr. N. S. 364.

A railroad erected in a city by legislative authority is not a nuisance *per se*. *Wetmore v. Story*, 22 Barb. 415; *Brooklyn City R. Co. v. Furey*, 4 Abb. Pr. N. S. 364, 367.

And this is so even where the cars are drawn by steam power into a crowded part of the city. *Drake v. Hudson River R. Co.* 7 Barb. 508; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497; *Hunter v. Long Island R. Co.* 13 Barb. 646; *Moses v. Pittsburgh, Ft. W. & C. R. Co.* 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Rep. 307; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25, 43.

In *Milbau v. Sharp*, 15 Barb. 193, 207, it is stated that a railroad in a city is not *per se* a nuisance or a purpresture.

So long as the building of a railroad is authorized by law, and is done with reasonable care and skill, it is not a nuisance. *Ridley v. Seaboard & R. R. Co.* 118 N. C. 996, 32 L. R. A. 708.

And the mere construction of a railroad track across a public highway in pursuance of law is no nuisance, but it must be so constructed as not to impede the passage or transportation of persons or

olution and ordinance in relation to the tracks of the defendant road. *Affirmed as to ordinance. Reversed as to resolution.*

The facts are stated in the opinion.

Mr. David J. Pancoast, for plaintiff in error:

The defendant company was not entitled to notice or a hearing.

The power of the municipal authorities of a city, in a summary manner, to remove obstructions from its streets, is an important one, without which good city government cannot well exist.

Stamford v. Stamford Horse R. Co. 56 Conn. 381, 1 L. R. A. 375; *Spokane Street R. Co. v.*

property, along the same. *Northern C. R. Co. v. Com.* 90 Pa. 300, 305.

As long as a railroad company uses proper care, and makes reasonable efforts to so conduct its business as to cause no unnecessary obstruction, it cannot be deemed the author of a nuisance; and while it has no right to unnecessarily obstruct the streets, it has a right to use them in a reasonable manner for the necessary transaction of its business. *State v. Louisville, N. A. & C. R. Co.* 86 Ind. 114, 116.

So, the duty imposed upon a street-railroad company to so construct its road as not unreasonably to interfere with the public in the use of the road, and thereby create a public nuisance, does not require absolute safety or perfect convenience, as every crossing of streets in a city necessarily affects in a greater or less degree the safety of travelers and the convenience of travel, and in a crowded and busy city where the travel is large, the inconvenience might be great and accompanied with some degree of danger; but, considering the necessity of such travel, it is not always held to be unreasonable, much depending upon the circumstances of the case. *Johnston v. Providence & S. R. Co.* 10 R. I. 365.

In *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 75, 77, 86 Am. Dec. 252, it was sought to restrain the railroad company from constructing a horse railroad through the streets of a city under the authority of their act of incorporation. The court stated that in order to make such erection a public nuisance it must be occasioned by acts done in violation of law, and that a work which is authorized by the law cannot be a nuisance; and further, that the question, whether or not the construction of such a road would be beneficial or injurious to the public right of way, and prove a public benefit or a public nuisance, was one for the determination of the legislature and of the city council; and that even if they erred in judgment, and the work proved an obstruction and a public inconvenience and injury, yet it was not punishable as a nuisance if constructed as prescribed by the charter.

A street railroad so laid out as to be even with the street and property laid and kept in order is no obstruction to the ordinary use of the street, but is a desirable and proper use thereof. *Coast Line R. Co. v. Cohen*, 50 Ga. 451, 462.

So, a railroad track made upon the street of a city by authority of law, properly constructed and operated in a skilful and careful manner, is not in law a nuisance. *Randle v. Pacific R. Co.* 65 Mo. 225; *Danville, H. & W. R. Co. v. Com.* 73 Pa. 38.

In *People v. New York, N. H. & H. R. Co.* 89 N. Y. 286, 270, it was held that the construction by a railroad of a bridge of less width than the highway was not *per se* a nuisance.

The tracks of a street-railroad company must be made to grade so that the only obstruction will be the passing of the trains. *Sherlock v. Kansas City Belt R. Co.* (Mo.) 43 S. W. 629, 632.

Spokane Falls, 46 Fed. Rep. 322; *Waters Pierce Oil Co. v. New Iberia*, 47 La. Ann. 863; *Pedrick v. Bailey*, 12 Gray, 161; *Montgomery v. Hutchinson*, 18 Ala. 573; *State, Trenton Horse R. Co., v. Trenton*, 58 N. J. L. 182, 11 L. R. A. 410; *Compton v. Waco Bridge Co.* 62 Tex. 715; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

The company's action in laying the track in question was entirely without the warrant of law, and, being so laid, it was in reality a public nuisance, which it was the city's right and duty to abate.

Stamford v. Stamford Horse R. Co. 58 Conn. 381, 1 L. R. A. 375; *Waters Pierce Oil Co. v. New Iberia*, 47 La. Ann. 863.

Where a street-railway company had obtained possession of land as a right of way by the involuntary action of an improvement company, and its possession was not unlawful, it was held that the subsequent annexation to the city of the land of which such company had become so possessed did not render the company's possession unlawful, neither did the subsequent acceptance of the street upon which the company operated its railroad as a public highway, nor the change of the name of the street, render the occupation and possession of the street by such railroad company a nuisance subject to be abated by a mere resolution of the city council, and the action of the authorities in tearing up and removing the railroad in the manner threatened by them was therefore restrained. *Denver v. Denver & S. F. R. Co.* 17 Colo. 583, 586. To the same effect, *Denver v. Mullen*, 7 Colo. 345; *Omaha & N. W. R. Co. v. Redick*, 16 Neb. 313.

So, where an injunction was sought to restrain the city authorities from opening a street through an embankment of a railroad company as an obstruction and a public nuisance upon the streets, the injunction was granted, as it was doubtful whether the street in question was ever a public street across the railroad except as such road made it by opening the culvert,—especially as the public authorities had acquiesced in such alleged nuisance for over twenty years. *Atlanta v. Georgia R. & Bkg. Co.* 40 Ga. 471.

And where a statute authorizes a railroad company to appropriate so much of the public road as is necessary to its purpose, and the portion taken does not exceed the width fixed by law, such a taking is not a public nuisance. *Danville, H. & W. R. Co. v. Com.* 73 Pa. 29, 38; *Fletcher v. Auburn & S. R. Co.* 25 Wend. 463; *Drake v. Hudson River R. Co.* 7 Barb. 508; *Harris v. Thompson*, 9 Barb. 350.

Where the state has granted the right to a railroad company to lay its track upon the streets of a city, the mayor and aldermen of the city have no such property in the streets and squares of the same under their act of incorporation or the act amending the same as will entitle them to pecuniary compensation for the additional servitude so placed upon the streets and squares, neither have they the right to an injunction restraining the construction of such railroad for the benefit of the residents, and if the residents are damaged by the construction of the road they are entitled to be heard by the courts upon a proper case being made out. *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602, 610, wherein the city sought to enjoin the defendants from laying their track along the streets of the city pursuant to their legislative power.

Yet it has been stated that it cannot be doubted that the use of steam locomotives, puffing, blowing, whistling, clattering, and crushing through the streets of a city or along a public highway in the country, is within the definition of a public nuisance, as being a nuisance to the citizens in general, 39 L. R. A.

Mr. Edward A. Armstrong for defendant in error.

Nixon, J., delivered the opinion of the court:

This writ of error brings here for review the judgment of the supreme court setting aside both a resolution and an ordinance passed by the council of the city of Cape May. The resolution was adopted June 4, 1895, and is as follows: "Whereas, the Cape May, Delaware Bay, & Sewell's Point Railroad Company, without the sanction or authority of the city council, on the 28th day of May last, made an extension of its road by laying an additional track on Beach avenue, from the Sea Breeze

dangerous to human life, requiring constant care and watchfulness from all who are in the vicinity to keep free from damage from it. *Vason v. South Carolina R. Co.* 42 Ga. 631.

Whenever any local private corporation under a legislative grant enters upon the streets of any city or borough it does so under and subject to the general police powers of the municipality, and when those powers are exercised reasonably and not fraudulently, corruptly, and oppressively by the municipality, the private corporation has no such vested rights in the occupancy of the streets as will defeat the official municipal action. *Monongahela City v. Monongahela Electric Light Co.* 4 Am. Electrical Cas. 53, 56, 57.

So, the construction of a railroad in a street may be a public nuisance, abatable by the public authorities. *Atty. Gen. v. Lombard & S. Street Pass. R. Co.* 1 W. N. C. 429.

Thus an unauthorized occupation in a street by railroad tracks is a nuisance *per se*, and its use as well as their removal may be controlled by injunction. *Musser v. Fairmount & A. Street R. Co.* 5 Clark (Pa.) 466; *Atty. Gen. v. Lombard & S. Streets Pass. R. Co.* 10 Phila. 352; *Larimer & L. Street R. Co. v. Larimer Street R. Co.* 137 Pa. 533; *Faust v. Second & Third Street Pass. R. Co.* 3 Phila. 164; *Sherlock v. Kansas City Belt R. Co.* (Mo.) 43 S. W. 629, 630.

And a railroad over and along a highway obstructing it is a nuisance where no express or legal statutory authority is granted for the erection thereof. *Com. v. Old Colony & F. River R. Co.* 14 Gray, 93.

Without the authority of the legislature a railroad corporation has no right to interfere in any way with any ordinary road or highway and every obstruction which such corporation causes to be placed in such road stands on the same ground as an obstruction similarly placed by any individual; and an obstruction endangering the public travel is a nuisance for which the party placing it there will be liable in damages in case any injury should be caused thereby. *Hamden v. New Haven & N. Co.* 27 Conn. 158, 166. To the same effect, *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79.

If, through the unlawful acts of a railroad company in maintaining its railroad upon the public streets of the city, it occasions injuries for which the public authorities have been forced to make compensation, the city authorities will have a right to recover the amount of damages thereby occasioned against such railroad company by reason of the nuisance thereby created. *Hamden v. New Haven & N. Co.* 27 Conn. 158.

A railroad charter which legalizes the use of the streets by a railroad company does not authorize the erection of an embankment except on condition that it shall restore the road to its former state of usefulness, and where such usefulness can only be re-established by the erection of good and sufficient railings on the sides of the embankment, un-

Hotel westward to the end of Beach avenue drive, a distance of about 1,500 feet, the effect of which is injurious to the said Beach avenue and the right of the traveling public therein. Now, therefore, be it resolved, that the said railroad company be notified and requested to remove the said extension at once, and if they shall refuse to comply with such notice and request that said committee shall be empowered and directed to employ counsel and take legal measures in behalf of the city to enforce the same."

The ordinance was introduced June 3, and adopted June 18, 1895, and is as follows:

"An Ordinance Relating to the Railroad Encroachments and Obstructions in Beach Avenue.

"Sec. 1. Be it ordained and enacted by the inhabitants of the city of Cape May, in city

council assembled, and it is hereby enacted by the authority of the same, that the extension to their street railroad which the Cape May, Delaware Bay, and Sewell's Point Railroad Company made on the 28th day of May, 1895, on Beach avenue, from the Sea Breeze Hotel westward to the end of Beach avenue drive, without the sanction or authority of city council, is an unlawful obstruction and encumbrance in and upon the said avenue; and the street committee is hereby authorized and directed to remove the same, and the mayor of the city is hereby requested to aid and assist the said committee in the enforcement of this ordinance according to the duty imposed upon him by the city charter.

"Sec. 2. And be it ordained and enacted by the authority aforesaid, that this ordinance shall take effect immediately."

til such railings are erected the embankment is a nuisance to the highway notwithstanding the usefulness of the road, and the statute of limitations will not protect the corporation against liability, as every continuance of a nuisance amounts to a new nuisance. *Hamden v. New Haven & N. Co.* 27 Conn. 158.

In *Vason v. South Carolina R. Co.* 42 Ga. 681, it was alleged that locomotive engines running on a railway in certain streets in a city were a nuisance tending to the immediate annoyance of, or working hurt, inconvenience, and damage to the citizens in general, as impeding and obstructing the free and common use of the streets, and by the shaking of the houses and breaking the plaster of the same, and disturbing the occupants by the noise of the bells and steam and the frightening of animals in the street, and also as endangering the life of the citizens, some having been killed. The court held that the use of steam on such a railroad, being specially permitted by the public authorities, could not therefore be abated as a nuisance, although if in its use acts were done beyond the scope of the permission, and if the use be in a manner not contemplated by the public authorities, equity would restrain it within the bounds prescribed.

Where a railroad is constructed without authority, either from the state through the legislative branch of the government, or from a municipal corporation, it is a public nuisance and unlawful, and may be made the subject of proceedings to abate it at the hands of the proper authorities in the local jurisdiction, but cannot be abated at the instance of a private individual. *Garnett v. Jacksonville, St. A. & H. River R. Co.* 20 Fla. 889, 904.

In *Denver & S. R. Co. v. Denver City R. Co.* 2 Colo. 673, street railroads constructed in a public street without authority of law are held to be a continuous obstruction and a public nuisance. And being so constructed without right no matter how little inconvenience the permanent appropriation of the street may occasion, such a railroad cannot defend itself from the charge of nuisance, but if authorized by law their acts may be justifiable no matter how much inconvenience to the public they may occasion.

An obstruction of a highway by the construction of a railroad across it in a manner not authorized by law is a nuisance. *Com. v. Vermont & M. R. Corp.* 4 Gray, 22, 24; *Com. v. Nashua & L. R. Corp.* 2 Gray, 54; *Com. v. Proprietors of New Bedford Bridge*, 2 Gray, 339.

In *State v. Tupper*, Dud. L. 135, it was held that the South Carolina acts of 1823, 1832, authorizing and empowering a railroad company to construct a single track on its road, but prohibiting the use of any locomotive steam engine below a certain street, and also providing that the railroad should

be constructed so as not to impede the ordinary passage of carriages and persons along the roads and streets and squares of the city, did not necessarily imply that steam power should be used as a means of propelling such cars, and the company using such power would be liable for any nuisance occasioned thereby.

By § 1 of chap. 355 of the New York Laws of 1855, the commissioner or commissioners of highways in each of the towns of the state are empowered to bring any action against any railroad corporation that may be necessary or proper to sustain the rights of the public in and to any highway in such town, and to enforce the performance of any duty enjoined upon any railroad corporation in relation to any highway in the town of which they are commissioners, and to maintain an action for damages or expenses which any town may sustain or may have sustained, or may be put to or may have been put to, in consequence of any act or omission of such corporation in violation of any law in relation to such highway, but nothing in the act is to be construed as impairing the right of any person or officer to bring any other action than authorized by law.

It has been held that under such act the highway commissioners have power to bring action against a railroad company constructing its road on and along two highways without first obtaining authority, and for failure to restore such highways to their former state of usefulness. *Barse v. Herkimer, N. & P. Narrow Gauge R. Co.* 13 N. Y. S. R. 215, 217.

Although power may be given to a street-railroad company to carry its tracks along streets of a city, yet it cannot, in the exercise of such right, cause any unnecessary obstruction to the public street, and the power to cause such obstruction cannot be derived from any resolution of a common council no matter how comprehensive its terms may be, and therefore the city authorities may proceed in a summary manner to abate such obstruction as a public nuisance, especially after notice had been given to the company to remove the obstruction, and a reasonable time has elapsed to enable them to comply with such notice. *Delaware, L. & W. R. Co. v. Buffalo*, 4 App. Div. 562.

In *Delaware, L. & W. R. Co. v. Buffalo*, 4 App. Div. 562, the court justified the proceedings of the common council of the city under N. Y. Laws 1890, chap. 519, tit. 9, § 5, whereby they condemned a bridge which had been erected by the railroad company across a street of the city as a nuisance, although at the time such bridge was built the company had the sanction of the city thereto, and the New York laws empowered such company to use the streets of the city.

And although a railroad company may have a

The principal question raised by the writ relates to the validity of this ordinance, and it is important to first note the relation of the parties to the controversy. The defendant in error is a railway corporation formed by the merger and consolidation, under the laws of this state, of three companies, and has been for several years past operating a street railway in and through the city of Cape May to adjacent points; and a map of this consolidated road is on file in the office of the secretary of state, showing the true location of the same, as required by law. The validity of this consolidation, and the right of the new corporation to exercise all the privileges and franchises possessed by the constituent roads out of which it was formed by the merger, are not challenged in these proceedings. The city council of Cape May, the plaintiff in error, by

an ordinance dated June 29, 1892, granted to the Cape May & Schellenger's Landing Railroad Company, one of the three companies merged into and now forming the Cape May, Delaware Bay, & Sewell's Point Railroad Company, "permission to lay, construct, maintain, and operate a railroad, with the necessary switches and turnouts, upon and adjoining the board walk from Madison avenue, in the city of Cape May, to Wood street, in said city, and from Wood street, crossing the said board walk to the southerly side of Beach avenue, and thence extending inside and adjoining the board walk along the same to Broadway, and thence to the northwardly side of Beach avenue and extending to the boundary line of the city of Cape May." Other provisions follow, providing, among other things, that the propelling power for its cars shall be

right to use the public places specified, it has no right to unreasonably and unnecessarily obstruct them, for an improper or unreasonable exercise of a right to use a street may become a nuisance. *State v. Louisville, N. A. & C. R. Co.* 86 Ind. 114, 116; *State v. Berdett*, 73 Ind. 185, 38 Am. Rep. 117.

In *Windsor v. Delaware & H. Canal Co.* 92 Hun, 127, as it was found that the railroad constructed by the defendant company materially and unnecessarily impaired the usefulness of the highway, and that no necessity existed for requiring such a narrow passage as was then maintained by the defendant, the court abated the nuisance.

The principle applicable in such a case is that the doing of a lawful act in an illegal and wrongful manner may cause the thing done to be treated as a public nuisance. *State v. Louisville, N. A. & C. R. Co.* 86 Ind. 114, 116.

In *Burlington v. Pennsylvania R. Co.* (N. J. Ch.) 38 Atl. 849, 850, it is said to be entirely settled that without statutory authority expressly given or arising from necessary implication, a railroad placed longitudinally in a street is a nuisance, and that a railroad so placed is regarded as practically an exclusive appropriation of that part of the street which it occupies to a use inconsistent with the legitimate use of the street by the public, its presence in the street being as repugnant to the rights of the public as the presence of a church or a market house, or any other structure devoted to private objects.

So, a railroad company erecting a building upon the public highway, and continuing it there and placing cars on the public highway and suffering them to remain therein is guilty of creating a public nuisance. *State v. Morris & E. R. Co.* 23 N. J. L. 360, 364.

And a railroad company having power to construct its road along, upon, or across, or to use an existing highway, cannot so construct it as to obstruct the use of the highway by the public, and it may be called upon to remove such obstruction and to abate the nuisance by grading the highway to the surface of the railroad, or by carrying the highway under or over the railroad, but it cannot be ordered to absolutely remove the constituent elements of the roadbed from the highway. *Palatka & I. River R. Co. v. State*, 23 Fla. 546, 558.

In *Donnauer v. State*, 8 Smedes & M. 649, the defendant was charged with a public nuisance in obstructing the streets in that he was grading and hauling dirt for a street railroad company which was preparing the streets for the purpose of laying its tracks under an act of the legislature which it was alleged gave the company power to so construct its road, and the question was whether it could so proceed, inasmuch as the title to the streets was vested in the city. The court held the 39 L. R. A.

defendant liable, for the reason that the act incorporating the company did not give it the right to so use the streets without the consent of the corporation and without complying with the municipal laws regulating such use of the streets.

The placing of an embankment upon a street, thereby changing the face and character thereof, by a railroad company, so as entirely to prevent the passing and repassing across the same, and so as to prevent the turning of vehicles into and from the street thereby rendering it entirely useless as a street, is a diversion of the street from customary use and enjoyment by the inhabitants, and creates a public nuisance. *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601, 618; *Columbus v. Jaques*, 30 Ga. 506; *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

A railroad company, in order to justify the placing of an embankment in a highway, must resort to its charter or to the general statutes authorizing it, and where there is no uncertainty in respect to the terms of the grant, and it only authorizes the old highway to be altered provided it is restored to its former state, or put in as good repair as at the time of altering the same, the company will be bound to compensate the town for any damages occasioned by obstructions caused by such company in the use of its road. *Hamden v. New Haven & N. Co.* 27 Conn. 158, 166.

In *Cincinnati R. Co. v. Com.* 80 Ky. 137, the leaving of a hand car upon the road, and hanging upon such car boxes and clothing by reason of which, and the location of the car upon the road, the horses of those passing were frightened and the lives of persons endangered, was held to be a public nuisance and an unlawful obstruction.

So, in *Louisville, C. & L. R. Co. v. Com.* 80 Ky. 143, 44 Am. Rep. 498, the habitual running by a railroad of its trains at an unsafe and unreasonable rate of speed, thereby endangering persons traveling upon the turnpike, without giving warning signals or taking precaution to avoid injuring such persons, was held to constitute a public nuisance of such a character that contributory negligence by the persons using the highway would furnish no excuse or defense.

The laying of a street railroad many be enjoined as a nuisance at the instance of the public authorities where the provisions of the city ordinance respecting the same have not been complied with. *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620.

If such a road deviates from the course laid out, or extends further than the limit fixed by the authorities, it is an obstruction to the street and a public nuisance so far as it exceeds the legal limit. *Com. v. Erie & N. E. R. Co.* 27 Pa. 330, 67 Am. Dec. 471.

So, an injunction will be granted to restrain the

electric motors, and also that the company shall file its acceptance of the ordinance with the city recorder, which was done. It will be perceived that the ordinance gives permission to conduct and operate the railroad, with the necessary switches and turnouts; and also that the route includes Beach avenue, from which that part of the defendant's road described in the resolution and ordinance was to be removed. After the passage of this ordinance the company laid its tracks and two turnouts on Beach avenue, and the road had been operated with these sidings for over two years without objection, when, in May, 1895, the two were connected by the addition of about 470 feet, and thus converted into one turnout of about 1,500 feet in length. This act on the part of the company gave occasion for the passage of the ordinance in question, and also the resolu-

tion. The purport of the ordinance is to adjudge this turnout, or "extension," as it is termed in the ordinance, an unlawful obstruction amounting to a nuisance, and to direct its removal as such. This is the status, as claimed by counsel for the plaintiff in error, who, in his brief, says, "On the fourth of June city council passed a resolution directing the street committee to take legal measures for the removal of said extension, and on the 13th of the same month passed an ordinance declaring the said extension to be a nuisance, and ordering its removal."

The general proposition that the municipal authorities of a city may, in certain cases, remove in a summary manner obstructions from its streets, will not be controverted by anyone. Power to do this is given to the council of Cape May. Laws 1875, p. 206, § 19. But

obstruction of the streets by a railroad company not authorized by law to use them, even though it may have the consent and authority of the municipal authorities. *Atty. Gen. v. Lombard & S. Street Pass. R. Co.* 1 W. N. C. 489.

And a city is a proper party to a bill in equity to restrain the wrongful use of its streets by a street-railroad company, such use constituting an obstruction and a nuisance. *Philadelphia v. Thirtieth & Fifteenth Streets Pass. R. Co.* 8 Phila. 648.

A railroad company erecting a road over a public highway, contrary to the provisions of its charter, and to the authority of the selectmen of the town, which required a draw bridge to be erected over the same for the accommodation of the public, creates an obstruction in the nature of a public nuisance for which it is liable to indictment by the public authorities. *Com. v. Nashua & T. R. Corp.* 2 Gray, 54.

To set up or establish a railroad in a street, when there is not sufficient authority to sanction it, is to set up that which is *per se* a nuisance, because it is an invasion of the right of the public, and becomes a purpresture by making too exclusive to one that which ought to be common to everyone, and it obstructs and impedes the free use of a public road or street, interfering with the freedom of transit. *Atty. Gen. v. Lombard & S. Street Pass. R. Co.* 1 W. N. C. 489.

The occupation of a public road by a track of a railroad operated by steam, which effectually prevents the use of the part so occupied by the public as a highway for ordinary travel, for which these lands are dedicated, and for which ordinary roads are laid out, unless authorized by law, is a public nuisance which may be abated by the public authorities. *Atty. Gen., Stickie, v. Morris & E. R. Co.* 19 N. J. Eq. 386, 392.

A city may, in the exercise of its police power, make reasonable regulations for railroad operations within the city limits, but the mere declaration of the city council that such a structure in its street is a nuisance does not render it such or make the company bound to abandon or remove such track even though there may be a provision in a city ordinance making such companies liable to the regulations imposed by future ordinances of the city. *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25, 43.

Any unauthorized use of the highway, in the absence of special authority under charter, must be presumed to have been granted to a railroad company on the condition that its exercise should be consistent with the establishment of the highway and in accordance with its use by the public, and a railroad company should not afterwards be permitted to destroy the usefulness of the public way by allowing its own road and approaches thereto

to become dangerous for the want of repairs, and therefore where a railroad company neglects such duty it is guilty of a nuisance. *Paducah & E. R. Co. v. Com.* 80 Ky. 147, 149.

And in *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524, 531, it is stated that a city has as much right to question the use of its streets by a street-car company as a private owner has to question the use of his property, and the fact that such a company has already built a certain length of its road does not alter the fact, where the act is done without any authority, and is therefore wrongful.

In *Louisville City R. Co. v. Louisville*, 8 Bush, 417, the right of the municipal government in the exercise of its sound discretion to make reasonable and proper regulations prescribing the manner in which the right of way of a street-railroad company should be exercised was upheld, the city government having the general power to regulate the use and enjoyment of private property in the city so as to prevent what proves pernicious to the citizens generally, and also power to prevent the use from becoming a nuisance. In that case the city sought to substitute the tram rail for the present rail as used on the street-railroad tracks by the company.

Under a charter giving power to pass all laws and ordinances necessary for the preservation of the health, peace, prosperity, comfort, and security of the citizens of the city not inconsistent with the Constitution and laws of the state, an ordinance prohibiting boys and other persons unconnected with railway trains, except passengers and other persons in the act of taking passage, from getting off or on any engines or cars at the depot or elsewhere in the city limits, and providing a penalty therefor, was upheld as a police regulation for the welfare and a proper regulation of municipal government. *Bearden v. Madison*, 73 Ga. 184, 186.

So, under a charter giving a city express power to regulate the use of all its streets, and to regulate all vehicles, business, trades, and associations, and declare, abate, and prevent nuisances on public or private property, a city has power to pass an ordinance regulating the speed of cars and locomotives propelled by steam power within the limits of the city, and also to prevent the same from obstructing any street crossing or standing thereon for a longer period than five minutes, and also to compel them when moving to sound a bell, and also in case of a freight car backed within the city limits to station a man on the top of the car at the farthest end of the engine to give signals, even though there may be no express provisions or authority in its charter to pass such an ordinance, the same being within the general police power and therefore violative of no provision of the Constitution. *Merz v. Missouri P. R. Co.* 88 Mo. 672, 676.

The same ordinance was passed upon in the case

such power without notice or hearing should be exercised only in cases of nuisances *per se*, and which are unquestioned and obvious, such as obstructions on a street which impede travel or endanger the safety of persons using it. A street railway is not such an unlawful obstruction as can be summarily and forcibly removed by police intervention, when its construction has been authorized by the city council, and it does not clearly appear that the authority has been exceeded. In such a case some less summary remedy should be sought, if any grievance exists. The ordinance passed by the city council in 1892 empowered the company to construct all necessary turnouts. It is in evidence and uncontradicted that the business of the company made this lengthened turnout necessary in order that its cars might be properly operated at this point. Two turnouts had

been in use at this place since 1898 without protest from anyone, and the act complained of merely connected the two by an addition of 470 feet; making one siding of about 1,500 feet, instead of 1,000 feet in the two old ones. It does not appear how this turnout, only about one third longer than the two previously used, could have so interfered with the public safety or convenience as to require its immediate and forcible removal without notice or a hearing given to the company. In *Wood, Nuisances*, 8d ed. 977, it is said: "The fact that a particular use of property is declared a nuisance by an ordinance of the city does not make that use of property a nuisance unless it is in fact so, and comes within the common-law or statutory idea of a nuisance." Furthermore, the adoption of this ordinance by the city council was at once both an adjudication of the rights and

of *Rafferty v. Missouri P. R. Co.* 91 Mo. 33, although in that case it was held that it did not apply to a case where the railroad employees were simply engaged in setting cars in a car yard.

And also in *Wilkins v. St. Louis, I. M. & S. R. Co.* 101 Mo. 93.

So, a similar ordinance was upheld in *Grube v. Missouri P. R. Co.* 98 Mo. 380, 4 L. R. A. 776.

Whatever is dangerous to human life or detrimental to health, and whatever renders the air or human food or drink unwholesome, is a nuisance within chap. 956 of the New York Laws of 1897, § 6. *Jamaica v. Long Island R. Co.* 27 How. Pr. 379, 382, in which case the railroad company was charged with violating the village ordinance relating to manure and other offensive substances, but the case turned solely upon the question whether or not the village ordinance was not superseded by the act of the legislature of 1868, which created a metropolitan sanitary district and the board of health, under which the above specified powers were given to the boards of health.

In *South Covington & C. Street R. Co. v. Berry*, 93 Ky. 43, 15 L. R. A. 804, an ordinance providing that street cars running upon the streets of the city should have two persons, a driver and a conductor, on each car, and that every failure to have the same should subject the president and the officers of the company to a fine, and empowering the police of the city to cause any car not having such driver and conductor to be returned to the stable, passed pursuant to a charter giving the city, *inter alia*, a right to cause the removal or abatement of any nuisance, was held constitutional and valid as merely protecting the public from the danger existing from running the cars without proper control and sufficient force, and providing for their removal if attempted to be run otherwise than as provided, in order to prevent their becoming a nuisance.

But a similar ordinance was held invalid in *Brooklyn Crosstown R. Co. v. Brooklyn*, 37 Hun. 413, although that case turned upon the construction placed upon the act incorporating the road and the acts regulating and defining the powers of the municipality.

In *Pittsburgh, C. & St. L. R. Co. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73, the court upheld an act calling upon railroad companies when approaching a crossing or a turnpike or other public highway in the state to sound a whistle continuously when within not less than 80 nor more than 100 rods from such crossing until it should have fully passed it, provided that such act should not interfere with any ordinance upon the subject. Upon the defendant's contending that such constant whistling would amount to a nuisance, the court stated that although such whistling might amount to a nuisance

yet when deemed necessary for the public good it might be permitted or required, for the reason that the operation of railroads might, in many instances, without legislative sanction, be in itself a nuisance, although such legislative sanction was not a legal nuisance.

So, an ordinance which prohibits the use of certain streets by cars, engines, carriages, or other vehicles drawn or propelled by steam does not impair any vested rights conferred upon a railroad company by its charter, neither does it deprive the company of its property without due process of law. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 529, 24 L. ed. 734, 737.

Under an act incorporating the town, and an act amending the same, which gives the authorities the control and supervision of the highways, streets, alleys, public grounds, and parks in the town, and to define and declare what shall be deemed nuisances, and to prevent and abate the same, a town has power to pass an ordinance prohibiting the use of steam as a motive power for the purpose of propelling street cars where there is no legislative grant. *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 213, 44 Am. Rep. 788.

In *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill, 209, 211, the question was whether, upon the construction of the New York act of 1837, the common council had power to restrain a railroad company from propelling its cars by steam power within the corporate limits of the city, the act providing that the common council should have power to make and establish ordinances to regulate, within the bounds of the said city, the grading of railroads and the running of railroad cars. The court stated that under the provisions of such charter the city had power by ordinance to entirely prohibit the use of steam for such purposes upon its streets, the act giving the city a large discretion, the right to regulate the running seeming, *ex vi termini*, to imply an authority to regulate the power by which they were to be driven.

In *Whitson v. Franklin*, 34 Ind. 302, 306, the court stated with approval the holding of the court in the above case of *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill, 209, to the effect that if a train of cars is impelled by force of steam through a populous city it may expose the inhabitants to unreasonable perils to such an extent that unless conducted with more than human watchfulness the running of such cars might be regarded as a public nuisance. In this case the city prosecuted the defendants for a violation of the city ordinance in driving the locomotive through the streets at a faster rate than 4 miles an hour in violation of the ordinance.

In *Spokane Street R. Co. v. Spokane Falls*, 46 Fed. Rep. 322, an injunction was sought to prevent the destruction of a street-railway company's track

a condemnation of the property of the defendant company without an opportunity to be heard; for it is not claimed that any previous notice, either actual or constructive, was given to the company of the action of the council. It being an ordinance which affected property rights, the defendant in error was entitled to notice before its passage.

This ordinance cannot be sustained, on still another ground. It is unreasonable. It will be perceived that it directs the removal of the extension to the street railroad made on the 28th of May, 1895, from the Sea Breeze Hotel westward to the end of Beach avenue drive. This distance includes the whole of the turnout, both the old part and the new. That this was the purpose of the council is made clear by the resolution introduced concurrently with

the ordinance, in which the extension is described in the same manner, and the words, "a distance of about 1,500" feet are added. It thus contemplated the forcible removal, as an unlawful obstruction of the street, of the whole 1,500 feet, the entire turnout of the defendant company on Beach avenue, two thirds of which had been used for more than two years without protest from the city council, or any private citizen or property owner, and which was laid under authority from the city to construct "all necessary switches and turnouts." In 47 N. J. L. 288, in *State, Pennsylvania R. Co., v. Jersey City*, the late Chief Justice Beasley said: "The third and last ground was that the ordinance in question is unreasonable, and the stress of the argument was properly laid on this point. If this by-law be

situated in one of the public streets of the city, and it was alleged that the same was so constructed as required by the conditions of the city ordinance granting the franchise, and also as required by the conditions of the contract entered into by the plaintiff and the defendant transit company. The answer denied that the track was constructed in conformity to the requirements of either the ordinance of the city or the contract with such transit company, and specified the imperfections of the track and the failures of the plaintiff to meet the requirements of the ordinance and contract. The plaintiff failing to introduce sufficient proof to controvert the same, the court held that the allegations of the defendant's answers were an obstacle to the granting of any equitable relief, the plaintiff, by disregarding the obligations and terms of the ordinance and contract, obstructing travel in the street and creating a nuisance.

So, under a charter giving the city power to declare what shall be considered as nuisances, and to prevent and remove the same, and to regulate the police of the town, and to make such ordinances as the good of the inhabitants of the town may require, an ordinance prohibiting the running of trains within the town at a greater rate of speed than 6 miles per hour is valid. *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113, 115.

Under a charter giving a city power to pass such ordinances as may be deemed necessary for the good government of the city, to control streets and alleys, and to declare what shall be deemed a nuisance, and to abate the same, and to control the laying of railroad tracks in the streets and alleys, an ordinance requiring a railroad company to keep a flagman by day, and a red lantern by night, at a point where its track crosses the street or state road over which only the usual trains pass is not a reasonable requirement, especially where it is not shown that the crossing is unusually dangerous, the charter containing no express grant of power to pass such an ordinance; the right to do so not coming within the police power of the municipality although in cases where the crossings are dangerous to the public safety such an ordinance might be upheld. *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 39, 42, 16 Am. Rep. 611. See also *Ravenna v. Pennsylvania Co.* 45 Ohio St. 118, *infra*.

An ordinance prohibiting a railroad engine, machine, or cars from standing or remaining on a traveled railroad crossing, used by teams and travel, to the hindrance and detention of the same at any time, was upheld in *Great Western R. Co. v. Decatur*, 33 Ill. 381, 383, wherein the traveling public were put in peril by the negligence of the company in allowing a train of cars to so obstruct the public in the use of the crossings as only to allow a narrow space of 12 feet or less through which none but a gentle team could pass in safety.

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In *State, Delaware, L. & W. R. Co., v. East Orange*, 41 N. J. L. 127, the effect of an ordinance of a town compelling a railroad company to station and maintain a flagman in the daytime and in the evening at a point where its railroad tracks crossed certain streets, such person with a flag and lighted lantern to give warning of the approach of the locomotives, engines, and cars, is simply to enforce a common-law obligation, and guard against any nuisance by the company in the construction of its road, and is therefore a valid exercise of a municipal power, being for the preservation of the public safety.

And in *Glaessner v. Anheuser-Busch Brewing Assn.*, 100 Mo. 508, a private railroad track constructed with the authority of the city officers was held to be a public nuisance, the powers given to the city with respect to the regulations of the use of the streets extending to public uses, and not private.

So, in *Com. v. Old Colony & F. River R. Co.* 14 Gray, 93, 96, the defendants, who had been found guilty of a nuisance upon the highway by unlawfully laying and constructing a railroad thereon, sought to relieve themselves from liability by reason of a statute subsequently passed confirming the location of such road, but the court determined that the effect of such statute only prevented the encroachment on the highway from being hereafter deemed a common nuisance, and did not prevent its being declared a nuisance theretofore.

The question whether the tracks and appendages thereof have been duly constructed under the authority of the legislature, or are a necessary incident to the franchise granted, is a legal one, which the municipal authorities have not the right to determine summarily in the exercise of a power to abate nuisances and remove obstructions from streets. *Brooklyn City R. Co. v. Furey*, 4 Abb. Pr. N. S. 364, 367.

Under a charter giving the authorities power to pass, alter, or repeal ordinances regulating and controlling the running of locomotives, and to regulate, control, or prohibit the passing through the streets and public places of buildings and other large structures materially interfering with the free use of the streets by the public, and to regulate the use of the streets and public places by foot passengers, vehicles, railways, and engines, and also to regulate or prevent the use of the streets for any other purpose than travel, the city has power by ordinance to prevent such obstructions as may materially interfere with the use of the streets, such as an ordinance providing that the standing at the intersection caused by the crossing of the main street or thoroughfare of any railroad or track within the city limits, of all locomotives or steam engines, cars, carriages, wagons, and vehicles of whatever kind longer than two minutes at one time, should be considered unlawful, was upheld

subject to this imputation, there can be no doubt that it would be the duty of this court to pronounce it a nullity." We think this ordinance is subject to that imputation.

We do not, however, concur with the judgment of the supreme court in setting aside the resolution. It only provides that the street committee shall notify and request the railroad company to at once remove the extension of its track on Beach avenue from the Sea Breeze Hotel to the end of Beach avenue drive,—a distance of about 1,500 feet, and instructs them, in case of refusal to comply with such notice, to employ counsel and take legal measures to enforce its removal. We think it was clearly within the power of council to pass such a resolution. It did not of itself affect

any property right of the railroad company, and therefore no notice was required to be given before passing it. By its terms, it was only a notice and request. No summary or arbitrary action was advised or suggested, but rather the contrary; for the committee is directed to employ counsel, and to take legal measures to accomplish the object proposed. It is always lawful to employ counsel and take legal measures to remedy a real or supposed grievance, whether public or private, and we think the instructions to the committee were unobjectionable.

Our conclusion is that the judgment of the Supreme Court setting aside the ordinance should be affirmed, but, with respect to the resolution, it should be reversed.

as reasonable. *State, Long, v. Jersey City*, 37 N. J. L. 348. In that case, however, the obstruction was not specifically declared to be a nuisance.

Railroad cars are carriages within the meaning of a charter authorizing the adoption of ordinances to prevent the encumbering of streets with carriages, carts, wagons, sleighs, boxes, firewood, or any other material or substance whatever, and an ordinance passed prohibiting the stopping of trains of railroad cars, or a locomotive, on any street crossing, either for switching or any other purpose whatever, except to prevent accident or in case of immediate danger, was held to be within the power of such charter and reasonable and valid as a means of preventing obstruction. *Duluth v. Maljett*, 43 Minn. 204. In that case, however, the obstruction was not specifically declared to be a nuisance.

So, in *Jamestown v. Chicago, B. & N. R. Co.* 89 Wis. 648, the court recognized the power of the municipality to compel the railroad company to restore the roadbed of the street to its former condition and to remove obstructions therefrom, and the same principles were also enforced in the later case of *Oshkosh v. Milwaukee & L. W. R. Co.* 74 Wis. 534, although the question of nuisance was not raised in either case.

Again, in *Toledo, P. & W. R. Co. v. Chenoa*, 43 Ill. 209, the court upheld the right of a municipality to enforce the provisions of its ordinance against the railroad company obstructing the use of the public street, although the question of nuisance was not raised and passed upon. To the same effect is *St. Louis, A. & T. H. R. Co. v. Belleville*, 122 Ill. 376, 384, wherein the court upheld the city's right to prohibit obstructions of the streets by railroad companies although it did not expressly declare such obstruction to be a nuisance.

And an ordinance compelling railroad companies to water their tracks within the city limits and on the street was held to be within the powers conferred by a charter, being for the welfare and convenience of the inhabitants on the streets as a health preserving effect, the same being an exercise of the police power. *City and Suburban R. Co. v. Savannah*, 77 Ga. 731, 733. In this case, however, it was not shown that the nonwatering of the tracks constituted a nuisance.

In the principal case, *STATE V. NEW ORLEANS, C. & L. R. Co.*, an ordinance calling upon a city railroad company to sprinkle streets without stating or defining where, when, and in what manner the sprinkling was to be done was held void and unreasonable as an unwarranted invasion of private rights, for the reason that in adopting ordinances of such a nature the situation or locality of the nuisance should be considered, it being necessary that the measure of duty should be stated so that there may be no conjectures as to how much or

how little is to be done by the parties upon whom the duty is imposed.

So, an ordinance prohibiting a railroad company from obstructing or preventing the free and uninterrupted use by the public of the intersection, caused by the crossing of any street or thoroughfare by any railroad or track within the limits of a city, for a longer period than three minutes at one time has been upheld, although the case did not show that the obstruction was specifically declared to be a nuisance. *State, Pennsylvania R. Co., v. Jersey City*, 47 N. J. L. 226.

Again, in *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625, the legislative power over railroads, for purposes of public safety and as an exercise of police power, was fully recognized although the question of nuisance did not arise in that case.

And in *Illinois C. R. Co. v. Galena*, 40 Ill. 344, an ordinance prohibiting a deposit of dust, dirt, filth, shavings, or other rubbish or obstructions of any kind upon the streets was held to apply to a railroad company allowing its cars to be across the street so as to obstruct the public use of the same. In this case, however, the act was not specially declared to be a public nuisance.

So, in *Broadway & S. A. R. Co. v. New York*, 49 Hun, 126, the court upheld the power of the municipal authorities to control the use of a snow plow upon the public streets by the railroad company so as to prevent it from throwing the snow against the sidewalks and thus preventing other vehicles from approaching the same, but the question was not specially decided upon the ground of nuisance.

Yet, an ordinance which manifestly abrogates a privilege and irrevocable franchise to a railroad company to load and unload freight at its sidings and turnouts on the streets, provided the use of the streets by the public is not unnecessarily or materially impaired, cannot be destroyed by an ordinance made for the obvious intention of destroying the franchise, no question of the right to resort to the exercise of police power or to abate nuisances arising. *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115, 122, 123.

So, an ordinance declaring the running of any locomotive, steam engine, train of cars, or cars of any kind whatsoever, through or upon any track, street, or thoroughfare in a city at a faster or greater speed than 1 mile in six minutes to be a nuisance, and providing that all locomotives or steam engines, steam carriages, or railroad cars stopping or ceasing in a particular spot between certain streets on its or their passage through the city should be considered a nuisance, was held not to be within the provisions of the city charter giving the city power to declare nuisances and provide for their removal, the power to remove nui-

LOUISIANA SUPREME COURT.

STATE of Louisiana
v.
NEW ORLEANS CITY & LAKE RAIL-
ROAD COMPANY *et al.*, *Appts.*

(49 La. Ann. 157L.)

***1. It may well be that one person or a number of persons can,** as relates to his or to their property, be brought within the scope of the police power of the municipality, and made to comply with regulations looking to the health and comfort of the public; but no person, no class of persons, no interests, can be singled out and forced to contribute labor or money in the interest of the public on property not owned by him or by them, which is in the exclusive use of the public.

2. It would be an unwarrantable in-

*Headnotes by BREAU, J.

stances applying only to statutory ones, the same being an unwarranted interference with franchises granted by the legislature to be exercised by the prosecutors for the public good, such acts not interfering with the public health or exposing the inhabitants to danger or inconvenience. *State, New Jersey R. & Transp. Co., v. Jersey City*, 29 N. J. L. 170, 175.

In *Ravenna v. Pennsylvania Co.* 45 Ohio St. 118, it was held that an ordinance compelling a railroad company to maintain watchmen at points where the tracks crossed a street was not an exercise of the powers granted to municipal corporations under § 1602, Ohio Rev. Stat., which authorized the prevention, *inter alia*, of injury or annoyance from anything dangerous, offensive, or unwholesome, and the causing any nuisance to be abated, and also to provide for the preservation of the peace and good order, and the protection of the property of the municipal corporation and its inhabitants. Although a municipal corporation has a right to exercise police powers, yet when the question is whether it has authority to enact a particular ordinance it must be shown that the power to do the particular thing in the way marked out has been given either expressly or by clear implication, the railroad company in the case in point not being a wrongdoer in crossing the street, its right being the same as that of any other individual in the use of the streets, although it cannot exempt itself from police regulations in the use of the same. See also *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 39, 42, 16 Am. Rep. 611.

So, where the board of trustees of an incorporated town have exclusive control over the streets within the corporate limits, with power to declare what shall constitute a nuisance, and to prevent, abate, and remove the same, and take such other measures for the preservation of the public health as they deem necessary, an ordinance compelling a railroad company at its own expense to keep a watchman and maintain gates where the tracks cross a street under a penalty for failure to do so, is not within the general grant of power to regulate travel upon the streets so as to make their use reasonably safe, and to enact ordinances for the protection of health, life, and property. *Pittsburgh, C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, 85 L. R. A. 684.

Where a tramway was laid down under a contract entered into by the defendants with the vestry pursuant to resolutions passed by the latter, it was held that the laying down of such road was not the paving or repairing of the street within the meaning of the London metropolitan local man-

vasion of private rights. In adopting ordinances to promote health and comfort, the "situation" or "locality" of the nuisance must be considered.

3. The law limits and defines the power it bestows and the duty it imposes.

4. Here the duty sought to be imposed was to "sprinkle" streets, without statuting or defining where, when, and in what manner the sprinkling was to be done.

5. There should be a measure of duty stated, so that those upon whom it is imposed will not be left to conjecture how much or how little they should do.

6. Due consideration should be given to "locality," as well as to "reasonableness" and "certainty," in drafting an ordinance with the view of promoting public health and comfort.

(June 26, 1897.)

agement act so as to justify the defendant's actions under the powers given to the vestry by such act, the road as laid being an obstruction to the street and a public nuisance. *Queen v. Train*, 31 L. J. M. C. N. S. 160, 2 Best & S. 640, 9 Cox, C. C. 180, 10 Week. Rep. 539.

In the above case it was sought to charge the defendant with obstructing the highway and creating a nuisance thereon by making a tramway upon the same, and it was found that accidents had happened in consequence of such way, and that the same was a nuisance and an obstruction in a substantial degree to the ordinary use of the highway by carriages and horses, and rendered the same unsafe and inconvenient. The defendants were found properly chargeable with the creation of such nuisance, and evidence showing the usefulness of such road in the carrying of passengers and as a saving of money was held inadmissible. *Queen v. Train*, 31 L. J. M. C. N. S. 160, 2 Best & S. 640, 9 Cox, C. C. 180, 10 Week. Rep. 539.

The English nuisance removal act, 18 & 19 Vict. chap. 121, § 8, is a sanitary one, and applies only to such nuisances as are injurious to health, and therefore does not apply to a nuisance occasioned by rainwater collected on a railroad bridge running through the planks thereof and dripping onto the highway and on persons using the same, such nuisance not being injurious to health, and therefore the justices are wrong in ordering its abatement under the statute. *Great Western R. Co. v. Bishop*, L. R. 7 Q. B. 550, 28 L. T. N. S. 905, 20 Week. Rep. 969, 41 L. J. M. C. N. S. 120.

But in *Newark Pass. R. Co. v. East Orange*, 53 N. J. Eq. 248, the court interfered by way of injunction to restrain the proceedings of the town authorities in removing the poles and wires used by the company in propelling its railroad by electricity until such time as the cause could be heard, the continuance of the operation of the road by the complainants in compliance with the terms of their contract not being seriously detrimental to the municipality.

In *Easton, S. E. & W. E. Pass. R. Co. v. Easton*, 133 Pa. 505, the court denied the right of the municipal authorities to forcibly remove the tracks of a street-railway company laid under authority of its franchise, and granted an injunction restraining such action, stating that the proper method to be adopted by such corporation was to proceed by way of legal process to prevent such a use as a nuisance and for the court to determine upon such question.

So, in the above case of *Delaware, L. & W. R. Co. v. Buffalo*, 4 App. Div. 562, there was a dissenting

APPEAL by defendants from a judgment of the Sixth Recorder's Court convicting them of violation of a city ordinance requiring the sprinkling of streets. *Reversed.*

The facts are stated in the opinion.

Messrs. Denegre, Blair, & Denegre, for appellant:

Every ordinance must be reasonable. The unreasonableness *vel non* of an ordinance is a judicial question.

Pick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220; *State v. Zurich*, 49 La. Ann. 447; *State v. Von Sachs*, 45 La. Ann. 1416; *State v. Mahner*, 43 La. Ann. 496.

The law must tell a man clearly and definitely what he must do or not do before it can punish him for any act of commission or omission in regard thereto.

State v. Smith, 30 La. Ann. 846; *Ex parte Bell*, 32 Tex. Crim. Rep. 808.

The ordinance in question evidences an at-

tempt on the part of the city council, under pretense of an exercise of the police power, to shift a public duty from the city at large, and to impose it upon the shoulders of particular persons or corporations. The legislature has not conferred upon the city of New Orleans the requisite authority to compel any person or corporation, at his or its own expense, to water the public streets and keep them free from dust.

State v. Robertson, 45 La. Ann. 954, 20 L. R. A. 691.

The ordinance constitutes an impairment of a contract and the deprivation of property without due process of law, within the prohibition of both the state and Federal Constitutions.

State, Kansas, v. Corrigan Consol. Street R. Co. 85 Mo. 263, 55 Am. Rep. 361; *Coast-Line R. Co. v. Savannah*, 30 Fed. Rep. 646; *Chicago v. Sheldon*, 76 U. S. 9 Wall. 50, 19 L. ed. 594.

opinion by Justice Follett in which he was of opinion that the city had no right to summarily tear down the bridge, erected by the company and which had been in existence for eight years over the street, as a public nuisance, and that the city's redress for its alleged wrongs should have been by way of action in which the duties and liabilities of the parties could have been determined. In this opinion Justice Ward concurred.

And where the nuisance consists in the use of the road for purposes creating a nuisance injurious to health in the transportation of live stock, the city authorities are not justified in destroying the road by tearing up the tracks which may be used for a lawful purpose, the remedy being to prevent the use for the purposes creating the nuisance. *Chicago v. Union Stock Yards & T. Co.* 184 Ill. 224, 35 L. R. A. 281.

Upon the question of the power of a city council to regulate public streets, and provide the manner in which corporations or persons shall exercise any privilege granted to them in the use of such street, and to regulate the running of locomotives and railroad cars, see *State, Cape May, D. B. & S. P. R. Co., v. Cape May*, 50 N. J. L. 393, 396, 404, 36 L. R. A. 653, 656, 657.

As to the validity of an ordinance prohibiting the use of salt on street-railroad tracks, see *State, Consolidated Traction Co., v. Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170.

Upon the question of a statutory compulsion of railroad companies to maintain crossings, see *People v. Detroit, G. H. & M. R. Co.* 79 Mich. 471, 7 L. R. A. 717, and *Kelly, v. Minneapolis*, 57 Minn. 294, 26 L. R. A. 92, and *note*.

The question of the liability of a railroad company for obstructing a highway crossing will be found in *note* to *Sellick v. Lake Shore & M. S. R. Co.* (Mich.) 18 L. R. A. 154.

Upon the question of the validity of an ordinance requiring a conductor on a street car, see *note* to *South Covington & C. Street R. Co. v. Berry* (Ky.) 15 L. R. A. 604.

As to the regulation of the carrying of passengers by street railroads, see *note* to *Sternberg v. State* (Neb.) 19 L. R. A. 570.

The question of the necessity of headlights on cars is treated of in *note* to *McGee v. Consolidated Street R. Co.* (Mich.) 20 L. R. A. 300.

Upon the question of municipal power to impose conditions when giving assent to street railways, see *note* to *Galveston & W. R. Co. v. Galveston* (Tex.) 36 L. R. A. 33.

II. Telegraph and telephone poles, etc.

Municipal corporations may make all regulations 89 L. R. A.

for the erection and use of electric wires in the street and require all reasonable safeguards for the same. *State, Wisconsin Teleph. Co., v. Janesville Street R. Co.* 37 Wis. 72, 22 L. R. A. 759.

In *Allentown v. Western U. Telegr. Co.* 148 Pa. 127, the court upheld the city ordinance relating to and regulating the erection of telephone and electric-light poles in the city streets as being within the power of such authorities. *Saatro, Western U. Telegr. Co., v. Philadelphia*, 22 W. N. C. 39. To the same effect, *Chester v. Philadelphia, R. & P. Telegr. Co.* 148 Pa. 120.

The action of the public authorities, highway commissioners, in removing telegraph poles and overhead wires, after notice and refusal to comply with the request of such authorities by placing its electrical conductors in subways properly constructed for their use, was upheld in the case of *American Rapid Telegr. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454, such structures being a nuisance, removable by the authorities after notice, as the property was not taken for public use but was simply removed from the public streets as a nuisance, which the public authorities had a right to remove, doing no unnecessary damage, as, after the passage of the act relating to subways and the building of the subways, and the giving of notice, the company had no right to maintain its poles and wires above the surface of the street, and when so allowed to remain they were there without authority and so became a public nuisance.

In *People v. Metropolitan Teleph. & Telegr. Co.* 31 Hun, 596, an action to abate the erection of telegraph poles as a public nuisance, and to enjoin the erection of more of such structures, and the renewal of such erection, was upheld.

Telegraph poles permanently placed upon the highway, of such sizes and dimensions and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers are a public nuisance at common law. *Reg. v. United Kingdom Electric Telegr. Co.* 31 L. J. M. C. N. S. 167, 2 Best & S. 647, *note*.

In *People v. Metropolitan Teleph. & Telegr. Co.* 31 Hun, 596, 602, it is said that so far as the poles of such companies are necessary either in size or height the right to erect and maintain them is given by the legislature, and so far as they are within that authority they cannot be alleged to be a nuisance or an unlawful obstruction of the streets by the people, but that wherever they exceeded their necessary size or height the act of the company in so maintaining them is unauthorized.

So, if telegraph poles are erected within the limits of a street or highway without legislative sanction they are nuisances abatable by the public

See also *Binghamton v. Binghamton & P. D. R. Co.* 61 Hun, 479; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41; *State, New Orleans, v. New Orleans Traction Co.* 48 La. Ann. 567.

The police power, extensive and indefinable as it may be, must be exercised with due regard to the rights and safeguards which the Constitution, state and Federal, has provided for the protection of property and contract rights.

Bass v. State, 34 La. Ann. 494; *Pontchartrain R. Co. v. Orleans Levee Dist. Comrs.* 49

La. Ann. 570; *State v. Robertson*, 45 La. Ann. 554, 20 L. R. A. 691; *State v. Itzkovitch*, 49 La. Ann. 366; *Chicago v. O'Brien*, 111 Ill. 536, 53 Am. Rep. 640.

The ordinance is in conflict with art. 443 of the Civil Code, which declares that a corporation cannot be guilty of a crime or misdemeanor.

State, Scarborough, v. Circuit Ct. of Appeals Judges, 43 La. Ann. 1166; *State v. McNally*, 48 La. Ann. 1450, 36 L. R. A. 533; *City & Suburban R. Co. v. Savannah*, 77 Ga. 731.

authorities, but if erected with such sanction they are not. *Irwin v. Great Southern Teleph. Co.* 37 La. Ann. 63.

In *Monongahela City v. Monongahela Electric Light Co.* 4 Am. Electrical Cas. 53, 56, 57, the petition for mandamus set forth that, in improving the streets it was necessary to remove defendant's telegraph poles so as to be in the curb line of the sidewalk, and defendant had refused to remove same after notice and request to do so, and the court granted the writ, there being no other adequate specific remedy, the city having a right to improve its streets and to demand the removal of the defendant's poles when the same were found necessary for the purposes of improvement.

The city authorities will have power to restrain by way of injunction the replacing of telegraph wires in the public streets, where the time limited by the city ordinance for the use of the streets in that manner has expired, they having power to regulate and control the manner in which the telegraph lines shall enter or pass through the city. *Mutual U. Teleg. Co. v. Chicago*, 16 Fed. Rep. 308.

In *Electric Improv. Co. v. San Francisco*, 45 Fed. Rep. 563, 564, 13 L. R. A. 131, an ordinance of the city prohibiting the suspension of electric wires over and upon the roofs of buildings was upheld as valid, passing within the legitimate police powers of the city under the authority of the state, such power embracing all regulations affecting the health, good order, morals, and safety of society, the stretching of such wires over buildings being extremely dangerous as being liable to originate fires and as obstructing the extinguishment of fires otherwise originating.

An ordinance regulating the stringing of wires in a city, and providing that whenever it is necessary to cross the line of any existing electric light, electric power, telegraph or telephone wires, or any wires used for transmitting electrical energy it should be at a certain distance, and that the person or company making such crossing shall apply all necessary safeguards for the same, except that when the wires of any telegraph, telephone, or fire-alarm or police system shall cross the line of any electric light or power system for the transmission of electric energy, the person or company owning or operating such electric light or power system of such wires shall provide all necessary safeguards at such crossings, and further providing that such company violating such condition or refusing to make such alterations and repairs in their present or future constructions in conformity with the provisions of the ordinance shall be subject to a penalty, is within the inherent provisional or police powers of the municipal corporation to pass ordinances regulating or restraining the use of such dangerous agencies. *State, Wisconsin Teleph. Co., v. Japewille Street R. Co.* 87 Wis. 78, 77, 22 L. R. A. 759.

In *American U. Teleg. Co. v. Harrison*, 31 N. J. Eq. 627, 631, the court enjoined the proceedings of the public authorities in cutting the wires or otherwise unlawfully interfering with the wires and 39 L. R. A.

elevations of the telegraph company, where such wires as then overhung the streets did not in the slightest degree impede or endanger the full, free, and safe use of such streets by the public, and did not therefore constitute a nuisance,—especially where the public authorities had not exercised the powers given to them under the statutes regulating and fixing the elevation of telegraph wires.

In the above case of *American U. Teleg. Co. v. Harrison*, 31 N. J. Eq. 627, the telegraph poles were erected outside of the streets or highways upon private property, and the wires overhanging the streets were erected with the permission of the owner's of the soil, but without the permission of the defendant corporation, and were sufficiently elevated not to impede, obstruct, or endanger the free and safe use of the streets, and therefore could not be destroyed by the public authorities as a means of abating them as a nuisance.

In *Com. v. Boston*, 97 Mass. 555, it was held that the determination of the mayor and aldermen of the places in which the poles of telegraph companies might stand was to be regarded as conclusive upon the rightfulness of their erection within the limits of a highway so that they could not be removed by the city or any other of its officers, or treated in any manner as a public nuisance,—especially where the mayor and aldermen acted according to the provisions of Mass. Gen. Stat. chap. 64, § 3.

In *People, Cochen, v. Dettmer*, 26 App. Div. 327, it was sought to compel the defendant, a park commissioner, by mandamus to take proceedings to prevent the further maintenance and operation of a steam railroad at grade over a certain parkway in a city, and the contention was that his duty was based upon the New York Laws 1892, chap. 665, which declared that the highway in question should, after the passing of the act, be "under the exclusive charge and management of the park commissioner of the city of Brooklyn," and further, that such commissioner should "make and enforce proper rules and regulations for the public use thereof;" and it was also suggested that such commissioner acquired the powers which the highway commissioners previously possessed under the highway law of 1890, chap. 568, § 15. The court held that the first enactment was not broad enough to empower the commissioner to institute such proceedings as the railroad was then upon the highway and had been there for many years, the language of the statute giving him no authority, even expressly or by implication, and further, that the Laws of 1892 contained no evidence of any intent to transfer to such commissioner the right to sue for injuries to the highway which belonged to the highway commissioners generally.

In *People, Cochen, v. Dettmer*, 26 App. Div. 327, the court intimated that if such railroad company was occupying and obstructing the avenue or street in defiance of the special statutes relating to that highway the remedy for such public nuisance was found by obtaining an indictment against the corporation, or in procuring the attorney general to

Messrs. James J. McLoughlin and Samuel L. Gilmore, for appellee:

An ordinance of the city council requiring all persons, firms, and corporations operating electric, trolley, or other cars or trains on the streets of this city to provide for the sprinkling of the streets through which their cars run, is a regulation under the police power for the health and comfort and convenience of the patrons of the cars, and of the people residing on the streets through which the cars pass, and for the health and comfort of persons in the vicinity, and is therefore legal, valid, and constitutional.

All persons, natural and artificial, are sub-

ject to the police regulations of the municipality in which they live; and this is so whether they are contractors or ordinary citizens.

Keeping the street in repair meant the street from curb to curb.

State, New Orleans, v. New Orleans City & Lake R. Co. 42 La. Ann. 555, and *State, New Orleans, v. Canal & C. Streets R. Co.* 44 La. Ann. 526.

Mr. B. B. Howard for the Board of Health.

Breaux, J., delivered the opinion of the court:

This appeal was taken from a judgment ren-

bring an appropriate suit in equity to restrain its continuance and abate it.

In *Mutual U. Teleg. Co. v. Chicago*, 16 Fed. Rep. 309, 11 Biss. 539, *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 359, 30 L. ed. 1187, 1189, 1 Inters. Com. Rep. 300, and *Hannibal v. Missouri & K. Teleph. Co.* 31 Mo. App. 23, the court passed upon the right of municipal corporations to regulate the erection and use of telegraph poles and wires in the city, although in those cases the question of nuisance did not specifically arise.

See, upon the question of public safety in the control of the use of steam and electricity, *note to Harrington v. Providence* (R. I.) 38 L. R. A. 306, where such matters will be found treated of under the head of *Matters of public safety*, and *infra*, IV. d.

On question of telegraph and telephone poles as additional burdens upon a highway, see *note to People v. Eaton* (Mich.) 24 L. R. A. 721.

III. Steam and electricity.

The question of municipal control over steam and electricity as nuisances affecting public safety will be found in *note to Harrington v. Providence* (R. I.) 38 L. R. A. 306, 1. b, and the consideration of the question of railroads as nuisances on highways is treated of in this *note, supra*, I.

Under § 527 of the Iowa Code, the city has power to abate all nuisances on streets, but such power and duty do not deprive it of the right to allow or grant permission for the use of the streets by railroad companies under § 464 of the Code. *Heath v. Des Moines & St. L. R. Co.* 61 Iowa, 11.

Cities have no authority, in the absence of a legislative grant to that effect, to grant privileges for the use of the street by steam motors, and such roads cannot be constructed upon streets and highways except as provided in the section of the Iowa Code. *Stanley v. Davenport*, 64 Iowa, 463, 467, 37 Am. Rep. 216.

Yet it has been stated that a stationary steam engine is not in itself a nuisance, even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets. *Baltimore v. Radecke*, 49 Md. 217, 227, 38 Am. Rep. 239.

But the use of steam, contrary to the provisions of an ordinance, for the purpose of propelling street cars along the public street in a thickly populated town in the absence of any legislative grant authorizing it to be done, is *per se* a nuisance. *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 213, 44 Am. Rep. 788.

A traction steam engine used on a highway and calculated to frighten horses lawfully driven thereon is a public nuisance rendering the owner liable under the English Statute, 24 & 25 Vict. chap. 70. *Watkins v. Reddin*, 2 Fost. & F. 629.

In *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 199, 60 Am. Rep. 686, it is said that to declare the use of road engines propelled by steam, and portable engines operated by steam, near, or their

passage over, a public highway, a nuisance, would be practically to prohibit their use in a manner in which they are customarily employed and moved from place to place.

So, a portable steam engine upon wheels, drawn by horse power, placed within 4 yards of the center of the road, used to propel a threshing machine in a barn near such road, not fixed thereto, or to the soil and not protected by any building, screen, or other cover, calculated to frighten horses, is a nuisance and an obstruction to the highway within the provisions of the English Statute 5 & 6 Wm. IV. chap. 50, § 70, which has in view the prevention of danger to passenger's horses and cattle. *Smith v. Stokes*, 4 Best & S. 84, 32 L. J. M. C. N. S. 190, 8 L. T. N. S. 425, 11 Week. Reg. 753.

In *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 563, 604, it is held that the New York Statute of 1885, chap. 499, which provides for the placing of electrical conductors under ground in cities in that state, and for commissioners of electrical subways, did not purport to deny such companies any privileges theretofore granted, but did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoyed in such a manner as to inconvenience and endanger the general public as little as possible. Judgment in this case was affirmed upon appeal to the United States Supreme Court in 145 U. S. 175, 191, 36 L. ed. 686, 672.

In *Richmond, F. & P. R. Co. v. Richmond*, 26 Gratt. 83, Affirmed 96 U. S. 521, 24 L. ed. 734, the court recognized the authority of a city council to prohibit the use of steam in propelling the city street cars, although the same was not based upon the question of nuisance, the same being for the purposes of safety, comfort, good government, and general welfare of the inhabitants, and a proper police regulation.

A city ordinance, enacted pursuant to a charter giving the city authority to make, ordain, and establish such by-laws, ordinances, rules, and regulations as shall appear requisite and necessary for the security, welfare, and convenience of the city and its inhabitants, and for the preservation of public peace and good government, which ordinance compels a railroad company to water the track on which it runs through the streets of the city, is a valid exercise of its police power, the same being necessary for the welfare and convenience of the inhabitants as preventing nuisances. *City & Suburban R. Co. v. Savannah*, 77 Ga. 731.

Upon the question of police power over electric companies, see *note to State, Laclede Gaslight Co., v. Murphy* (Mo.) 31 L. R. A. 731.

As to grant of franchise to electric subway companies, see *note to State, St. Louis Underground Service Co., v. Murphy* (Mo.) 34 L. R. A. 389.

As to whether or not a traction engine used upon a public highway is a nuisance, see *note to Com. v. Allen* (Pa.) 16 L. R. A. 148.

E. W.

dered by the sixth recorder's court, imposing a fine of \$25 or thirty days' imprisonment upon the president of the New Orleans City & Lake Railroad Company, under an ordinance adopted to compel persons operating street cars to sprinkle the streets through which their cars run. Under the terms of the ordinance, it was made "unlawful for any person, firm, or corporation to operate any electric, trolley, or other cars or trains on the streets of this city without first providing in some reasonable manner for the sprinkling of the streets through which their cars run." The ordinance further provided "that any person, firm, or corporation violating this ordinance shall be deemed guilty of a misdemeanor, and shall be subject to a fine of \$25, or thirty days in the parish jail, or both, at the discretion of the recorder." The facts, as developed by the testimony offered by the plaintiff, are that by reason of the velocity of the car, and its weight and its rapidly revolving wheels, volumes of dust are raised and wafted by the winds to the streets adjacent to the tracks; that the clouds of dust are counter to the health and comfort of the inhabitants. Several physicians of prominence testified that dust is injurious. Regarding comfort, there was no necessity of proving how annoying and uncomfortable are clouds of dust. The defendant, as relates to the facts, showed that, under its grant, it was bound, during the continuance of its franchise, to keep in good order and repair all streets through which their lines run, between the rails and for 1 foot on each side of the rails; that sprinkling the streets through which its cars run would compel it to expend large amounts to defray the costs.

The defendant, in the plea filed in the recorder's court, assailed the ordinance upon a number of grounds. The first was that the ordinance was unreasonable. No one disputes the proposition that an unreasonable ordinance should not be enforced. The word "unreasonable" is here used in the sense that an ordinance is inconsistent with the law of the land and the right to property. From that point of view, the courts have universally entertained jurisdiction to determine whether the ordinance was blinding. It is, said the court in *Yick Wo v. Hopkins*, 118 U. S. 371, 30 L. ed. 227, "an ancient jurisdiction of judicial tribunals to pronounce upon the reasonableness and consequent validity of their by-laws. Ordinances must be reasonable," citing *Dill. Mun. Corp.* (3d ed.) § 319, and reviewing several decisions upon the subject.

It remains for us to pass upon the question of unreasonableness *vel non* of the ordinance. There is indefiniteness in the ordinance. It does not set forth with the least particularity what shall be done, or the extent of the service required, in order to escape the penalty it ordained should be inflicted for not sprinkling the streets. The failure or performance may vary each day and in each locality where sprinkling may be required. No attempt was made to indicate how the work shall be done, the days the streets should be sprinkled, the capacity for sprinkling the sprinklers should have, and the number of sprinklings that should be applied each day, 39 L. R. A.

or at such time as may have been intended. Without a matured plan covered by the terms of an ordinance in regard to sprinkling the streets, nothing good or useful can be accomplished. It will give rise only to confusion and failure. Authority must issue its orders with such clearness and definiteness that it may be understood, and the work required should be specified so that performance can be required in every locality and from everyone, under some defined rule. There should be some similarity in the work in each district. There cannot be under the ordinance in hand. There should be a measure of duty imposed, and those upon whom it is imposed should not be left to conjecture how much or how little they should do. For the purpose of illustrating: No one ordinarily careful would enter into a formal written agreement with a contractor to sprinkle 54 miles of street (the total length of defendant's line) without specification of some kind as relates to the work required. The act to be done would not be indicated by the single word "sprinkle" in the contract. The contractor would never know when he is exonerated from the obligation of his contract by performance. An ordinance imposing a duty "to do" should contain some of the elements of certainty usual in private contracts.

This brings us to the objection that the ordinance is not equal and uniform in its operations, and imposes an unjust and oppressive burden upon a particular class of persons or corporations. In so far as relates to the work of "sprinkling" the streets from curb to curb, less that portion over which defendant has a franchise, in our judgment the requirement of the ordinance is not equal and uniform. These streets are used by the public. The work necessary to maintain their cleanliness, or to insure freedom from excessive dust, is a burden which the municipality cannot impose upon particular persons and corporations, only because they own a franchise over an adjacent way. It cannot be imposed by municipal ordinance in the manner here attempted. The defendant cannot be compelled to clean and sprinkle streets not covered by its contract and over which it has no franchise. The dust raised by defendant's cars, it may be, is carried by the winds to the streets near. The evidence does not disclose that such is a fact. Presumably, however, it is; but defendant's cars are not the only vehicles which raise the dust and it would scarcely be desirable equality to make it sprinkle all the dust. The question may be propounded: Can they not be made to sprinkle their own tracks, and relieve their own road, as well as the adjacent streets, of the dust raised by their cars? To this the answer immediately suggests itself: The ordinance being indefinite and uncertain, it would serve no purpose to decide in this case the issue raised by the question. Having determined that the ordinance in its entirety is unreasonable, we would not be justified in holding that it is reasonable and valid in so far as it affects defendant's track. In view of the "unreasonableness" of the present ordinance, both the streets and the tracks are unaffected thereby.

This conclusion relieves us from the necessity of passing upon the other points urged, as it

finally disposes of plaintiff's case. We do not think we should subject ourselves to the examination of every point, and pass upon them, in view of the fact that it would not add to or in any respect change the conclusion we have reached. Whatever there may be in other points must be left to future consideration and decision, if ever they are again presented.

It is therefore ordered and adjudged that the judgment appealed from is reversed, annulled, and avoided. The ordinance is declared void, and the prosecution by the plaintiff against the defendant is dismissed.

A petition for rehearing having been presented, the following response was handed down on December 13, 1897:

One of the grounds of the application for a rehearing was the asserted possible interpretation which may be given to our reference to

the work of sprinkling the streets from curb to curb, and our reference to the contract under which the defendant holds its grant. Of course, the contract, which is to become operative only in the distant future (the year 1906) never received a moment's consideration in preparing the opinion and entering the decree. All reference to a contract was the one under which the defendant's road is being operated. In order, however, to prevent any misinterpretation, and to put the question entirely at rest, we expressly limit all discussion preceding our decree to the question of indefiniteness of the ordinance, and the consequent unreasonableness. This entirely eliminates all questions of contracts, and of extant duties due under the contract.

Having thus modified the discussion leading to the decree, the rehearing is refused.

ALABAMA SUPREME COURT.

DRENNEN & COMPANY, *Appt.*,

MERCANTILE TRUST & DEPOSIT COMPANY.

(.....Ala.....)

1. **Employees of a corporation in the hands of a receiver on foreclosure of a mortgage have a perfect equity** to priority of payment for wages earned within six months before the receiver's appointment, when the funds from which they ought to have been paid have been used for the benefit of bondholders, even if the terms of the mortgage embrace income.
2. **The public character of a corporation is not a element of the equity** in favor of the priority of claims against a receiver for wages when earnings which should have been applied to them have been wrongfully diverted for the benefit of bondholders; but a manufacturing company or a mining company is subject to the rule as much as a railroad company.
3. **More casual and incidental repairs to remedy defects** caused by current use are not improvements or betterments within the rule which gives priority to wages out of the assets of a receiver of a corporation when funds that should have been used to pay wages have gone into improvements.
4. **Labor necessary to the continuation of the business of a corporation** does not entitle the workmen to priority of payment out of the assets of a receiver on foreclosure of a mortgage, if the labor is not shown to have been to the advantage of the bondholders, or necessary in conservation of their interests, or that

the receiver has realized any income out of which the wages should be paid.

5. **An averment is not objectionable** because made on information and belief.

6. **An averment of the receipt** of "about \$40,000" is not insufficient for indefiniteness.

7. **Claims for the purchase price of the products of a corporation** constituting a part of its gross earnings, and a part of which represents the labor of employees, constitutes, in the hands of a receiver, a class of assets to which employees whose wages earned within six months are still unpaid have a claim prior to that of bondholders on foreclosure.

8. **Assignees of employees** may have their priority of payment out of the assets of a receiver.

(Coleman and Head, JJ., dissent.)

(January 5, 1897.)

A PPEAL by intervener from a judgment of the City Court of Birmingham County denying its petition for a distribution of the assets of the Mary Lee Coal & Railway Company which had reached the hands of a receiver in a proceeding by the Mercantile Trust & Deposit Company to foreclose a mortgage upon its property. *Reversed.*

The facts are stated in the opinions.

Messrs. Hewitt, Walker, & Porter for appellant.

Messrs. Alexander T. London and John P. Tellman for appellee.

McClellan, J., delivered the opinion of the court:

The Mary Lee Coal & Railway Company

NOTE.—The above case goes beyond most prior cases in repudiating the distinction between private corporations and those of a quasi public character in respect to the power of a court to permit receivers and to create charges on the property for current expenses which shall have preference over 39 L. R. A.

a mortgage. On this question, see *Farmers' Loan & T. Co. v. Great Creek Coal Co.* (C. C. S. D. Ill.) 16 L. R. A. 803, and *note*; also *Hooper v. Central Trust Co.* (Md.) 29 L. R. A. 222; *Hanna v. State Trust Co.* (C. C. App. 8th C.) 30 L. R. A. 201.

having made default in the payment of the interest on its bonded indebtedness, the trustee in the mortgages executed by said company to secure its said indebtedness, seasonably after such default made, filed a bill in the city court of Birmingham praying the appointment of a receiver, "with full power and authority to demand, sue for, collect, receive, and take into his possession the goods, chattels, rights, credits, moneys, and effects, lands, tenements, books, papers, and property belonging to the said Mary Lee Coal & Railway Company, and that said receiver may receive from the said court, in addition to the ordinary powers possessed by such receivers, full power and authority to manage, run, and operate said property; and to carry out any and all contracts that said company may have made, and to renew the same, connected with the conduct of their business, and especially the contract with T. G. Bush, receiver; if essential thereto, to pay to the said Bush, receiver, any indebtedness which may now be due him; and to preserve and protect the corporate franchises, privileges, and property; and to preserve the corporate existence of the said company; and to preserve all corporate property from being sacrificed under any proceeding which can or may be taken, and would be likely to prejudice or sacrifice the same; and that an injunction may issue against the said defendant company, and all persons claiming to act by, through, or under it, and all other persons, to restrain them from interfering with the said receiver's taking possession of and managing the said property." The further prayer of the bill is for the ascertainment of the mortgage indebtedness, principal and interest; a decree requiring the defendant to pay the same by a short day, to be named by the court; and, in default of such payment, for a decree that said company, and all other persons claiming under it, be absolutely barred and foreclosed of and from all right of equity of redemption in and to said premises, and for a decree directing the sale of the whole mortgaged premises for the payment of said bonded indebtedness, and the interest thereon, etc. The premises embraced in the mortgages, and for which a receiver and sale are thus prayed, consisted of a coal mine and plant, complete, coking ovens, and a railway, in Jefferson county. The railway was 6 or 7 miles in length, built primarily, it may be admitted, for the development, and to be used in the working, of defendant's said mine; but defendant's charter, which authorized the construction and operation of this railway, required that defendant should transport persons and the property of others upon it, so that as to this road the defendant corporation was a common carrier. A receiver was appointed in accordance with the prayer of the bill, and took possession of all the property and effects of the respondent corporation. The bill was filed and the appointment made on November 28, 1893. On February 20, 1894, Drennen & Co. filed a petition in the cause, which, as finally amended, presents the following averments: That the defendant, the Mary Lee Coal & Railway Company, is indebted to petitioners in the sum of \$14,697.52, including interest to time of filing the petition, and that all this indebt-

edness had accrued during the months of August, September, October, and November, 1893. That, as shown by the bill, said defendant owned and operated the coal mine, coke ovens, and a railway in Jefferson county at the time of the appointment of the receiver under said bill, and that the defendant had carried on these operations for six months prior to such appointment; and that the company then owed a large amount of back wages to its employees and operatives, a great part of which was due to them for work and labor done in said mine, and in and about said coke ovens and railway. That the amount alleged to be due petitioners from said company is a part of such back wages due by defendant to its said employees and operatives for work and labor done and performed for the defendant during the months of July, August, September, October, and November, 1893, and that the books and accounts of petitioners, showing the said amount alleged to be due them, have been compared and checked over with the books and accounts of the defendant, which are in the possession of the receivers in the cause, and both sets of books and accounts agree as to said amount due the petitioners. That the work done by said employees and operatives during said months consisted in part in digging and mining and shipping coal, in keeping said mine in operation, and in preparing said coal for shipment, and that about \$8,947.52 of the amount due petitioners was for this work; in other part, to the extent of about \$750 in value, in operating and repairing defendant's said railroad; and for the rest, to the extent of about \$5,000, in operating and repairing said coke ovens, and in preparing coke for shipment to market. And that all said work was necessary to enable the defendant to carry on its business, and was done for the benefit of the complainant in the cause, and to preserve the property and franchises of the defendant embraced in the deeds of trust to the complainant. That petitioners have been informed, and believe, and so state, that there was due to the defendant at and before the time of the appointment of the receiver the sum of about \$40,000, for coal and coke sold by the defendant, which had been taken from said mine and manufactured in said ovens; that said \$40,000 represented gross earnings of the defendant, into which the labor of said employees and operatives entered, and that they performed work and labor in mining said coal and in manufacturing said coke. That defendant was, and has been for a year or more prior to the appointment of the receiver, a corporation duly organized under the general laws of Alabama, and as such had power to condemn land for railroad purposes, and to operate its said railroad as a common carrier, and did so operate it. And that petitioners, for value, purchased from said employees and operatives their claims against the defendant, aggregating said sum of \$14,697.52 and said claims were duly transferred and assigned to them before the appointment of said receiver. The following is the prayer of this petition: "That your honors will take jurisdiction of this petition, and that a day be fixed or set for the hearing of the same, and that such notice as is required by law and the rules of your honors' court be given or served

upon the parties to this cause, and that upon the hearing of this, their petition, your honors will render a decree declaring or establishing the said claim of the petitioners a prior and preferred claim to and over said mortgage or deeds of trust of complainant, and that the said receiver be required to pay said claim of petitioners out of the first moneys that come into his hands over and above what shall be necessary to pay the running and operating expenses of said property. Petitioners ask and pray for all other, and such other, orders and decrees as may be necessary in the premises." The petition is verified; one of the petitioners making oath that its allegations and statements made of his own knowledge he knows to be true, and those made upon information and belief he believes to be true. To this petition the complainant in the cause interposed a demurrer, assigning numerous grounds of objection to its sufficiency. The assignments chiefly relied on may be summarized as follows: (1) That the petition fails to show that the Mary Lee Coal & Railway Company is a railroad corporation. (2) That the petition fails to show that the receiver has any money in his hands subject to the payment of petitioners' claim or that complainant or the bondholders ever received any moneys that should have been paid to the petitioners, or that they were ever paid anything on their bonds after the accrual of the claims of petitioners, or that the security afforded by said mortgages was enhanced or improved in value by the rendition of the services referred to in the petition. (3) That the petition fails to show that the Mary Lee Coal & Railway Company ever diverted any of its gross earnings from the payment of its running expenses, either for the improvement or betterment of its said railroad or other property, or for the payment of interest on any of the bonds secured by said deeds of trust, or any of the other charges secured by either of said deeds. And there are other assignments, based on the grounds above stated, going separately to the particular claims of petitioners for work, etc., done on the railroad, on the coke ovens, and in manufacturing and shipping coke, and in the mine severally. These need not be further set out at this place. The city court sustained complainant's demurrer, and dismissed the petition, and from that decree petitioners prosecute this appeal.

The equitable doctrine whereby employees of railway corporations which have passed into the hands of receivers on bills for foreclosure, and the like, filed by or in behalf of the holders of their bonded indebtedness secured by mortgage or deed of trust, are given a preference and priority of payment over the bondholders in respect of wages earned within a short period—generally said to be six months—before the appointment of the receiver, is thoroughly well established in other jurisdictions, and especially in the decisions of the Supreme Court of the United States. *Foadick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Milttenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 236, 27 L. ed. 117; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963; *Farmers' Loan & T. Co. v.* 39 L. R. A.

Kansas City, W. & N. W. R. Co. 53 Fed. Rep. 182; *Poland v. Lamoille Valley R. Co.* 52 Vt. 144; *Leitzenberger v. Jarvis-Conklin Trust Co.* 8 Utah, 15; *Union Trust Co. v. Southern*, 107 U. S. 591, 27 L. ed. 488; *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625; *Hale v. Frost*, 99 U. S. 889, 25 L. ed. 419. The grounds of this doctrine, and its extent and limitations, are nowhere more lucidly and forcibly stated than in the opinion of Chief Justice Waite in *Foadick v. Schall*, 99 U. S. 235, 25 L. ed. 339, where it is, we believe, first clearly expounded and declared; and we cannot do better here than to quote the language of that learned judge: "As to the second question, we have no doubt that, when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court in the exercise of a sound judicial discretion, may as a condition of issuing the necessary order, impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character, and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results, almost as a matter of necessity, from the peculiar circumstances which surround such litigation. The business of all railroad companies is done, to a greater or less extent, on credit. This credit is longer or shorter, as the necessities of the case require; and, when companies become peculiarly embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid, and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid for the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit,

to require, as a condition of such an order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For even though the mortgage may, in terms, give a lien upon the profits and income, until possession of the mortgaged premises is actually taken, or something equivalent done, the whole earnings belong to the company, and are subject to its control. *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459, 20 L. ed. 199; *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603, 23 L. ed. 405; *American Bridge Co. v. Heidebach*, 94 U. S. 798, 24 L. ed. 144. The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none. But, if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied. We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made, out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders, and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. It is not to be supposed that any such use of the

income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act. The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that, if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion." *Fosdick v. Schall*, 99 U. S. 235, 251, 25 L. ed. 339, 342 *et seq.*

The subject-matter involved in the case of *Fosdick v. Schall* was railroad property, and stress is laid upon that fact in the opinion. Moreover, in all the cases cited above as sustaining this doctrine the question arose between mortgagees of railroad property, or receivers of railroads, and persons who claimed to have furnished labor or supplies in the operation of the road, or to have put permanent improvements and betterments upon the property; and this character of the property is not infrequently referred to in these cases as one of the grounds or reasons for the existence of the doctrine. Nor are there lacking in many of them expressions (which are, perhaps, no more than *dicta* of the judges writing the opinions) to the effect that the rule has never been, and cannot be, extended to the property of any other corporation or class of corporations. The application of the principle to railroad corporations and property, and the view that it should not be extended to other corporations and their property, is based partly upon the supposed peculiarities of such corporations, in the manner of conducting their business, adverted to somewhat by Chief Justice Waite, *supra*, but mainly on their public character, the public uses to which their property is devoted, the public convenience which their business is to conserve, the right and interest which the public have in the carrying on of their business without break, let, or hindrance, and their corresponding duty to the public to so carry it on; but, while these considerations are pretty generally referred to in these cases, the equity of the principle is nowhere, nor in any degree, made to rest upon them. To the contrary, they seem to be advanced merely for the purpose of affording a justification—we had almost said excuse—for the application and effectuation in the particular case of an

abstract equity resting entirely upon other and altogether sufficient grounds of recognized equitable cognizance, and which needs no other justification or excuse for its application in any case than the existence of the facts upon which it arises and rests. It may be—probably is—that all which is said in the cases about railroads, and this equity being confined to the property, etc., of railroad corporations, comes from a conservative view of the sacredness of the rights of mortgagees as against the subsequently accruing claims of third persons, and is prompted by an apprehension that if the principle is allowed to operate in respect of the property of other corporations, as to which there may not be, from all points of view, the same necessity for its application, it would become an engine of oppression to bondholders, and be used in violence to their vested rights and interests. This view is most commendable, but the apprehension is without any reasonable foundation, it seems to us. If the principle is equitable in itself, it can never be used to work injustice or inequity to bondholders or to anybody else. And that it is equitable in itself, and without reference to whether the mortgagor corporation is a railroad company or not, is demonstrated by the opinion of Judge Waite in *Fosdick v. Schall*, which has been uniformly followed and never doubted, and is demonstrable by every consideration obtaining in the premises. The doctrine proceeds on the broad principle which underlies the administration of all law concerning property rights, that, when one party has property which belongs to another, restitution, in some form or another, must be adjudged or decreed by the courts, upon proper and seasonable application by the party aggrieved. The theory is, to get nearer the case in hand, that the bondholders, or the receiver for them, have property, or something of value, to which the party invoking the court's aid has a better abstract right,—a superior equity. To state the proposition yet more concretely, the equity arises and is rested upon one or another of the three following categories or states of fact: First, that the gross earnings of the corporation before the receivership, to which its operatives and laborers and persons furnishing necessary supplies are, upon all the authorities, entitled in preference and priority to the bondholders, have been diverted from the payment of their wages and accounts, and paid to the bondholders, or are in the hands of the receiver, to be paid to the bondholders, or to be expended by him in the further operation of the corporation's works for the benefit of the bondholders, or have been expended, either before or after receiver appointed, in the improvement and betterment of the mortgaged property, whereby the security of the bonds is increased, to the obvious advantage and benefit of the bondholders. Or, second, that whether, strictly speaking, there has been any diversion of gross earnings from the employees, directly or indirectly, to the bondholders, or not, the operatives and laborers have performed services and labor in the improvement and betterment of the mortgaged property, so that such labor and services have inured directly to the benefit of the bondholders, in the enhancement of the value of their security, and hence of

their bonds; they thereby securing, in addition to the property embraced in their mortgages, the value of the services of the company's operatives and laborers, which value belongs to such operatives and laborers, and would have been paid to them, it is to be assumed, by the corporation, out of its gross earnings, but for the intervention of the bondholders, and the appointment, at their instance, of the receiver. Or, third, that labor and services have been performed and rendered in carrying on the business of the corporation, and keeping it a "going concern" (the mortgages and bonds evidencing a contemplation of the parties to them that the operations of the corporation should be kept on foot and going, and a necessity therefor, as a means of production of the net income out of which the bonds, principal and interest, are to be paid); that the business has been kept going by the receiver, and earnings from it have been realized; that such earnings have been paid to the bondholders, or are held by the receivers; and that the laborers have not been paid for services thus rendered prior to the receivership. The first two categories of fact under which such priority will be awarded are fully stated, and the equity of the results flowing from them is fully demonstrated, in the opinion of Judge Waite copied above. The third finds ample illustration and support in an opinion of the Supreme Court of the United States, delivered also by the Chief Justice, in *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596, where it was sought to have the amount due Bowen for coal supplied to a railroad company before the appointment of the receiver made a first charge upon the income of the receivership, and, such income having been paid to the bondholders, to have payment made out of the *corpus* of the mortgaged property; and it is not questioned that sums due to laborers stand upon the same footing as supply accounts in this connection. In the course of the opinion, Judge Waite said: "In the present case, as we have seen, the debt of Bowen was for current expenses and payable out of current earnings. . . . It is said, however, that as no part of the income, before the appointment of the receiver, was used to pay mortgage interest, or to put permanent improvements on the property, or to increase the equipment, there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. There is nothing to show that the receiver was appointed because of any misappropriation of the earnings by the company. On the contrary, it is probable, from the fact that the large judgment for the right of way was obtained about the same time the receiver was appointed, that the change of possession was affected to avoid anticipated embarrassments from that cause. But, however that may be, there certainly is no complaint of a diversion by the

company of the current earnings from the payment of the current expenses. So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick v. Schall*, the 'current debt fund' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it if no change in the possession had been made. This rule is in strict accordance with the decision in *Fosdick v. Schall*, which we see no reason to modify in any particular." And to the same effect (that it is not necessary to the application of this doctrine that there should be, strictly speaking, any diversion of income before the appointment of the receiver) are the opinions of Judge Thompson, expressed in his work on Corporations, and of Judge Caldwell on the circuit bench. 5 Thomp. Corp. § 7118; *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. Rep. 182.

Enough has, we think, been said by ourselves, and through our adoption of the language of Judge Waite to demonstrate that the equity of the doctrine lies solely in the facts that the gross income of the corporation, which in good conscience belongs to its laborers and operatives, has been, in one form or another, diverted from them, and converted, directly or indirectly, to the use, benefit, and behoof of the bondholders, to whom in equity and good conscience it does not belong (whether the mortgages securing the bonds in terms embrace income or not) until the wages of laborers and operatives, and the accounts of supply or materialmen for labor done and supplies furnished recently before the appointment of the receiver, have been paid. And this is the whole equity, and it is in itself a perfect equity. The fact that the corporation is of a public character does not enter into it, and is not an element of it, any more than such fact would be necessary to a recovery in trover for a horse converted by a corporation. Every element of this equity may exist as well against a private as against a public corporation, and against bond creditors of the one as well as the other. The right to be asserted is obviously the same, whatever the character in this respect of the corporation. The wrong done to the employees is the same,—the misappropriation of the fund for the payment of their wages. And the remedy for the effectuation of the right and the redress of the wrong is applied upon considerations which take no account of whether the corporation whose earn-

ings have thus been wrongfully diverted from the payment of its employees is a railroad company, or a manufacturing company, or a mining company. The diversion of the fund being shown, and the equity being thus made to appear, the redress is accorded, the equity is declared and effectuated, by courts of chancery, upon that broad and beneficent maxim of equity jurisprudence which imposes, or authorizes the court to impose, upon every suitor asking equitable relief, the duty and burden of doing equity; and we have not heard or seen it suggested that this principle is applicable more to one suitor than another, or more to a public than a private corporation. The necessity for the application of this equitable doctrine, for giving preference to claims of employees for wages is doubtless more frequent in railroad cases, but that does not argue that the facts which authorize it cannot as well exist in other cases. So there is more necessity, ordinarily, for a railroad corporation to be kept a "going concern," because of the duty it owes the public, and the character of its business; and hence it is true that the facts stated, constituting the equity of the doctrine in the third category, *supra*, exist more frequently in respect of railroad property. But there may well be, from the point of view of the bondholders, as much necessity to keep the works of a private corporation going, in order to protect and preserve the property which is the bondholders' security, as also to earn income for the payment of current expenses, and the principal and interest of the bonds. And the necessity of keeping the corporation a going concern is in all cases gauged, not from the standpoint of the public, but from the standpoint of the bondholders; and for the purpose of determining, not what injury the public would have suffered from the stoppage of the works, nor how they have been benefited by the continuation of the business, but what injury the bondholder would have suffered from such stoppage in the loss of net income, and the diminution of the value of the property, with a view to measuring the benefits he has received from the laborer of employees in continuing to carrying on the operations of the corporation. The damages and loss to the bondholder from a stoppage of the operations of a railroad would generally be greater than from the stoppage of the works of a mining company; but, whether greater or less, they stand upon the same footing as a measure of the benefit accruing to him from the labor which prevented their infliction upon him. The difference is one of quantity, and not of kind.

We have undertaken to state this doctrine as it has been declared in other jurisdictions, and there applied to railroad property, and to give our reasons, on general principles, for the conclusion we have reached, that that limitation of the doctrine is unsound, and that, of consequence, in our opinion, the equity is as salutary, and its effectuation is as practicable and necessary, against the bondholders of a private as against those of the public corporations. The argument against this wider application of the doctrine which is based on the supposed fact that such application has not heretofore been made, is the same argument that stood

in the way of the conclusion in *Fosdick v. Schall*, and was in that case entirely demolished, in respect of railroad corporations and their property; the same argument, indeed, that has had to be met and overthrown in every new application of equitable principles from the beginning, and which, had it been allowed to obtain and control, would have left England and this country without the splendid system of equity jurisdiction which now embellishes the jurisprudence of both countries. It may be, as suggested, that courts have been very stupid, or very much at fault, in not making an earlier application of these principles to cases like the present one; but, if so, it is the same stupidity which delayed the declaration of the doctrine of *Fosdick v. Schall*, that in the early ages failed to recognize equity jurisprudence at all, and which, upon the eventual establishment of the court of chancery, stood in the way of the immediate development and application of all the principles of equity into a perfect system of equity jurisprudence, which has not even yet been attained. The broader application of the doctrine which we are attempting to justify on what we regard as very plain and simple elementary principles of equity will not lead to, involve, or admit of any of the dire consequences which are suggested, as will be clearly seen upon reference to the limitations which those principles themselves involve, and which we have endeavored to state with care and precision. It will not take the place of mechanic's lien laws, and the like, nor obviate the necessity or policy of such enactments. It will not in any sense encroach upon vested or contractual securities or rights. The principles upon which it rests, in the application of it which we are proposing, in and of themselves mark a distinct line between the particular corporation cases to which it applies, and the ordinary cases of mortgages on property, whether of individuals or corporations to secure the payment of debts, and under it there is not the slightest danger of the secured creditor in any case losing anything which he is entitled to on recognized principles of equity and good conscience. We have examined all the authorities brought to light in the case, not to speak of the adjudications of this court; and none of them conflicts with our position, except in the matter of obvious *dicta*, to which we have already referred.

We have proceeded thus far, and to the conclusion indicated above, without reference to or consideration of what has heretofore been said or decided by this court on the subject. Aside from the case of *Merchants' Bank v. Moore*, 106 Ala. 646, there are two cases in our Reports which are supposed to bear upon it. The first is that of *Meyer v. Johnston*, 53 Ala. 237. In this case it appears that the mortgagor of a railway executed a second mortgage on the property to secure money borrowed for the purpose of making permanent improvements upon it, and this money was so used. Of an effort made by the beneficiaries in the second mortgage to have their claim given a priority over the first-mortgage debt, the court by Manning, J., said: "The claim of complainants below, for the value of the improvements made . . . on the railroad . . . is

equally without just foundation. It would be a case of charging the mortgagee with improvements put on the mortgaged property by the mortgagor, which is wholly inadmissible." Page 352. The equitable principle of *Fosdick v. Schall* had not been formulated and expounded at the time of, nor was it urged in argument or at all considered by the court in, the decision of *Meyer v. Johnston*; nor, indeed, did the facts there involved present a case for its application. So that we feel entirely warranted in saying that adjudication is not an authority against the so well established doctrine of *Fosdick v. Schall*, and the other cases in that line of authority. The other case referred to is that of *Lehman Bros. v. Tullasseo Mfg. Co.* 64 Ala. 567. In that case the equitable doctrine invoked by these petitioners was not only fully considered by this court, but it was reaffirmed and adopted, and its operation was expressly extended to the property of a manufacturing company then in the hands of a receiver appointed at the instance of the holders of the corporation's bonds, which were secured by a deed of trust or mortgage on its property. Brickell, Ch. J., delivered the opinion of the court, and, after quoting with approval the following language from the opinion of Judge Waite in *Fosdick v. Schall*, viz.: "When a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable,"—went on to say: "The further observation is made, in reference to railroad mortgages, which seems to us applicable to mortgages by manufacturing and commercial corporations, generally, that they 'are comparatively new in the history of judicial proceedings. They are peculiar in their character, and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions of some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results, almost as a matter of necessity, from the peculiar circumstances which surround such litigation.'" And the chief justice, in another connection, said further: "The general creditors . . . then before the court, under the circumstances, could properly, for the convenience and interest of all, be required to concede the use of the property [belonging to the mortgagor, but not covered by the mortgage], from their strict legal rights to it, and its immediate reduction to money by a sale; as the mortgagees could be required to concede from their strict legal rights, that from the earnings of the mortgaged property, outstanding debts for labor, supplies, etc., should be paid." 64 Ala. 596 *et seq.* The case of *Merchants' Bank*

v. *Moore*, 106 Ala. 646, above referred to, goes upon certain dicta of Judge Brewer in *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, which we have already considered, to the conclusion that the doctrine under consideration cannot be applied to other than railroad corporations. That conclusion is, we think, at war with our own case of *Lehman Bros. v. Tallassee Mfg. Co.* 64 Ala. 567; and it appears to have been rendered without consideration, and certainly without discussion, of the broad and beneficent principles of equity which not only support the doctrine in respect of railway corporations, but, with equal force, require its extension to all corporations which, as shown by deeds of trust or mortgages to secure bonds, it is in the contemplation and to the interest of the parties (the mortgagor and bondholders) should be kept going; and this without at all impinging upon the sacredness of the vested rights of the bondholders. We are now of opinion that what is said in that case in limitation of the doctrine to railroads is unsound in principle, and must be modified so as to comport with the views we now announce. And we will return to and reaffirm the decision in *Lehman Bros. v. Tallassee Mfg. Co.*; and upon that, in connection with the general equities to which we have adverted, we do not hesitate to apply the doctrine of *Fosdick v. Schall* to the property of the defendant corporation, though it be only a mining and coke manufacturing concern, now in the hands of the receivers appointed at the instance of the trustee in the deeds of trust, if the petition presents the particular facts which are essential elements of the equity petitioners invoke and rely upon.

To return, then, to the petition: We find no averment in it of any such improvement or betterment of the mortgaged property by the laborers whose wages are unpaid, and to whose claims petitioners have succeeded, as would entitle them to priority over the bondholders. There are averments of repairs to the coke ovens and to the railroad; but mere casual and incidental repairs, such as are implied here,—the mere mending of a break or defect caused by current use, etc.,—are not improvements or betterments, within the rule we are considering. The improvements must be of such character as to add a value, in a sense permanent, to the property, so that the security of the bonds is thereby increased, before the bondholders can be called upon to make restitution of that value to the laborers.

Nor do we find that a case is made under the third statement of facts supporting this equity above. It is said that the labor was necessary to continue the business of the corporation, but it is not shown either that such continuance was to the advantage of the bondholders, or necessary in conservation of their interests, or that any income out of which, or because of the receipt of which, the wages for this labor should be paid, had been realized by the receiver from his administration and operation of the business and works of the corporation. Hence no case is made under the third statement above of the facts constituting this equity.

But we do find an averment on information and belief, that "there was due to the defendant at and before the time of the appointment of said receiver the sum of about \$40,000, which

was due for coal and coke sold by the defendant, and which was taken from said mine and manufactured in said ovens, and that said \$40,000 represented the gross earnings of the defendant, into which the labor of said employees and operatives entered, and that said employees performed work and labor in mining of said coal and in manufacturing said coke, and which is referred to in this section." This averment is not objectionable because of being made on information and belief. *Christian v. American Freehold Land Mortg. Co.* 92 Ala. 180; *Lucas v. Oliver*, 34 Ala. 626; *Nix v. Winter*, 35 Ala. 209. It is as definite as to amount as if the language had been "a large sum, to wit, \$40,000," which means about \$40,000 and is a customary and sufficient mode of averring such facts. It is an averment that the company, when the receiver was appointed, held and owned claims for products sold, bills receivable, for about \$40,000. Prima facie, the parties owing these bills were solvent, and the amounts against them were good. It is shown that the receiver was authorized and directed to take into his possession all the property of the corporation, special reference being made to assets of this kind, and that he did take possession of all its property of every kind. It is probable these accounts have been collected, but, whether so or not, they or their proceeds constitute the "moneyed assets that have been taken from the company," spoken of by Judge Waite as the class of assets upon which ordinarily the power to give laborers priority of payment over bondholders is exercised. The petition shows that these "moneyed assets" belonged to, and were a part of, the gross earnings of the corporation. They therefore belonged to the employees, in preference to the bondholders. If they are still uncollected in the hands of the receiver, the petitioners are entitled to have their claims charged upon them under the general prayer for relief. If they have been collected, and the money is in the hands of the receiver, petitioners are entitled to have their debts paid out of it. And if their proceeds have been paid to the bondholders, or expended in the administration of the receivership, the claims of the petitioners should be made a charge on the corpus of the mortgaged property, and paid out of the first moneys coming into the hands of the receiver, as specially prayed in the petition. The claims of the petitioners, being for labor done within six months before the appointment of the receiver, come within the strictest rule declared by any of the cases as to time. 5 Thomp. Corp. § 7115.

No objection to the relief prayed can be based upon the fact that petitioners claim as assignees of the employees. 5 Thomp. Corp. § 7117.

The petition prays that notice of its filing be given to the parties to the pending suit. This was, in our opinion, sufficient, in respect of making parties to the intervention, and the objection in this connection taken by the demurrer is untenable.

Finally, our conclusion is that the petition made a case for the relief as shown above, and the demurrer to it should not have been sustained.

The decree of the Circuit Court is therefore reversed, the demurrer to the petition as a whole is overruled, and the cause is remanded.

Head, J., dissents.

Coleman, J., dissenting:

The Mary Lee Coal & Railway Company (a corporation authorized by its charter to own and operate coal mines, coke ovens, and a railway in Jefferson county), to secure its bonded indebtedness, executed a deed of trust to the Mercantile Trust & Deposit Company, the appellee, upon all its property, and tolls, charges, and its income. Having defaulted, the trustee filed a bill praying for a receiver, and fore closure of the mortgage. Pending the foreclosure bill, the appellants, Drennen & Co., by petition, interposed a claim for \$14,697, and prayed that it be allowed as a preferred claim. The basis of this claim is that it was "due for repairs and work and labor done and performed for the defendant, the Mary Lee Coal & Railway Company, during the months of July, August, September, October, and November," preceding the filing of the bill. Of the amount claimed, about \$8,947 was due for digging and mining and shipping coal and in keeping said mine in operation, and in preparing said coal for shipment; about \$5,000 was due in operating and repairing said coke ovens, and in preparing coke for shipment to market; and about \$750 was due for operating and repairing defendant's said railroad. The real issue involved is whether the doctrine believed to have been first promulgated in the case of *Foadick v. Schall*, 99 U. S. 235, 25 L. ed. 339, which allowed wages earned within six months before the appointment of a receiver preference and priority over the bondholders whose debts were secured by a mortgage preceding the accrual of the claim for wages, and which doctrine, by that decision, and others since rendered, was expressly limited to public railroads, shall be further extended, and as extended be applied to private business corporations, companies, and individual transactions. The principle asserted, and the rule adopted for its application, in the opinion of the court, logically lead to this result. No case has been cited in support of the contention, and the writer believes it is without precedent.

New and useful inventions for the benefit of mankind are commendable, but the province of courts is to apply existing principles, and not create rules and principles which injuriously affect the rights of parties, acquired by contract. The province and power of courts of equity to intervene for the protection of right and prevention of wrong, and to invent remedies, where none exist, to secure these ends, is one of its most useful attributes, and the exercise of this power on proper occasions has developed into our present admirable system of equity jurisprudence; but there is a great and irreconcilable difference between the application of a remedy and the creation of a right and priority which subvert and subordinate existing contractual interests. It has been truly said that under some circumstances courts of equity may amplify remedies, but cannot dispense with legislation or amplify jurisdiction. The reasons now assigned for this new departure have been obvious to the judicial mind for a century or more, and the very fact that the conclusion has not hitherto been accepted as sound and permissible, of itself, is full of

warning to that conservatism which should characterize courts of justice. Precedents, though not always entitled to absolute domination, when they have become so established as to enter into and become elements of contract cannot be set aside by courts without inflicting injustice. The legislative department has no authority by its enactments to impair the obligation of contracts, and surely courts of justice ought not, by their adjudications, to adopt and apply principles to existing contracts which will have the effect of an *ex post facto* legislative enactment. It is unnecessary to cite authority in support of a proposition of law recognized in all courts, and especially in this state, to the effect that in the absence of an agreement to the contrary, at common law, a mortgage upon property carried with it all subsequent improvements, repairs, and betterments; and this rule prevails until changed by statute in courts of equity, as well as law, in all states where the common law exists. Nor is it necessary at this late day to cite the authorities which have upheld the validity of mortgages, including those of railroads, upon after-acquired property, and tolls and charges and incomes. It was the prevalence of these rules which led to the enactment of what are known as the "mechanics' and materialmen's lien laws," and statutes giving priority for labor and supplies and materials, the constitutionality and application of which statutes have undergone so many exhaustive discussions in the courts of the country. In no case that is now recalled have these statutes been sustained in so far as they were intended to displace or subordinate prior liens and contracts; nor can there be found a decision, in my opinion, which demanded of the owner of a right, vested in him by virtue of a prior valid contract, that he concede something of his rights as a condition precedent to his obtaining the aid of the courts of the country. I am not now construing the question of the unqualified right of a suitor to a receiver in a proper case, and the terms a court may impose as a condition to the appointment of a receiver, nor the power of a court to create prior liens for the preservation of property held by it during the pendency of litigation. The principle asserted in the case under consideration goes far beyond all these rules and regulations incident to the appointment of receivers and the preservation of property. It boldly announces as a universal principle of "abstract equity," not dependent upon contract nor affected by contract, "and which needs no other justification for its application in any case than the existence of facts upon which it arises and rests." I quote from the opinion itself as follows: "Enough has, we think, been said by ourselves, and through our adoption of the language of Judge Waite, to demonstrate that the equity of the doctrine lies solely in the facts that the gross income of the corporation, which in good conscience belongs to its laborers and operatives, has been, in one form or another, diverted from them, and converted, directly or indirectly, to the use, benefit, and behoof of the bondholders, to whom in equity and good conscience it does not belong (whether the mortgages securing the bonds in terms embrace income or not) until the wages of laborers and operatives, and the

accounts of supply or materialmen, for labor done and supplies furnished recently before the appointment of the receiver, have been paid. And this is the whole equity, and it is in itself a perfect equity. The fact that the corporation is of a public character does not enter into it, and is not an element of it, any more than such fact would be necessary to a recovery in trover for a horse converted by a corporation. Every element of this equity may exist as well against a private as against a public corporation, and against bond creditors of the one as well as the other. The right to be asserted is obviously the same, whatever the character in this respect of the corporation. The wrong done to the employees is the same,—the misappropriation of the fund for the payment of their wages. And the remedy for the effectuation of the right and the redress of the wrong is applied upon considerations which take no account of whether the corporation whose earnings have thus been wrongfully diverted from the payment of its employees is a railroad company or a manufacturing company or a mining company. The diversion of the fund being shown, and the equity being thus made to appear, the redress is accorded, the equity is declared and effectuated, by courts of chancery, upon that broad and beneficent maxim of equity jurisprudence which imposes, or authorizes the court to impose, upon every suitor asking equitable relief the duty and burden of doing equity; and we have not heard or seen it suggested that this principle is applicable more to one suitor than another, or more to a public than a private corporation. The necessity for the application of this equitable doctrine for giving preference to claims of employees for wages is doubtless more frequent in railroad cases, but that does not argue that the facts which authorize it cannot as well exist in other cases. So, there is more necessity, ordinarily, for a railroad corporation to be kept a 'going concern' because of the duty it owes the public, and the character of its business; and hence it is true that the facts stated constituting the equity of the doctrine in the third category, *supra*, exist more frequently in respect of railroad property. But there may well be, from the point of view of the bondholders, as much necessity to keep the works of a private corporation going, in order to protect and preserve the property which is the bondholders' security, as also to earn income for the payment of current expenses and the principal and interest of the bonds. And the necessity of keeping the corporation a going concern is in all cases gauged, not from the standpoint of the public, but from the standpoint of the bondholders, and for the purpose of determining, not what injury the public would have suffered from the stoppage of the works, nor how they have been benefited by the continuation of the business, but what injury the bondholder would have suffered from such stoppage, in the loss of net income, and in the diminution of the value of the property, with a view to measuring the benefits he has received from the labor of employees in continuing to carry on the operations of the corporation. The damages and loss to the bondholder from a stoppage of the operations of a railroad would generally be greater than from the stoppage of the works of a min-

ing company: but, whether greater or less, they stand upon the same footing, as a measure of the benefit accruing to him from the labor which prevented their infliction upon him. The difference is one of quantity and not of kind."

It must be observed that the "equity" here asserted is not made to depend upon any statute or agreement to that effect in favor of the "wages of laborers and operatives, and the accounts of supply or materialmen, for labor done and supplies furnished recently before the appointment of the receiver," and, until paid, made a prior charge upon the gross income proceeding from such consideration, or if such income has been otherwise expended, then upon the *corpus* into which consideration entered. The predicate for the argument is "that the gross income *belongs* to the laborers and operatives and materialmen, which, in one form or another, has been diverted from them, and converted, directly or indirectly, to the use, benefit, and behoof of the bondholders, to whom *in equity and good conscience it does not belong* (whether the mortgages securing the bonds in terms embrace income or not) until these wages and materialmen have been paid." We have italicized the words which are made the pillars of the argument. Is it a fact that the gross income covered by a prior executed mortgage, known to the parties, belongs, in any sense, to the laborer or materialman, as a matter of equal or equitable right, and that it does not belong to the bondholder, although by contract he has secured a prior lien, which lien existed, and which the laborer and materialman knew existed, when the services were rendered and the supplies or material were furnished? Have we discovered or invented a legal X ray, which exposes to the judicial eye an imperfection in the old doctrine of contract on personal credit, or manifests as unsound the rule which declares contracts to be sacred and inviolable? If the income belongs to the laborer, he ought to be able to recover it in an action for money had and received, and not by a judgment for services rendered. If he or the materialman has a lien upon or prior claim to the income, or upon the "*corpus* into which the labor or material has entered," as an "abstract" and "perfect equity," independent of contract or statute, the judicial mind, for a century or more, has been grossly at fault. The interventions of legislatures to provide for labor and material furnished, and the study and worry of courts to adjust the rights of contractors and prior mortgagees under these statutory enactments, were to a great degree superfluous, and labor lost; for if the doctrine now contended for be sound, there arose from the facts, without the statute or agreement, a perfect equity, which only needed application and enforcement. If the doctrine now contended for is sound, there must arise on every farm, in every manufactory, mine, and enterprise in which labor is performed and material furnished, from which a gross income is derived, the same rights and equity, independent of, and superior to, the claims of all other creditors, without regard to previous or subsequent contracts. If the perfect equity exist, the arbitrary limitation by some courts to six months within which such claims may be en-

forced is a tyrannical usurpation by the courts. We cannot reasonably presume that the distinguished court which rendered the decision of *Foedick v. Schall*, 99 U. S. 235, 25 L. ed. 839, and subsequent decisions in line with it, did not clearly perceive the full force of the argument and "abstract equity" now insisted upon successfully for the first time in this or any other court (at least, within the knowledge of the writer), and apprehend the nature and consequences involved. That court did not attempt to justify the new rule adopted upon the ground that the petitioners had an abstract equity, perfect in itself, superior to the bondholders, but based its conclusion upon the power of the court to impose conditions precedent to the appointment of receivers and the granting of equitable relief, and justified the imposition of these conditions because of the public character of railroad corporations, and limited its application to such enterprises, and to cases in which the mortgagee applied to courts of equity for affirmative relief. In the case of *Kneeland v. American Loan & T. Co.*, 136 U. S. 89, 34 L. ed. 879, that court has already issued its warning that the rule will not be extended to other than the exceptional case specified, and reaffirmed the established doctrine, in the following language: "No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage lien." How is it possible to reconcile the doctrine enunciated in 136 U. S. 89, 34 L. ed. 879, with that enunciated in the case at bar, where the rule is applied to "improvements which add value, in a sense permanent, to the property," and which holds that, if the income has been otherwise expended, then these claims become a prior lien upon "corpus" to which the labor or materials of claimants contributed nothing, and which originally constituted the security of the mortgage? The writer cannot sanction as sound a rule of equity which annuls (usually termed "displaces") existing relations between a mortgagor and mortgagee, in the interest of a third party, whose interest was acquired against the mortgagor subsequent to and with a full knowledge of the rights of the mortgagee. The justification of the courts, denying a mortgagee his priority, has been rested mainly upon—First, the equitable doctrine that he who seeks equity must do equity; and, secondly, upon the equitable doctrine of estoppel; and, thirdly, that the claim is one of abstract right, arising from certain conditions and circumstances. As to the first of these propositions, that he who seeks the aid of a court of equity must do equity, the rule operates only between the parties to an agreement or transaction, to prevent the one from taking an undue advantage of another, but cannot be invoked by a stranger, who is not even a proper party to the suit. But the argument assumes the question in controversy, and that is that these claimants have an equity peculiar to them, because of the character of the claims. These claims must necessarily arise either from contract, express or implied, or from statute, or

result into such superior claims, as matter of law from facts. It is not pretended that the right is of statutory creation, or of contract between the parties, the mortgagee and labor or materialman creditor, nor between the mortgagor, as the agent of the mortgagee, and the labor or material creditor. Is it a conclusion of law that a mortgagee guarantees to labor and materialmen that the business of the company or corporation will be conducted on business principles, and the company never become insolvent? Is it a conclusion of law that a mortgagee's lien shall be subordinate to claims for labor and material? Is it a conclusion of law that a lien upon incomes acquired by solemn contract is subordinate to such claims? And, on the other hand, is the right of the laborer or materialman made by law to depend upon the skill and judgment of the employer, so that, if permanent injury results, his claim becomes thereby of a higher and superior character? Or does it depend upon how the gross income be expended by the employer? If this be law, it is because the courts make it law, and in no sense is it the application of any just principle. Contracts for labor and material, unaided by special provision of the contract or statute, stand on no higher ground than other simple contract creditors, and are no more entitled to the income than the latter creditors. Labor and material claimants have as much right to have a simple contract creditor, to whom income has been paid, declared a trustee for their benefit, as to have a mortgagee, who has a lien upon it, to whom it has been paid, declared such trustee. There is not a single element of an estoppel in the whole matter. Neither the laborer nor the materialman act or refrain from acting at the instance of the mortgagee. It is a question of contract between them and the mortgagor, in a matter not under the control or supervision of the mortgagee, and rendered with a full knowledge of the mortgagee's lien. It would require affirmative action on the part of the mortgagee, inducing the labor and purchase, to raise an estoppel against him.

The new doctrine is a revolution in jurisprudence, subverting settled principles, and not the application of new remedies to existing rights, and it should be walled into the "exceptional cases" declared to be such by Mr. Justice Brewer in *Kneeland's Case*, 136 U. S. 89, 34 L. ed. 879, and reasserted in *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 668. In the case of *Wood v. Guarantee Trust & S. D. Co.* 128 U. S. 416, 421, 32 L. ed. 472, 473, it was declared that three conditions must exist, to justify the application of the rule of *Foedick v. Schall*: First, it must be applied wholly to "operating expenses;" second, and only where there is a "diversion of the income of a going concern;" and, third, "that it had never been applied in any case except that of a railroad, and that there was a broad distinction between such a case and that of a purely private concern." In the case of *National Bank v. Carolina, K. & W. R. Co.* 63 Fed. Rep. 25, the application of the rule is limited to railroads. It is said: "The theory of this equity is this: It is the interest as well of the public as of all parties interested in a railroad that it be kept a going concern. To do this, there must be a ready

supply of labor and materials necessary to this end. If persons who give labor and materials were required in every instance to make careful examination into the condition of the company, so as to ascertain its solvent capacity for paying debts, all of its operations might be brought to a standstill. For this reason, persons dealing with a company are encouraged to do so, with the knowledge that the court will see that all such supplies of labor and material given, and not paid for within a reasonable period before the appointment of a receiver, will be provided for by the court.

. . . But, in exercising this equity, the court goes upon dangerous ground, and therefore proceeds cautiously, keeping rigidly within prescribed limits." In the case of *Hanna v. State Trust Co.* 38 U. S. App. 61, 16 C. C. A. 586, 70 Fed. Rep. 2, 30 L. R. A. 201, an attempt was made to invoke and apply the rule of *Posdick v. Shall* to a private company or corporation. It was said: "The doctrine of these cases has no application to this case. They rest on the peculiar character of railroad property and of a railroad corporation. The distinction between railroad corporations which are of a quasi public character, and purely private corporations, has been often pointed out.

. . . It is enough to say that the supreme court itself has said that the doctrine of the cases cited has only been applied in railroad cases." A lengthy quotation is made in the opinion from the case of *Raht v. Attrill*, 106 N. Y. 423, 60 Am. Rep. 456, in point, and quite a number of decisions from other courts are also cited. In *Coe v. New Jersey Midland R. Co.* 31 N. J. Eq. 105, the question of the application of the rule to private business enterprises, and the consequences, are fully discussed and disapproved; also in *Poland v. Lamolille Valley R. Co.* 52 Vt. 144. Without a single exception, so far as the writer has been able to ascertain after a most diligent investigation, the courts are uniform in applying and limiting the rule wholly to railroad cases; and in the case of *Thomas v. Western Car Co.* 149 U. S. 95, 37 L. ed. 663, believed to be the last utterance by the Supreme Court of the United States on the question, a lengthy quotation is made from the *Case of Kneeland*, 136 U. S. 89, 34 L. ed. 379, in which the warning given in that case, and the limitation placed upon the rule, were repeated with approbation and reasserted. The application of the rule was denied as to manufacturing corporations, in *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. Rep. 372, and in *Seventh Nat. Bank v. Shenandoah Iron Co.* 35 Fed. Rep. 436. In 2 Cook, Stock & Stockholders, § 861, p. 1402, it is said the rule "is extraordinary," and "does not apply to manufacturing companies." The principle is criticised as to its application in railroad cases, and it is held that it "plainly impairs the obligation of the mortgage contract," by the following eminent texts: Wait, Insolvent Corp. §§ 290, 291; Beach, Receivers, §§ 391-393; High, Receivers, § 394a; Jones, Corporate Bonds, § 555. Surely the rule ought not to be extended by adjudications of a court, as it has been in the case before us, in the face of such high authority, and in defiance of the obligation of contracts. If the equitable right exist as an abstract right, the

parties themselves can come into the courts and insist upon its protection, and need not wait for the bondholder or mortgagee. That I have not overstated the position of this court may be seen by a reference to the case of *Merchants' Bank v. Moore*, 106 Ala. 646, which the present opinion and decision of the court declare to be unsound. In that case there was no question of a bondholder or prior lien claimed by contract. A general creditors' bill was filed on behalf of all creditors, and a decree rendered, which declared a conveyance made by the defendant in favor of certain creditors to be a general assignment for the like benefit of all creditors. The defendant debtor had been engaged in sawing and planing lumber for a market,—a mere private business concern. It was not continued or asked to be continued as a "going concern." *Moore et al.* filed their petition, in which they claimed that the company was indebted to them for labor and materials which entered into the "permanent improvement" of the property which had been assigned for the benefit of creditors, and which fact, petitioners asserted, gave them a priority over the other general creditors. There was no claim of priority by virtue of any contract or statutory lien, but the contention was based purely and solely upon the one fact,—that their labor and materials entered into the permanent improvement of the property. This court held that these facts did not entitle them to a priority over the other creditors. Certainly this has been the uniform holding of this court, under like circumstances, from its organization; and now it is proposed to declare different principles, and annul a long-established rule of parties contracting on personal credit, and lay down the new rule that labor performed or materials furnished, which enter into the improvement of property, creates a perfect equity, which entitles that class of creditors to a priority over other creditors without regard to the terms of the contract or provisions of statutes. The very improvements may have been the basis of credit, and the credit given without any notice or knowledge of the existence of claims for labor or material. The writer of the opinion in the case of *Merchants' Bank v. Moore*, 106 Ala. 646, did not at the time suppose there was any conflict between that case and that of *Lehman Bros. v. Tallassee Mfg. Co.* 64 Ala. 567, and, after a careful re-examination, believes it to be demonstrable beyond reasonable controversy that there is no conflict upon any issue involved and decided in these cases. In the case of *Lehman Bros. v. Tallassee Mfg. Co.* there were three different creditors, who appealed from the decree of the chancery court to this court,—*Lehman Bros.*, *Clopton et al.* and *Stone & Clopton*. *Lehman Bros.* appealed upon the grounds that the chancery court held that they were not bona fide holders of certain bonds which were in their hands as collateral security, and that *Lehman Bros. & Co.* were not entitled to the benefit of this security. There was no contest between the bondholders and mortgagees and *Clopton et al.* On the contrary the bondholders acceded to the claim of *Clopton et al.*, and consented, so far as they were concerned, to the granting of the payment of this claim. The claim of *Stone & Clopton* was for the al-

lowance of attorney's fees out of the general fund, not covered by any mortgage. The chancery court disallowed this claim. The other claim was that of Clopton, Goldthwaite *et al.*, and arose from the following facts: The Tallassee Manufacturing Company was financially pressed, and unable to raise money. It had hypothecated certain cotton, which was needed for manufacturing purposes. It was at that time a "going concern." In order to release the cotton, and get possession of it for the use and benefit of the company, with the consent of the trustees and assignees, and with the understanding had with these parties that they were to be repaid, as appears from the pleadings, these parties, upon their individual responsibility, raised the money for the purpose of releasing the cotton. There was no litigation in the case, whatever, between the bondholders and mortgagees, on the one hand, and other creditors, but the contest was solely between general creditors; the petitioners, as such, claiming priority of payment over other unsecured creditors, upon the facts stated, just as in the case of *Merchants' Bank v. Moore*, 106 Ala. 646, out of the property, or proceeds of property, not covered by any mortgage or lien. It was conceded throughout the opinion, and by all the creditors, that the bondholders were entitled to everything covered by their mortgage; and the opinion of the court was careful to keep separate, not only the property itself covered by the mortgage, but the income from this source so far as it could be separated from the income derived from property not mortgaged for the benefit of the bondholder. The phase of the litigation applicable to the case under consideration arose only between unsecured creditors, as to their rights in the property, and the income from property not included in the mortgage. Clopton Goldthwaite *et al.*, claimed that the facts gave them a preference over the other unsecured creditors, as to the property not included in the mortgage. They set up no claim to property covered by the mortgage. The chancery court denied their right to any preference whatever. This ruling was affirmed on appeal. The one or the other of the two conclusions follows,—either that the claim of Clopton, Goldthwaite *et al.*, was not a claim similar to that preferred by Moore *et al.*, in *Merchants' Bank v. Moore*, 106 Ala. 646, or if it was similar, then the decision of this court affirming the decision of the chancery court, which had denied and refused to decree a priority to petitioner, is directly in harmony with the case of *Merchants' Bank v. Moore*, and directly at variance with the new doctrine. On the other hand, if the claim of Clopton, Goldthwaite *et al.*, was not of a similar character, and did not rest upon like circumstances, the decision is not an authority upon the question as issue, for there was no such question before the court to be adjudicated. The only ground for the reversal of the case in *Lehman Bros. v. Tallassee Mfg. Co.* 64 Ala. 567, was the error of the chancery court in holding that Lehman Bros. were not bona fide holders of the bonds. In all other respects the case was affirmed. It is impossible to find any conflict in the case of *Merchants' Bank v. Moore*, 106 Ala. 646, and *Lehman*

Bros. v. Tallassee Mfg. Co. 64 Ala. 567, as to any issue involved in either case. The writer is aware that counsel for Clopton, Goldthwaite *et al.*, in written argument filed, insisted that their claim was within the principle declared in *Fosdick v. Schall*, and cited that case in their brief; and this no doubt led to a discussion, in the opinion of this court, to some extent, of that case and the principle insisted upon; but it is apparent that this court did not apply or undertake to enforce the doctrine in *Lehman Bros. v. Tallassee Mfg. Co.* for the priority of the claim was denied. What was said in the opinion as to extending the rule of *Fosdick v. Schall* to manufacturing enterprises was merely dictum. It will also be seen that the court placed the power of the court to grant the relief, not upon any abstract right or equity of claimants, but its authority to require a concession, as a condition precedent to granting relief. In the carefully considered case of *Meyer v. Johnston*, 58 Ala. 237, many of the principles involved in this discussion arose. On page 828 the rights and property embraced in the mortgage were considered. The mortgage conveyed all property, real and personal, then owned, or which might thereafter be owned, and all "tolls, incomes, and profits." This court reaffirmed the validity of such conveyances, and declared that the rights of the mortgagees were superior to subsequent claims for improvements, and even for the construction and completion of the railroad itself. Extensive quotations were made from the cases of *Dunham v. Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 254, 17 L. ed. 584, and *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 481, 20 L. ed. 206, which are directly in point, and many other authorities were cited. In the case of *Cowdrey*, 78 U. S. 11 Wall. 481, 20 L. ed. 206, the claim rested upon the fact that it was for iron laid upon the road, and capital applied to the road, without which the road could not have been operated. The court held the claim subordinate to that of the mortgagee. As a conclusion, the court used the following language: "If the railroad company itself, the corporation created by the state to build, equip, and operate a work useful to the public, though belonging to the company, cannot, when its enterprise is about to fail, and its labor and expenditures to be lost, give to those who shall then come to its aid, and help to complete it obligations which . . . shall have priority over others previously contracted,—what prerogative of a court of equity entitles the chancellor to step in and do so instead of the company? The company may not do so, because, holding that contracts should be inviolable, the law will not permit the obligation of them to be impaired." On page 352 this court expressly repudiated the doctrine that the mortgagee could be charged with improvements put upon the mortgaged property. The opinion, as a whole, is in direct conflict with the principle now being asserted.

It is clear, from the authorities of this state and elsewhere, that when the Mary Lee Coal & Railway Company executed its mortgage to the Mercantile Trust & Deposit Company, its mortgage was valid as a conveyance upon all its property, and upon "income and tolls," and that this principle of law entered into, as

a constituent of, that contract. That this prior right, acquired by a solemn contract, cannot be displaced in favor of the claims of petitioners subsequently accruing, and which, in the absence of agreement, must be presumed to have been rendered upon the personal obligation of the mortgagor, without impairing the obligation of the mortgage contract, is too clear to admit of controversy. It is the doctrine of all the courts. Even in the cases where the rule has been enforced against a prior mortgage, the courts concede that the effect of the application of the rule is to "displace" prior liens, and the "displacement" is justified solely upon the ground that courts of equity may demand from the mortgagee, as a condition precedent to relief, either in the appointment of a receiver, or foreclosure, that he concede or consent to the final payment of the claim of the laborer and materialman, although, by virtue of the mortgage, the lien, in fact and in law, is prior and superior to any claim for labor or supplies; realizing that the priority could not be adjudicated upon any principle of "abstract equity." So apparent was it that the innovation impaired the obligation of contracts, the courts limited the application of the "condition precedent" to railroads, because of their public character, and to "going railroads," and where there was a "diversion" of income. How it can be that the application of assets, whether money or property, to the satisfaction of a mortgage, which, by valid contract known to all parties, is a first lien upon it, is a "diversion" of assets, remains yet to be sustained. There is much force in the position that the public have great interest in railroads, and that no one should be allowed to strike down, without warning, the public interest. This question is one not simply of debtor and creditor, growing out of contract, but of commerce itself. Many states have provided for these conditions by statute, and saved their courts from the imputation of "court-made law." *Central Trust Co. v. Thurman*, 84 Ga. 735. Whether the same results as to impairing the obligations of contracts would follow as to railroad mortgages executed since the promulgation of the rule of *Fosdick v. Schall*, we need not now con-

sider. We have no such case before us. In the case of *Meyer v. Johnston*, the same distinction was drawn as to railroad corporations, on the ground that the public were interested in such enterprises, as that drawn in *Fosdick v. Schall*; and upon this ground the giving of a prior lien to receiver's certificates was upheld. It is said that when *Meyer v. Johnston* was rendered the case of *Fosdick v. Schall* had not been established. That is no argument. The same equity existed then, and it was directly repudiated. But that argument is further stripped of all force when we consider the final determination of the case. The law of this state at that time required this court, on a second appeal, to render judgment without being bound by the first appeal. When the case of *Meyer v. Johnston* came up on a second appeal (64 Ala. 603), it seems that the opinion in the case of *Fosdick v. Schall* had been delivered. We cannot doubt that the learned counsel representing the interests which had been adversely decided would have availed themselves of the new doctrine, had it been supposed to have been so far-reaching. The same members of the court presided on the first appeal as on the second, and also when the case of *Lehman Bros. v. Tallassee Mfg. Co.* 64 Ala. 567, was decided. What the attitude of this court should be when a case like that of *Fosdick v. Schall* comes before it, need not now be considered; but in my opinion the rule cannot be extended to cases like that before us, without violating the sacredness of contracts. The rule declared in *Merchants' Bank v. Moore*, 106 Ala. 646, which strictly followed the decision of *Meyer v. Johnston*, ought to be adhered to. Certainly, if there was any conflict between the case of *Merchants' Bank v. Moore* and the case of *Lehman Bros. v. Tallassee Mfg. Co.*, the same conflict exists between the latter case and the case of *Meyer v. Johnston*, and which, if there be such conflict, was virtually overruled, without any reference to it. In my opinion, there was no conflict in any of the decisions previous to that rendered in the case at bar.

Rehearing denied February 9, 1898.

ARKANSAS SUPREME COURT.

H. B. ROGERS, Exr., etc., of T. J. Rogers,
Deceased, Appt.,
v.

GALLOWAY FEMALE COLLEGE *et al.*

(.....Ark.....)

1. A contract to establish a college "at" a certain town does not require that it should be placed within the corporate limits.

2. A contract to establish a college "in" a certain town does not require it to be

NOTE.—As to validity of subscription contracts, see *First Presby. Church v. Cooper* (N. Y.) 3 L. R. A. 468, and cases cited in note.

For gift by promissory note, see *Richardson v. Richardson* (Ill.) 26 L. R. A. 305.

39 L. R. A.

placed within the corporate limits when a large number of the inhabitants of the town dwell beyond such limits.

3. A binding contract is made by a subscription to secure the location of a college at a certain town when the required amount is subscribed, and the subscription accepted, and the college located at that place, while agencies are constituted and put to work to carry out the enterprise.

4. One will not be heard to deny the existence of facts which he, either in express terms or by conduct, has represented as existing, and which he intended to be acted upon by another in a certain way, and which was so acted upon in good faith by the other to his detriment.

5. A subscriber to a fund to be given for securing the location of a college

at a certain place on condition that a specified sum is raised cannot avoid his subscription by showing a deficiency in the amount after it has been accepted as sufficient by the party establishing the college when he was a leading spirit in the enterprise, knew the subscribers, and knew what was demanded.

6. A private understanding with one of four persons who make equal subscriptions, to the effect that other persons will raise and pay a part of his subscription, will not release one of the other four, where this agreement did not amount to a release of the subscriber from any part of his subscription.

7. Agencies representing a church committee for the express purpose of enforcing subscriptions have no authority to vary the terms of the contract of a subscriber.

8. A college established by a church pursuant to subscriptions and propositions therefor is the beneficiary of the subscriptions, standing *in loco ecclesiae* as to the right to sue upon it.

(*Battle, J., dissents.*)

(January 22, 1898.)

APPEAL by defendant from a judgment of the Chancery Court for White County in favor of plaintiff in a suit brought to enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinions.

Messrs. Cockrill & Cockrill, for appellant:

There can be no recovery upon the note sued on because the college was located outside the town of Searcy.

The language of the contract imports that the money was payable upon condition.

2 Parsons, Contr. § 527; *Turner v. Baker*, 30 Ark. 186.

The condition was that the college should be located within the corporate limits of Searcy.

Williams v. Fort Worth & N. O. R. Co. 82 Tex. 553; *Annapolis & E. R. Co. v. Baltimore F. Ins. Co.* 32 Md. 37, 3 Am. Rep. 112.

At a town means at some place within the town, rather than a place without, or even at the utmost verge of, but not in the town.

Chesapeake & O. Canal Co. v. Key, 3 Cranch, C. C. 599; 1 Bishop, Directions & Forms, § 80; 1 Bishop, Crim. Proc. § 378; *Blackwell v. State*, 30 Tex. App. 416.

At, when used to denote place, refers to a fixed and definite place.

Difiori v. Adams, 53 L. J. Q. B. N. S. 437; *Union P. R. Co. v. Hall*, 91 U. S. 348, 23 L. ed. 430; *Harris v. State*, *Dolan*, 72 Miss. 960, 33 L. R. A. 85; *Kaler v. Tufts*, 81 Me. 63; *State v. Old Town Bridge Corp.* 85 Me. 17; *Homer v. Homer*, L. R. 8 Ch. Div. 758.

In is, however, "more definite and specific than at."

Hilgers v. Quinney, 51 Wis. 62; *State, West Jersey R. Co. v. Camden Receiver of Taxes*, 38 N. J. L. 299; *Kibbe v. Benson*, 84 U. S. 17 Wall. 625, 21 L. ed. 741.

Here the contract specifies that the college should be located in Searcy. The location beyond the corporate limits of Searcy was a violation of the express condition of the contract, and was fatal to a recovery upon it.

Turner v. Baker, 30 Ark. 186; *Jacks v. Helena*, 41 Ark. 213; *Haney v. Caldwell*, 43 39 L. R. A.

Ark. 184; *Arkadelphia Cotton Mills v. Trimble*, 54 Ark. 316.

Equity will reform an instrument only where it is signed under a mutual mistake. It will never make a new contract for the parties.

Sims v. Thompson, 39 Ark. 301; *Wilson v. Strayhorn*, 26 Ark. 28; 2 Beach, Eq. § 544; *Bispham*, Eq. § 546.

Pipkin's error as to the use of "in" for "near" could not avail the plaintiffs.

Calverly v. Harper, 40 Ill. App. 96; *Hicks v. Coody*, 49 Ark. 425.

If the proof had been otherwise sufficient, the plaintiffs would be forced to stand by the contract as it is written for the further reason that they acquiesced in the contract in its present form after knowledge of all the facts.

Bowden v. Spellman, 59 Ark. 251.

A condition "must be strictly performed in every particular, in order to entitle the party, whose duty it is to perform it, to enforce the contract against the other party."

Story, Contr. § 33; *Schuler v. Myton*, 48 Kan. 283; 1 Beach, Modern Law of Contracts, § 726.

The surrounding circumstances may be looked to by the court to determine the sense in which the parties to a contract have used words of doubtful meaning.

Weis v. Meyer, 55 Ark. 18; *Kelly v. Carter*, 55 Ark. 112; *Sicayne v. Vance*, 23 Ark. 282; *Vaughan v. Matlock*, 23 Ark. 9; *Glanton v. Anthony*, 15 Ark. 543.

A gratuitous subscription is only a continuing offer to make a gift, and if withdrawn before it is acted upon by the promisee in such manner as to raise a consideration, it cannot be enforced.

1 Whart. Contr. §§ 518, 528, p. 718; 1 Beach, Modern Law of Contracts, § 206; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Richelieu Hotel Co. v. International Military Encampment Co.* 140 Ill. 248; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601, 6 L. R. A. 807; *Grand Lodge I. O. of G. T. v. Farnham*, 70 Cal. 158; *Stuart v. Second Presby. Church*, 84 Pa. 388.

The bare acceptance of an offer to make a gift is not a sufficient consideration to bind the promisor to complete it.

Pearsall v. Great Northern R. Co. 161 U. S. 646, 666, 40 L. ed. 838, 845.

The promisor may withdraw at any time before the promisee has entered upon the performance of its contract or has made expenditures, or done something to its detriment in reliance upon the promised donation.

1 Beach, Modern Law of Contracts, § 206; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Grand Lodge I. O. of G. T. v. Farnham*, 70 Cal. 158; *Richelieu Hotel Co. v. International Military Encampment Co.* 140 Ill. 248; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601, 6 L. R. A. 807.

Neither the mutual promises of the several subscribers, nor the efforts of the intended donee to obtain the subscriptions, constitute a consideration to sustain the contract.

1 Parsons, Contr. § 454; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286, 16 Am. L. Reg. 550; *Berkeley Divinity School v. Jarvis*, 32 Conn. 412; *Presbyterian*

Church v. Cooper, 112 N. Y. 517, 8 L. R. A. 468.

There could be no recovery upon the note because the condition that there should be a total subscription of \$25,000 was not complied with.

Turner v. Baker, 80 Ark. 186; *Stuart v. Second Presby. Church*, 84 Pa. 388.

When a party claims to recover on the ground of having performed a condition precedent, the burden of proving such performance is on him; and the performance must be satisfactorily established.

1 Whart. Contr. §§ 554, 601.

Where subscriptions are made under an agreement that they are not to be binding unless a specified sum is subscribed, it is essential that there should be no conditions as to the liability of any of the subscribers not applicable to all.

Blodgett v. Morrill, 20 Vt. 509

Confidential subscriptions, made for the purpose of making up the required sum, are a fraud upon the other subscribers, and should not be treated as valid subscriptions.

New York Exchange Co. v. De Wolf, 81 N. Y. 273; 1 Whart. Contr. § 529; 1 Parsons, Contr. *454; 2 Thomp. Corp. § 1956.

All the negotiations were with the Methodist Church, and there is not a syllable of evidence that it was then contemplated that the subscribers should deal with a corporation. It cannot be said that the contract was made for the benefit of a person whose existence was not contemplated, and such a person cannot sue upon it.

See *Presbyterian Soc. v. Beach*, 74 N. Y. 77; *Richelieu Hotel Co. v. International Military Encampment Co.* 140 Ill. 248; *Machtas Hotel Co. v. Coyle*, 35 Me. 405; 2 Beach, Priv. Corp. § 512.

Messrs. J. N. Cypert, Green & Hicks, W. B. Smith, and J. W. House, for appellees:

The original undertaking was to locate the college "at" Searcy and not "in" Searcy. The insertion of the word "in" instead of "at" in the note, with the fraudulent purpose of ingrafting new conditions in the contract, the terms of which had already been defined and understood, was a fraud upon the subscribers and the church, and the note should be reformed so as to conform to the original undertaking.

2 Beach, Mod. Eq. Jur. 544; 2 Pom. Eq. Jur. 847, 870; *Truesdell v. Lehman*, 47 N. J. Eq. 218; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437, 1 L. R. A. 548; *Welles v. Yates*, 44 N. Y. 525; *Rider v. Powell*, 28 N. Y. 310; *Oliver v. Mutual Commercial Marine Ins. Co.* 2 Curt. C. C. 277; *Comer v. Himes*, 49 Ind. 490; *North & West Branch R. Co. v. Swanik*, 105 Pa. 555; *Bryce v. Lorillard F. Ins. Co.* 55 N. Y. 240, 14 Am. Rep. 249.

If the proposition was to locate the college "at" Searcy, then the law is clear and the plaintiffs are entitled to recover.

Purifoy v. Richmond & D. R. Co. 108 N. C. 100; *Faires v. Cockerell*, 88 Tex. 428, 28 L. R. A. 528; *Wichita v. Burleigh*, 36 Kan. 41; *First Nat. Bank v. Wilson*, 62 Ark. 143.

When the subscription was presented and accepted by the committee representing the three conferences, the contract was closed and 39 L. R. A.

he had no power to withdraw it; mutual obligations had been assumed.

1 Beach, Priv. Corp. § 65; *Cook, Stock & Stockholders*, § 84; *Ex parte Hodges*, 24 Ark. 201; *Philomath College v. Hartless*, 6 Or. 158, 25 Am. Rep. 511; *Bates County v. Winters*, 112 U. S. 327, 28 L. ed. 745; *Barnes v. Perine*, 12 N. Y. 25; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Thompson v. Mercer County Supers.* 40 Ill. 379; *Marie v. Garrison*, 88 N. Y. 26; *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 384; *North Missouri R. Co. v. Winkler*, 29 Mo. 820; *Warner v. Callender*, 20 Ohio St. 197; *Fort Worth & R. G. R. Co. v. Lindsey*, 11 Tex. Civ. App. 244; *Williams v. Rogan*, 59 Tex. 438; *Amherst Academy v. Coole*, 6 Pick. 433, 17 Am. Dec. 387; *Williams College v. Danforth*, 12 Pick. 541; *Armstrong v. Karshner*, 47 Ohio St. 276.

The subscription could not be withdrawn, because others had been induced to give large amounts by reason of Rogers's subscription.

1 Beach, Priv. Corp. § 109; 2 Beach, Corp. § 532; *Grand Lodge I. O. of G. T. v. Farnham*, 70 Cal. 158; *Amherst Academy v. Coole*, 6 Pick. 427, 17 Am. Dec. 387; *Philomath College v. Hartless*, 6 Or. 158, 25 Am. Rep. 510; *Long v. Battle Creek*, 39 Mich. 328, 33 Am. Rep. 384; *Thompson v. Mercer County Supers.* 40 Ill. 379; *Troy Conference Academy v. Nelson*, 24 Vt. 119; *Phipps v. Jones*, 20 Pa. 260, 59 Am. Dec. 708; *Stewart v. Hamilton College*, 2 Denio, 416; *La Fayette County Monument Corp. v. Ryland*, 80 Wis. 29; *Armstrong v. Buel*, 40 Neb. 803; *La Fayette County Monument Corp. v. Magoon*, 78 Wis. 627, 8 L. R. A. 761; *Maine Cent. Inst. v. Haskell*, 73 Me. 143; *Osborn v. Crosby*, 63 N. H. 583; *Watkins v. Eames*, 9 Cush. 589; *Second Precinct in Pembroke Church & Cong. v. Stetson*, 5 Pick. 509; *Troy Conference Academy v. Nelson*, 24 Vt. 192; *Lathrop v. Knapp*, 27 Wis. 214; *Petty v. Church of Christ*, 95 Ind. 279.

By accepting the subscription and agreeing to locate the college at Searcy, the church had promised something upon its part, it had assumed an obligation, it had suffered an inconvenience, it had done something to its detriment. The subscribers were the recipients of this obligation. It was not a mere offer upon the part of the subscribers to make a gift, they were getting something in return.

Bates County v. Winters, 112 U. S. 327, 23 L. ed. 745; *Barnes v. Perine*, 12 N. Y. 25; *Fort Worth & R. G. R. Co. v. Lindsey*, 11 Tex. Civ. App. 244; *Buchel v. Lott* (Tex. App.) 15 S. W. 418.

If Rogers was seeking to secure the location of the college upon a subscription that was not bona fide, he could not take advantage of the wrong.

Martin v. Creech, 58 Mo. App. 391; *Smith Soules* (Vt.) 10 Atl. 536; *Friedline v. Carthage College Trustees*, 23 Ill. App. 496; *Buchel v. Lott* (Tex. App.) 15 S. W. 413.

Even if a less sum than \$25,000 was subscribed and accepted by the church this would not release Rogers from liability. This only concerned the church, and not Rogers.

Smith v. Burton, 59 Vt. 420.

Greer authorized the subscription and signed the note for \$2,500 in order to hold the other

three, so this would make Greer responsible for \$2,500, in any event just as much so as either one of the other three. He could not be permitted to take advantage of his own wrong. If he could take no advantage, Skillern, Yarnell, and Rogers were not injured, their liability had not been increased nor diminished, hence they had no right to complain.

1 Beach, Priv. Corp. § 109; 2 Beach, Priv. Corp. § 548; Cook, Stock & Stockholders, pp. 187, 138; Thompson, Liability of Stockholders, §§ 122, 124; *Bavington v. Pittsburgh & S. R. Co.* 34 Pa. 362.

If Rogers got what he contracted for he has no right to complain.

Swartwout v. Michigan Air Line R. Co. 24 Mich. 403; *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 477, 58 Am. Dec. 181; *Smith v. Burton*, 59 Vt. 419.

The committee accepted the subscription and thereupon passed a resolution adopting Searcy as the location for the college. This was a written contract, carrying with it all the force of any written contract.

First M. E. Church v. Donnell, 95 Iowa, 494; *Allen v. Duffee*, 48 Mich. 1, 38 Am. Rep. 159; *Heard v. Morning Star Lodge, K. of H.* 56 Ark. 265; *Eastman v. Porter*, 14 Wis. 46.

Wood, J., delivered the opinion of the court:

This suit was to recover of one T. J. Rogers, \$2,500, the amount of a subscription to the Methodist Episcopal Church South, alleged to have been given for the purpose of locating, building, and maintaining a female college at the town of Searcy. The defense was that the promise was made on three conditions, *viz.*:

"(1) That three citizens of Searcy, other than himself, should subscribe \$2,500 each; (2) that an aggregate of not less than \$25,000 should be subscribed by the citizens of Searcy; and (3) that the college should be located within the then corporate limits of the town of Searcy,"—neither of which had been performed; also (4) that the offer to subscribe was withdrawn before it was accepted; and (5) that there could be no recovery upon the original subscription. We will consider these in the order they are presented by counsel.

First. Was the subscription upon condition that the college should be located "within the corporate limits of Searcy?" The chancellor found "that Thos. J. Rogers, in his lifetime, to wit, on or about the 27th day of February, 1888, subscribed the sum of \$2,500 for the purpose of inducing the location, building, and maintaining a college for the education of females 'at' the town of Searcy," etc. In the latter part of the year 1887 the Methodist Episcopal Church South, through its three annual conferences of the state, appointed a committee, "with unrestricted authority," "to consider the educational interests of the church in Arkansas, and to provide for the establishment of a female college, to be under the patronage of the said conferences." Several towns of the state were spoken of as suitable for the location of such a college, and were competitors for it. Among the number was Searcy. A few of its citizens invited Bishop Galloway, who was the presiding bishop of the conferences in Arkansas, to deliver an address at 89 L. R. A.

Searcy, which he did on Sunday, the 26th day of February, 1888. At the close of his address he gave an opportunity to the people there assembled to subscribe to a fund for the purpose above indicated. Eugene Cypert acted as secretary or recorder, putting down the names of the subscribers and the amounts subscribed. The bishop stated that he "thought a bonus of \$25,000 was necessary," and that, while he could not "speak authoritatively for the commission," he "felt sure that bonus would secure the college." Much testimony has been adduced pro and con upon the question of whether the bishop, in making the proposition, and Rogers in accepting it, for a subscription to the location of a college, used the words, "in Searcy" or, the words "at Searcy." As to what particular words were employed is purely a question of fact. The proof is ample to support the finding of the chancellor that "at Searcy" was used. But it is argued that Rogers subscribed upon condition that the college was to be located "in Searcy," meaning "within the corporate limits," and that such was the contract even if "at" instead of "in" was employed to express it. The preposition "at," "when used to denote local position, may mean 'in, on, near by,' etc., according to the context, denoting usually a place conceived of as a mere point; . . . so with names of towns, . . . as, at Stratford, at Lexington. . . . But if the city is of great size, 'in' is commonly used; as, in London. . . . Unless, again, the city is conceived of as a mere geographical point; as, our financial interests center 'at' New York." Century Dict., *At*. "With the names of cities and towns the use of 'at' or 'in' depends, not chiefly upon the size of the place, but upon the point of view. When we think merely of the local or geographical point, we use 'at'; when we think of inclusive space, we employ 'in,'—as, we arrived at Liverpool; there are a few rich men in this village." Standard Dict., *At*. "Primarily, this word 'at' expresses the relations of presence, nearness in place. . . . It is less definite than in or on; at the house may be in or near the house." Webster, Dict., *At*. To determine the true sense in which words are used, we must consider the subject-matter concerning which they are used, and the circumstances calling for their application to any given subject. *State v. Old Town Bridge Corp.* 85 Me. 17; *Harris v. State, Dolan*, 72 Miss. 964, 38 L. R. A. 85.

The Methodist Episcopal Church South had in view the establishment of a college at some eligible town or city in the state that would offer a sufficient consideration in money to be used in erecting a college building. The church had no funds for that purpose, and was dependent upon such donations as might be offered by citizens of the town or city seeking the location of the college. The question uppermost in the minds of the representatives of the church was to raise as a consideration for the college location the sum of \$25,000. The proposition of locating the college within or without the corporate limits of the town or city securing the location thereof was never thought of by those who spoke for the church until after the subscription list had been tendered and accepted. Bishop Galloway testified on this point: "I do not remember that he [Rogers] asked

me any question about the location inside or outside the corporate limits of Searcy. I do not think it was presented to me, or mentioned by me, when the subscriptions were taken." Many witnesses testify to the same effect, and there is no proof to the contrary. Mr. Rogers was a man of large possessions in realty in the town of Searcy and in the county of White. He was an enterprising citizen, "and manifested great interest in this project, as he usually did in all enterprises he undertook." He was present at a preliminary meeting of the citizens a few nights before the day he subscribed, announcing that he would give as much towards securing the college as anyone else, and urging with his accustomed zeal and energy other citizens to become subscribers, and to say what they would give. At a meeting of the subscribers and other citizens on the day following the Sunday meeting, Rogers was present. This meeting was for the double purpose of ratifying what had been done the day before, and to complete the subscription list for \$25,000, the amount required to secure the location. The secretary of this meeting was instructed to compose "a caption for the subscription list descriptive of the list and its purposes." That caption reads: "Following is a list of those who have subscribed for the purpose of securing the location of the Methodist State Female College at Searcy, the amounts by them respectively subscribed being set opposite their names." It was expressly mentioned and understood at this meeting, in the presence of Rogers, that the subscriptions made by those present on the Sunday preceding were ratified. The list was completed, and at another meeting at the church Monday night the list of subscribers containing the above caption was presented, in a speech by Prof. Rives, Sr., on behalf of the citizens, to the church committee, and was by it, then and there, on motion, duly accepted, and the college located at Searcy. Rogers was present at all the meetings, but at none of them did he even suggest or intimate that his subscription was grounded upon the condition, in express terms, that the college was to be located "within the corporate limits of Searcy." Some of the largest subscribers testify that, had he done so, they would not have subscribed. In the light of events which transpired soon after the college had been located at Searcy, we think it doubtless true that Rogers was prompted to his commendable liberality and herculean endeavors in securing the location of the college at Searcy by both the desire and expectation of having the college, when built, placed upon his ground, most of which was within the corporate limits. There was every reason for him to be inspired with such a hope, and to be urged by such a motive; for the tract of land which he owned at that time in Searcy was regarded, by many as well as Rogers, as by far the most suitable site to be had for the college location. Indeed, at that time it was almost the consensus of opinion that the Rogers tract was the most eligible, and the committee to select the grounds for the college building and campus agreed to select this tract, and would have done so, but for the fact that insuperable barriers, as they supposed, stood in the way of their securing title

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to another small tract (Shinpocho) adjoining, which was regarded by the committee as necessary for the college campus; and, of course, the necessary grounds for the campus, as well as for the building, had to be considered in selecting the situs for the college. Although Rogers doubtless had in his mind the final location of the college on his own ground, we think the fact that he and so many others considered his as the most suitable location, made him willing to take his chances on finally securing it on his ground after the location should be determined upon for Searcy. The paramount consideration with him first was the location of the college at Searcy, without which he could not expect to have the college building located on his land. Another cogent fact showing this is that the tract which he himself preferred was not all within the corporate limits, and the only other tract which anyone considered at all suitable was not all within the corporate limits. We find nothing in the record to justify the conclusion that the parties to the contract used the word "at" in any other sense than usually indicated by the term, denoting a place conceived of as a mere geographical point, just as we would say, speaking of the location of a village, or some institution: "Hendrix College is located at Conway, the University at Fayetteville. We are going to locate a college at Searcy," etc. It is true that "at" is often used to denote inclusive space, and such is the case when it is used, as it frequently is, to lay the venue in criminal cases, it being necessary in those cases to show that the crime was perpetrated within the jurisdiction of the court. *Graham v. State*, 1 Ark. 171; *Blackwell v. State*, 30 Tex. App. 416; *Augustine v. State*, 20 Tex. 450; *State v. Nolan*, 8 Rob. (La.) 517; *Bishop, Forms*, § 80; 1 *Bishop, Crim. Proc.* § 378. See also other cases cited in brief of appellant in which "at" was used in the sense of "in," denoting acts to be performed within definite limits. But should we concede that "at" was used by the parties in the sense of "in,"—which is the most that can be claimed for it under the proof,—still it does not follow that it means "within the corporate limits." In *First Nat. Bank v. Wilson*, 62 Ark. 143, Judge Riddick said, "There may be towns that have overgrown their corporate limits." Generally, in speaking of a town as a mere place of geographical location, we have no reference whatever to the corporate limits, but simply use the name of the town as designating the aggregate body of people living in such considerable collection of dwelling houses, and in such proximity as to constitute a town, as distinguished from the country. *Standard Dict., Town*. For instance, if the bishop did say, "We propose to locate a college 'in' Searcy," no one would have been justified in concluding from that language alone that he meant "within the corporate limits of Searcy," as contradistinguished from that part of the town lying beyond the corporate limits. And it is shown that a large number of the inhabitants of the town dwelt beyond the corporate limits. Such a proposition, however, coming from the committee of the church, would bind it to locate the college in the town of Searcy, and not in the country adjacent thereto. In this view of the

case, whether or not the college was located in the town or country is a question of fact upon which the finding of the trial court will not be disturbed.

Second. It is contended "that there can be no recovery, because Rogers withdrew his offer to subscribe." As soon as Rogers ascertained that the committee who had been appointed to fix upon the situs for the college would go beyond the corporate limits to look at locations, he notified members of that committee that they had no power to look at locations beyond the corporate limits, and he told Mr. Pipkin, who was a member of the committee of the conferences, that he would not "pay a cent" if the college was located out of town. He notified the building committee to the same effect. It may be said properly that these were the agencies left in charge by the church committee to carry on the work, in the absence of said committee, until the college should be duly organized and incorporated. So the notice that he did not intend to be bound by his subscription was sufficient. But this notice was not given until after the Monday night meeting, when the subscription list was presented to the representatives of the church, and accepted by them, and the location of the college given to Searcy. The contract between Mr. Rogers and the church, as stated, was closed that night. The terms of the contract were that the church, for a valuable consideration moving from the citizens of Searcy, would locate, build, and maintain a college there, and that the subscribers, in consideration of the performance of these stipulations by the church, would pay to it certain amounts. The rule, as announced by the best text-writers and the best adjudications, is that a gratuitous subscription will be considered as only a continuing offer to make a gift, and, until accepted by the promisee, and acted upon in such manner as to raise a consideration, it may be withdrawn. 1 Whart. Contr. 528; Clark, Contr. 167; 1 Parsons, Contr. 451; Anson, Contr. 73, note; 1 Beach, Modern Law of Contracts, § 206; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Richelieu Hotel Co. v. International Military Encampment Co.* 140 Ill. 248; *Grand Lodge, I. O. of G. T. v. Farnham*, 70 Cal. 158; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601, 6 L. R. A. 807. See also note of Judge Bennett to *Cottage Street M. E. Church v. Kendall*, 16 Am. L. Reg. N. S. 546, where cases on *Subscription* are reviewed. "Any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by or charge imposed upon him to whom it is made, is a sufficient consideration to sustain a promise." *Ex parte Hodges*, 24 Ark. 201; *Troy Conference Academy v. Nelson*, 24 Vt. 189; *Amherst Academy v. Couls*, 6 Pick. 427, 17 Am. Dec. 387; *Barnes v. Perine*, 12 N. Y. 18, 25; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286. As soon as the subscription was accepted the church entered upon the performance of her part of the contract by locating the college at Searcy. This, too, was the most important part of the contract for the church as well as the subscribers, for it deprived the church of entertaining propositions of donations from other places in the state, however liberal and inviting they may have

been, and by the act of locating the college the subscribers got all they were then asking. Furthermore, the church immediately constituted agencies, and put them to work to carry out, in good faith, her part of the contract, which these agencies were doing when Rogers concluded that he would not be bound by his subscription. Moreover, this subscription was not an offering to charity, and it was something more than a mere subscription to a public purpose. The presentation of the subscription list, under the circumstances, carried with it the request that the church locate the college at Searcy, and thus deny it to all other places. The granting of this request meant the expenditure of thousands of dollars by the church, and the bestowment upon the subscribers of a real benefit. *Philomath College v. Hartless*, 6 Or. 158, 25 Am. Rep. 511. In *Williams v. Rogan*, 59 Tex. 488, the court said: "This is not the ordinary case of a subscription to some charitable or public purpose in which there are no contracting parties except the subscribers; but the subscribers are the parties upon the one side, and the district conference the party upon the other. Upon the acceptance of the proposition of the conference, the subscribers became bound, as did the conference upon its acceptance of the subscription and agreement, to build in accordance with the terms of the subscription. There was, then, a mutuality of engagement, so that each party had the right to hold the other to a binding agreement, and it became so previous to or even without performance." There is ample warrant in the law, under the facts of this case, for holding Rogers to his subscription without going to the extent of the Texas court, though there is a strong line of cases supporting this doctrine. *Collier v. Baptist Education Soc.* 8 B. Mon. 68; *Troy Conference Academy v. Nelson*, 24 Vt. 194; *Ladies' Collegiate Inst. v. French*, 16 Gray, 196 (cases cited); *Fryeburg Parsonage Fund v. Ripley*, 6 Me. 442; Anson, Contr. p. 94, note, *Subscriptions*.

Third. Was the subscription of Rogers upon condition that there should be a full subscription of \$25,000, and, if so, was the condition fulfilled? Bishop Galloway, speaking presumably for the church committee, required a bonus or subscription of \$25,000 as a condition precedent to the location of the college at Searcy. The church, under this proposition, was not bound to locate the college until said amount was subscribed, and upon the authority of *Turner v. Baker*, 30 Ark. 186, neither were the subscribers (unless for other reasons), for the stipulations of the contract, when entered upon, had to be mutually binding upon the respective parties to constitute a valid consideration. Was the \$25,000 subscribed? A subscription list showing that said amount had been subscribed was presented to the committee. True, it contained the names of Wilburn and Greer, who it is said, were not bona fide subscribers of the amounts named for each, and that, even reckoning these, the list lacked \$364 of the necessary amount. Greer's subscription was authorized by him; Wilburn's was not. However, the list shows the names of six gentlemen "who gave a written guaranty of balance, \$364." When it was ascertained that Wilburn's subscription for \$1,-

000 was not authorized by him, the six gentlemen who had guaranteed the balance held themselves bound under the terms of their agreement to make this good, and did so. They were the parties to the agreement "to make up the balance," and must have understood what that meant better than anyone else. In the absence of any showing to the contrary, we think their construction of what they were required to do "to make up the balance" (although \$364 was expressly named) should be taken as the true state of the case. Therefore a finding that \$25,000 was subscribed would not be clearly against the preponderance of the evidence. But, should we be mistaken in this, still the contention could not avail Rogers, for so long as the doctrine of estoppel *in pais* retains its potency in a court of conscience one will not be heard to deny the existence of a certain state of facts which he, either in express terms or by conduct, represented as existing, and which he intended to be acted upon by another in a certain way, and which was so acted upon in good faith by the other, to his detriment. *Carr v. London & N. W. R. Co.* L. R. 10 C. P. 307; *Seton v. Lafone*, L. R. 19 Q. B. Div. 68, 70; *Troy Conference Academy v. Nelson*, 24 Vt 194; 2 Herman, Estoppel & Res Judicata, §§ 759, 762, 764. "The getting up of the subscription was the business of the citizens." The business of the church committee was to locate the college. In the work of "getting up" and perfecting the subscription list, Rogers took a prominent part. He knew, or should have known (being present), how the alleged subscriptions of Wilburn and Greer were taken; that the former was by the daughters of Wilburn, and the latter through Mr. Pipkin. At the Monday afternoon meeting he made no objection to, and no inquiry concerning, the two subscriptions now called in question. But, on the contrary, so well satisfied was he that the list met the requirements of the committee as to the \$25,000, and that it would be accepted, that he joined in a request to the bishop to appoint a committee on the location of the college site, and himself proposed how that committee should be constituted. The church committee, some of whom were present at all the church meetings, could not have failed to observe that Rogers was a leading spirit in the enterprise. When Prof. Rives, representing Rogers and all the subscribers, presented the list as a subscription list for \$25,000, the church committee had the right to rely upon this representation. There was nothing to give notice that the subscribers present were not acting in the utmost good faith. Rogers was a resident, knew the subscribers, and knew what the committee demanded. The committee "took the subscribers at their word," so to speak, accepted the list as a subscription for \$25,000, and located the college at Searcy, expending thousands of dollars more than the subscription of \$25,000 in its erection and equipment. But that Rogers got what he asked would be enough, under the circumstances, to sweep him from any standing in a court of equity on this contention.

Fourth. Is the subscription of Rogers "void because the condition that four persons should subscribe \$2,500 each was not complied with?"

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It is claimed that G. B. Greer was not a bona fide subscriber for \$2,500. Rogers proposed to be one of four to subscribe \$2,500 each. This was not a condition imposed by the church, but Rogers had the right to, and did, make it a condition for binding him. Greer authorized Pipkin to enter his name upon the subscription list for \$2,500. This was done the 26th day of February, 1888. Pipkin says that he told Greer "that the whole matter was hinging on his [Greer's] decision; that, if he would pay the \$2,500, the institution would be located at Searcy, and that Greer said 'he would not let it fail; to go and put him down for \$2,500.'" Pipkin further says: "I told him, as a gentleman, that if he would pay the \$2,500, and save the institution, that I would do what I could to help him. Nothing was said upon any note or release in any respect from the \$2,500," and at that time no amount was mentioned. This is uncontradicted. About one month after this (March 26) Greer executed his note to cover the subscription, and he says "that he did it upon condition that he was to be one of four to make up \$10,000, with the understanding that \$1,500 was to be collected and paid by Mr. Pipkin and Mr. Jeffett as a credit on his note. They were to canvass the state and get it. He says he was willing to subscribe only \$1,000, and that the note was executed for \$2,500 in order to bind the other three who had subscribed \$2,500 each; that Pipkin signed the note as chairman of the board, and that Yarnell and himself, who were on the board, signed it. Yarnell was away, and he [Greer] signed his [Yarnell's] name, having authority to do so." The paper spoken of by Greer as the "note" is as follows:

Received of G. B. Greer fifteen hundred dollars, to be applied to his subscription to the Galloway Female College for twenty-five hundred dollars when collected

[Signed] E. M. Pipkin,
President of Board.
A. W. Yarnell,
G. B. Greer, of Board.

Pipkin says that he never thought of this being considered a release of Greer on his subscription for \$2,500; that it was not so intended. Yarnell denied that Greer had any authority to sign his name. It is sufficient to say of this so-called release that the proof does not justify the conclusion that it was designed as a release *pro tanto* of Greer's subscription. But, if it were so intended, it could not have that effect. Pipkin neither as "president of the board" nor as a private individual had authority to release any of the subscribers from their subscriptions. The authority which the building committee had in the premises, or Pipkin acting for it and the church, was not to release, but to collect, what had been subscribed. Greer's name was, by his authority, put upon the subscription list. Any private understanding he might have had with Pipkin that he (Greer) was not to pay but \$1,000, even if such were the fact, could not operate to defeat his subscription, or that of any other subscriber. This so-called release was not taken until a month after Greer's contract with the

church had been closed. Pipkin was not representing the church committee when he was soliciting Greer's subscription, nor when Greer instructed him to put his name on the list. Pipkin's commendable energy and enthusiasm may have led him to make promises on his own behalf which he could not carry out. But, if so, for this the church was in no wise responsible. Moreover, Greer's subscription for \$2 500 has been fully paid, which speaks for itself as to whether or not Greer considered himself bound by it. Where a specific sum is to be raised, and confidential subscriptions are taken from some, not intended to be collected, in order to induce others to subscribe, such fictitious or honorary subscriptions would be a fraud upon the other subscribers, and the latter would not be liable unless, after deducting the bogus subscriptions, the required sum had been raised. 1 Whart. Contr. 529; 1 Parsons, Contr. 454; *Blodgett v. Morrill*, 20 Vt. 509; *New York Exchange Co. v. De Wolf*, 31 N. Y. 273. But the conduct of the church committee was free from fraud and dissimulation throughout the whole transaction.

Again, since this condition was imposed by Rogers, who knew that Greer's subscription was put down by Pipkin, and that it was the last of the four for \$2,500, and since Rogers made no inquiries about it, and was a party to the presentation of the list in that form to the church committee, thereby representing that same met the requirements of said committee for the location of the college; and since the offering of that list, under the circumstances, could be construed as nothing less than a request from the subscribers for the location of the college, as the committee granted this request, which could not now be undone without irreparable loss to the church and college, the subscribers must not be heard to complain. The church is not complaining of Greer's subscription, Greer is not complaining, and Rogers' complaint on this score is unavailing.

Fifth. The last contention, "that there can be no recovery upon the original subscription," is not well taken.

1. Even if the original contract had merged in the note as is insisted, still the note would be binding for reasons already shown. But without an original contract of subscription there could be no recovery at all, and this, as stated *supra*, was entered into between the church and Rogers Monday night, February 27, 1888. Although an offer to subscribe was made by Rogers the day before, it did not become binding until the conditions imposed were fully met by the parties, and the contract closed. Nothing was done, or could have been done, after that, without the assent of both Rogers and the church, to alter the terms of the contract. The agencies representing the church committee had no authority to vary the terms of the contract. They were constituted for the express purpose of enforcing it as made. If, as appellant argues, the oral or original contract merged in the note, and no parol evidence is admissible to vary its terms, what becomes of the conditions that \$25,000 was to be subscribed, and that four persons were to subscribe \$2,500 each, etc.? The note is as follows: "On consideration of the location, erection, and operation by the Methodist

Episcopal Church for the state of Arkansas of the state female college of said church in Searcy Ark., I hereby agree to pay on demand to the building committee to be appointed by said church the sum of \$2,500. The only conditions prescribed by this instrument are the 'location, erection, and operation by the Methodist Episcopal Church of the state female college of said church in Searcy, Arkansas.'" That the college has been located, erected, and operated is conceded, and Rogers only complains that it was not located "within the corporate limits of Searcy," and that the other conditions, *supra*, were not complied with. But none of these being mentioned in the note, if it alone is to be considered as the contract and the basis of the suit, then Rogers' "last estate is worse than his first," for he could only defeat payment of the note by showing that the conditions therein contained had not been complied with. Under this view, necessarily, various other contentions would pass out. The pleadings and proof show that suit was grounded upon the original contract of subscription entered upon at the time mentioned above.

2. The solemn admission of appellant "that the Galloway Female College, as now incorporated, is the institution which was established pursuant to the subscriptions and propositions of Bishop Galloway February 26 and 27, 1888," answers his contention as to the want of proper parties. The college is the beneficiary of that subscription. It stands *in loco ecclesie* as to the right to sue upon it. *Chamblee v. McKenzie*, 31 Ark. 155; *Talbot v. Wilkins*, 31 Ark. 411; *Hecht v. Caughron*, 4th Ark. 132; *Benjamin v. Birmingham*, 50 Ark. 433; *Sandels & H. Dig. § 5623*. See also *Johnston v. Ewing Female University*, 35 Ill. 518; *Snell v. Methodist Episcopal Church Soc.* 58 Ill. 290.

3. The reasons designated "A," "B," "C," "D," have been already considered except "C," and that was not raised below, and seems unimportant. Upon a careful consideration of this large record, assisted, as we have been, by learned and exhaustive briefs of counsel, we conclude that there is no equity in the answer to the complaint. The church has faithfully performed her part of the contract. She has planted at the town of Searcy an excellent institution of learning, valued at \$60,000, which has been creditably maintained and sustained by the great body of Methodists in the state. Mr. Rogers "forged to the fore" in the movement which secured this college for his town, his conduct doubtless causing many of his fellow citizens to subscribe so liberally towards the enterprise. They, like him, have shared the benefits, but unlike him, they have also borne the burdens. It would have been a praiseworthy expenditure of capital and energy on the part of Mr. Rogers, even though bottomed on the conditions disclosed in his answer. But, unfortunately for him, as to whether or not these conditions existed, and had been complied with, are mainly questions of fact upon which the ruling of the learned chancellor was adverse to him, and the record shows full warrant for his finding. Nor have we discovered any misapprehension of the law applicable to such cases.

The decree is therefore in all things affirmed.

Battle, J., dissenting:

As to the facts in this case, my conclusion is as follows: A proposition was made to the people of Searcy to locate a female college of the Methodist Church of the state of Arkansas at Searcy, if any number of them would subscribe, in the aggregate, the sum of \$25,000 for that purpose. On that condition, and the further condition that three other citizens of Searcy would each subscribe a like amount, and thereby make the total amount of the subscriptions of himself and the three others \$10,000, Thomas J. Rogers subscribed the sum of \$2,500. He thereafter executed the memorandum sued on, by which he agreed to pay this amount, on demand, to the building committee to be appointed by the Methodist Church. Many other citizens of Searcy subscribed liberally for the same purpose, and several nonresidents subscribed, whose subscriptions were added to their list, but, in order to make the subscriptions of all of them (including the nonresidents added to the list) amount to \$25,000, or the subscriptions of any four of them amount to \$10,000, the amount

said to have been subscribed by G. B. Greer, was necessary. He ostensibly subscribed and gave his note for \$2,500 but with the secret understanding and agreement that he would contribute only \$1,000, it being understood that \$1,500 should be collected by subscription from other sources, and credited on his note and subscription. He, however, afterwards agreed to and did pay about \$2,500 without the benefit of the credit he was to receive. Before he decided to do so, Rogers declined to pay his subscription unless the college was located within the corporate limits of Searcy, and gave sufficient notice in due time that he would not do so except on the condition named, which was never performed.

According to the facts before stated, Rogers is not bound to pay his subscription. *Turner v. Baker*, 80 Ark. 186; *Stuart v. Second Presby. Church*, 84 Pa. 888; 1 Beach, *Modern Law of Contracts*, § 40; 1 Whart. *Contr.* § 529; 1 Parsons, *Contr.* 8th ed. *454.

I think the decree of the chancery court should be reversed, and the complaint dismissed.

CONNECTICUT SUPREME COURT OF ERRORS.

Frederick J. GUSTAFSON and Wife

v.

Charles P. RUSTEMEYER, *Appt.*

(70 Conn. 125.)

1. **The mere naked assertion of the value of property** by a vendor to the purchaser during negotiations for a sale, though consciously untrue and relied upon by the purchaser to his hurt, does not, in the absence of special circumstances, constitute an actionable deceit.
2. **A purchaser seeking to avoid the general rule** that mere representations of value do not constitute actionable deceit must allege the specific facts which bring him within one of the exceptions to the rule.
3. **The objection that the facts found show that plaintiffs have no cause of action** cannot be raised on appeal under Gen. Stat. § 1185, where the appellant did not make any claim of that kind in the court below, and does not make it in his assignments of error, but merely presents it in his brief.
4. **The trial court cannot be convicted of error on appeal** in excluding evidence which was not admissible for the purpose for which it was offered, because it was admissible for purposes first suggested in the appellate court.
5. **A purchaser who was induced to make the contract** by the false and fraudulent representations of the vendor may, acting seasonably, rescind the contract after giving or tendering back what he has received, and recover back the consideration, or he may retain the land and recover damages for the deceit, in a proper action.

NOTE.—For expression of opinion as a fraud, see note to *Hedin v. Minneapolis Medical & Surgical Inst.* (Minn.) 35 L. R. A. 417.

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6. **The measure of damages for the fraudulent misrepresentation of a vendor** of real property inducing the purchaser to enter into the contract is the difference between the value of the property as it would have been if as represented and its real value, and not necessarily the difference between the purchase price and its real value.

7. **Parol evidence is admissible to show fraudulent misrepresentations** by the vendor as to the quantity of the land sold, though not in any manner incorporated in the deed consummating the contract.

8. **The failure of the court upon a trial without a jury to definitely adopt one of the two measures of damages** contended for by the respective parties is not reversible error where the application of either rule leads to substantially the same result.

(Hamersley, J., dissents.)

(January 5, 1898.)

APPEAL by defendant from a judgment of the Superior Court for Hartford County in favor of plaintiffs in an action brought to recover damages for fraud in the sale of real estate. *Affirmed.*

Plaintiffs exchanged a house on Julius street in Hartford for a farm belonging to defendant in Suffield and some lumber. The farm was in three pieces and defendant stated that it contained 186 acres, more or less, when in fact it contained only 96½ acres, he also claimed to include in the trade 10,000 feet of lumber when he owned only 1,000 feet. Prior to the trade plaintiff went upon the land which was in irregular pieces, and defendant pointed out certain monuments as being on the land when in fact they were not so. The calls in the deed

were correct. For the injury caused by these false assertions plaintiffs brought this action. Defendant pleaded a general denial, and as a counterclaim set up that plaintiffs represented that the Julius street house was worth \$3,000 over and above encumbrances, when in fact it was worth only \$1,750.

Further facts sufficiently appear in the opinion.

Mr. William F. Henney, for appellant:

Misrepresentations of the dimensions of the farm in question by defendant to plaintiff, even though intentional, cannot lay a foundation for an action upon the facts found by the court.

Wamsley v. Currence, 25 W. Va. 548; *Crown v. Carriger*, 66 Ala. 590; *Chrysler v. Canaday*, 90 N. Y. 277, 43 Am. Rep. 166; *Simar v. Canaday*, 53 N. Y. 306, 13 Am. Rep. 523.

All statements by a vendor as to the value of property sold are not mere matter of opinion. If he, knowing them to be untrue, makes them with the intention of misleading the vendee, and if the latter, relying upon them, is misled to his injury, he may avoid the contract or recover damages for the injury.

Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523.

The court erred in excluding the testimony offered to show the comparative value of the Sufferd farm and the Julius street property. The true rule of damages is not the difference in value between what plaintiff got and what he bargained for, but the difference between the value of what he gave and what he received in the trade.

Smith v. Bolles, 132 U. S. 129, 33 L. ed. 281; *Atrater v. Whiteman*, 41 Fed. Rep. 428; *Gaspell v. Northern P. R. Co.* 43 Fed. Rep. 900.

Mr. Joseph L. Barbour, for appellees:

Defendant's claim is based wholly on allegations that the plaintiffs falsely, fraudulently, and knowingly misrepresented the value of certain real estate, and thereby, in effect, induced the defendant to purchase the same. There is no allegation that plaintiffs misrepresented or concealed the amount of encumbrance; the alleged misrepresentation was simply as to the value above encumbrances.

Misrepresentations must be of a fact, not expressions of opinion. Statements as to value are usually expressions of opinion not to be relied on.

Homer v. Perkins, 124 Mass. 431; *Gordon v. Butler*, 105 U. S. 553, 26 L. ed. 1166; *Ellis v. Andrews*, 56 N. Y. 83; *Schramm v. O'Connor*, 98 Ill. 539; *Anderson v. McPike*, 86 Mo. 293; *Dawson v. Graham*, 48 Iowa, 378; *Shade v. Creriston*, 93 Ind. 591; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166; *Williams v. McFadden*, 23 Fla. 143; *Lockwood v. Fitts*, 90 Ala. 150; *Welling v. Schiller*, 27 Ill. App. 284; Gen. Dig. 1890, p. 988, § 39.

In regard to affirmations regarding the value of real estate, the maxim *Caveat emptor* has been held to apply.

Medbury v. Watson, 6 Met. 259, 39 Am. Dec. 726; *Morse v. Shaw*, 124 Mass. 59; *Safford v. Grout*, 120 Mass. 20; *Litchfield v. Hutchinson*, 117 Mass. 195; *Vnn Epps v. Harrison*, 5 Hill, 63, 40 Am. Dec. 314; *Hurrey v. Young*, Yelv. 21; *Ekins v. Tresham*, 1 Lev. 102.

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Fraud will not be inferred by law from facts stated unless they show it conclusively.

Thomas v. Mullain, 44 Conn. 146; *Gates v. Steele*, 58 Conn. 316.

The question excluded was as to how the farm which the defendant conveyed to the plaintiffs compared in value with the house which the plaintiffs conveyed to the defendant, and counsel for the defendant claimed its admission to show that the plaintiffs had sustained no damage because they received something of equal value.

That is not the rule of the supreme court of Connecticut.

Murray v. Jennings, 42 Conn. 9, 19 Am. Rep. 527; *Brush v. Keeler*, 34 Conn. 500; *Scranton v. Mechanics' Trading Co.* 37 Conn. 130; *Krumm v. Beach*, 96 N. Y. 398; *Stiles v. White*, 11 Met. 356, 45 Am. Dec. 214; *Morse v. Hutchins*, 102 Mass. 439; 8 Sutherland, Damages, § 1171.

A deed is not such a written instrument as will compel the exclusion of parol testimony as to its consideration or antecedent representations concerning it.

Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; *Meeker v. Meeker*, 16 Conn. 387; *Baldwin v. Carter*, 17 Conn. 205, 42 Am. Dec. 735; *Clarke v. Tappin*, 32 Conn. 69.

Parol evidence is admissible to contradict, vary, or avoid a written instrument where it clearly shows that but for the oral stipulations it would not have been executed.

Wanner v. Londis, 137 Pa. 61; *Pierce v. Woodward*, 6 Pick. 206; *Willis v. Hulbert*, 117 Mass. 151.

There is no contract, sealed or unsealed, that is sufficient of itself, unaided by other circumstances, to cover and protect fraud.

Collins v. Tillou, 26 Conn. 368, 68 Am. Dec. 398; *Dale v. Gear*, 88 Conn. 15, 9 Am. Rep. 353; *Feltz v. Walker*, 49 Conn. 98; *Busick v. Van Ness*, 44 N. J. Eq. 82; *Deakins v. Alley*, 9 Lea. 494.

Parol evidence is admissible to prove fraudulent representations inducing a written contract for the sale or exchange of land.

Wilson v. Huecker, 85 Ill. 349; *Morris v. Shakespeare*, 20 W. N. C. 564.

This court has said that it would not grant a new trial where it appeared that the appellant had suffered substantially no injury from even an erroneous decision.

Wooster v. Glover, 37 Conn. 316; *Brush v. Keeler*, 34 Conn. 499; *Kelsey v. Hanmer*, 18 Conn. 320.

This is a case in which punitive damages can be allowed, including the expenses of trial.

Ires v. Carter, 24 Conn. 392; *Platt v. Brown*, 30 Conn. 337; *Bennett v. Gibbons*, 55 Conn. 450; 3 Sutherland, Damages, § 1178.

Torrance, J., delivered the opinion of the court:

The first question to be considered is whether the court erred in sustaining the demurrer to the counterclaim. The false representation therein set out and relied upon relates simply to the worth of the Julius street property over and above the encumbrances. It is a mere naked representation of the value of an equity of redemption, and nothing more.

The general rule is that a mere naked assertion of the value without more, made between vendor and vendee during the negotiations for a sale, though untrue, and known to be so by the one who makes it, and relied on by the other, to his hurt, does not constitute an actionable deceit; and this for the reason that such an assertion, in most cases, is, and is understood to be, the statement of an opinion, and not of a fact, and the party to whom it is made has no right to rely upon it, and, if he does so, his loss, if any occurs, is held to be the result of his own folly. 1 Bigelow, Fr. 490; *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 815; *Morse v. Shaw*, 124 Mass. 59; *Homer v. Perkins*, 124 Mass. 431, 27 Am. Rep. 677; *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 879; *Chrysler v. Canaday*, 90 N. Y. 272; *Shanks v. Whitney*, 66 Vt. 405. See also cases cited in note to *Coltrill v. Krum*, in 18 Am. St. Rep. 556, 100 Mo. 397.

There are, undoubtedly, exceptions to this general rule, arising out of the special circumstances under which the representation as to mere value is made,—as, for instance, where the one who makes the representation holds a position of trust or confidence towards the other, which gives the latter a right to rely on the representation, or where the seller has, or assumes to have, special knowledge of the value of the property, and the buyer has no knowledge thereof, and the latter, to the seller's knowledge, trusts entirely to the seller's representation. In such cases the seller may justly be held liable for his false representations, because by them the buyer is fraudulently induced to forbear inquiry as to their truth. A mere false representation as to the value of real estate, knowingly made by the seller to the buyer, is not actionable, unless the buyer has been fraudulently induced to forbear inquiry as to its truth; and in that case the means by which he was thus induced to forbear inquiry must be specifically set forth in the pleading. "To such representations the maxim *Caveat emptor* applies. The buyer is not excused from an examination unless he be fraudulently induced to forbear inquiries which he would otherwise have made. If fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration, and cannot be charged in general terms only." *Parker v. Moulton*, 114 Mass. 99, 100, 19 Am. Rep. 815; *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 879; *Chrysler v. Canaday*, 90 N. Y. 272.

Upon the counterclaim, as it stands, the defendant's case falls within the general rule and not within any of the recognized exceptions. If he desired to bring it within any of these exceptions, he should have alleged the specific facts which would bring it within one of them; but this he did not do, and for this reason the demurrer was properly sustained.

In his brief the defendant claims, in substance, that the general principles here applied to the statement of facts in the counterclaim, if applied to the facts found, show that the plaintiffs have no cause of action. He says, "Misrepresentations of the dimensions of the farm in question by the defendant to the plaintiff, even though intentional, cannot lay a

foundation for an action, upon the facts found by the court." If the defendant were at liberty to make this claim here, it might be shown in reply that the facts set up in the counterclaim and the facts found differ very materially, and that this difference may be just the difference between a false representation that is actionable and one that is not; but the defendant, under the statute (Gen. Stat. § 1135), is not at liberty to make this claim here, because he did not make any claim of this kind in the court below, nor has he made it in his assignments of error. Under the circumstances of this case, we decline to consider this claim.

The defendant claims that the court excluded the evidence of the value of the Julius street property as compared with the value of the farm, and that it erred in so doing. Although there is some doubt as to whether the court did absolutely and finally rule this evidence out, we will consider the case as if it had so ruled. The defendant claimed that the measure of damages was the difference between the value of the farm and the value of the property given in exchange for it, while the plaintiffs claimed that it was the difference between the value of the property which the defendant owned and conveyed and its value if it had been as represented. From the record, it is clear that this evidence was offered solely as bearing upon the question of damages, and on the assumption that the rule as to the measure of damages was as claimed by the defendant. In his brief the defendant now claims that the evidence was admissible for another purpose, namely, as "tending to show the improbability of his having made the representations complained of." The evidence was undoubtedly admissible for this purpose, and for other purposes, as, for instance, as evidence—but not conclusive—to show, from the price paid, the value of the farm conveyed to the plaintiffs. Bigelow, Fr. pp. 627, 628; 3 Sutherland, Damages, p. 592. But the trouble with this claim is that it was not made in the court below, and cannot be considered now. The question, then, whether the court erred in excluding this evidence, depends on the further question, What is the proper measure of damages in cases of this kind? A vendee, induced to purchase land by false and fraudulent representations, may, acting seasonably, rescind the contract, and, after giving or offering to give back what he received, may recover back the consideration, or he may retain the land, and recover damages for the deceit in a proper action. *Ives v. Carter*, 24 Conn. 392, 403; *Krumm v. Beach*, 96 N. Y. 398; *Vail v. Reynolds*, 118 N. Y. 297; *Fryor v. Foster*, 130 N. Y. 171. The present case is one where the plaintiffs have elected to keep the land, and seek to recover for the deceit in an action of tort; and the question is, What is the measure of damages in this action? Upon this question the decisions of the courts of last resort are not in harmony. In one class of cases the measure of damages is held to be the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be, while in the other class of cases it is held to be the difference between the real value of

the property retained by the plaintiff, as it was at the time of the purchase, and the value of that which he gave for it. In the former class of cases the plaintiff is allowed the benefit of his bargain; in the latter, he is not. *Morse v. Hutchins*, 102 Mass. 489, is an example of the first class of cases, while *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 281, is an example of the other class. In *Morse v. Hutchins* the court says: "It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase, and its value if the property had been what it was represented or warranted to be."

This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow to the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer, and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract." In *Smith v. Bolles*, on the other hand, it was said: "The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations."

The defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out, and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation." Both of these cases relate to sales of personal property, but no distinction is made, in the application of these rules, between sales of personal and sales of real property. Bigelow, Fr. p. 627; Sedgw. Damages, 2d ed. p. 559; 3 Sutherland, Damages, § 1171. And no good reason has yet been given why there should be any such distinction. Both courts, in the cases above mentioned, recognize the existence of the general rule that the defendant is only liable for such damages as are the natural and proximate result of his fraud, but they differ in applying it. In *Morse v. Hutchins* the loss of the benefits of his bargain is regarded as one of the elements of plaintiff's damages, resulting naturally and proximately from the fraud, while in *Smith v. Bolles* such loss is not so regarded. The general rule in 89 L. R. A.

regard to the measure of damages in actions of deception has been stated, and we think correctly, as follows: "The defendant is liable, not for everything that follows upon his fraud, but for what may be presumed to have been within his contemplation at the time, as a man of average intelligence." Bigelow, Fr. p. 625. Applying the general rule (as thus stated to a case like the present, we think the loss of the benefits of the bargain is one of the elements of damages which the defendant must be held to have contemplated as the natural and proximate result of his conduct, and for which he is therefore answerable. In Bigelow, Fr. p. 627, the rule is stated as follows: "It is now well settled that, in actions for deceit or breach of warranty in sales of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be," citing numerous cases. This is the rule, also, as stated and favored in 3 Sutherland, Damages, pp. 589, 592. It is the rule adopted and followed in numerous cases relating to the sale of personal property, and it is the rule adopted and followed in the following cases relating to the sale of real estate: *Krumm v. Beach*, 96 N. Y. 398; *Vail v. Reynolds*, 118 N. Y. 297, in New York; *Drew v. Beall*, 62 Ill. 164, 168; *Nysewander v. Loeman*, 124 Ind. 584; *Puge v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Shanks v. Whitney*, 66 Vt. 405; *Williams v. McFadden*, 23 Fla. 143. Moreover, it is the rule adopted and followed by this court in *Murray v. Jennings*, 42 Conn. 9, 19 Am. Rep. 527. In that case it does not appear to have been much discussed, but its application was directly in question,—was, indeed, the only question in the case,—and it was specifically and deliberately adopted and followed. We see no good reason why it should not be considered as the settled rule in this state. The evidence of the value of the Julius street property, then, having been offered solely for the purpose of showing the amount of the plaintiffs' damages, under the rule laid down in *Smith v. Bolles*, was inadmissible, and the court committed no error in excluding it for that purpose.

The defendant further claims that the court erred in holding that all his representations as to the number of acres in the farm "were not embraced in the deed itself, and the descriptions contained therein." From the objectionable way in which this matter is stated in the record, by transcript from the stenographer's notes, instead of a brief statement of the point by the court in the ordinary manner, it is a little doubtful just what the precise claim of the defendant was before the lower court upon this point. He seems to claim that, as the false representations were made about a month before the deed was made, they were too remote in time to be admissible; but in his brief he says: "The court erred in refusing to hold that all the representations as to the dimensions of the property were embraced, and must be found, in the descriptive part of the deed itself." He says, in effect, that the representations were made a month before the deed was given;

that plaintiffs had ample opportunity during that month to find out whether they were true or false, and that they then accepted a deed repugnant on its face to the representations; and that these facts show that it is "hardly credible that after all these representations the defendant executed and the plaintiffs accepted a deed radically different from their tenor." These facts were entitled to great weight as evidence bearing upon the question whether the plaintiffs relied on such representations, and whether they were made at all; and we must, upon this record, assume that the court gave to them all the weight to which they were entitled; but, in spite of them, the court found against the defendant on this point, as upon a matter of fact, and we cannot review that finding here. We understand the real claim of the defendant upon the point now in question to be that evidence of the oral representations was inadmissible because it tended to contradict or vary or add to the deed in some way; that all such representations prior to the deed were merged and embraced in it, and so could not be proved. This claim is not tenable. The evidence was not offered to contradict, add to, or vary the deed, but to show the fraud as alleged, which could be shown in no other way. It was offered to show the false representations which induced the plaintiffs to enter into this transaction and to accept the deed. Certain monuments were pointed out by the defendant to the plaintiff as marking the bounds of the land as to which they were in treaty, which in fact were situated outside of it. This was done with an intent to deceive, and led her to accept the deed subsequently tendered, without having the property surveyed, or making any further examination as to the number of acres embraced within the boundaries mentioned in the conveyance. Her omission to take such steps was a natural consequence of the fraudulent representations. They had precisely the effect designed by the defendant, and he was properly held responsible for the resulting damage. As was said in *Russell v. Tuttle*, 2 Root, 22: "This action is not laid upon the writing, but for the fraud, . . . which can be proved no otherwise than by the testimony of witnesses." In *Cubot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313, a vendor, orally, falsely represented that a farm contained 180 acres, when it contained but 117; and it was held that, although a parol warranty could not be shown as against the deed, fraud in representing the quantity could be shown. In *Whitney v. Allaire*, 1 N. Y. 205, 308, it is said: "For more than thirty years it had been the settled doctrine of the courts of this state that fraudulent representations in reference to the title of real estate, accompanied with damage, is a good ground of action, and that it is immaterial whether any or what covenants are contained in the deed of conveyance." In *Carroll v. Jacks*, 43 Ark. 439, a vendee, induced to accept a deed by false and fraudulent representations, sued for damages for the fraud; and it was held that, notwithstanding the deed and its covenants, he could prove the oral representations. A similar ruling was followed in *Dano v. Sessions*, 65 Vt. 79; *Keefe v. Sholl*, 181

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Pa. 90; *Griswold v. Gebbie*, 126 Pa. 353.—cases where vendees, after deeds to them, sued for fraud in the sale of real estate. See also the following cases, where fraud was allowed to be shown notwithstanding the fact that the evidence, in one sense, tended to contradict a writing: *State, Cummings, v. Cass*, 52 N. J. L. 77; *Mallory v. Leach*, 85 Vt. 156, 82 Am. Dec. 625; *Cole v. High*, 173 Pa. 590; *Feltz v. Walker*, 49 Conn. 93-99; *Fox v. Tabel*, 66 Conn. 397-400. The court below did not err in admitting the evidence in question.

In his last assignment of error, the defendant claims, in effect, that the court failed to adopt and apply any fixed rule as to the measure of damages, and did not assess them "in accordance with the rules of exact justice." The record shows that the parties upon the trial made specific, conflicting claims with respect to the rule of damages; and they were entitled to have the true rule applied, and to know which of the conflicting rules was applied by the court. It was the duty of the court to adopt and apply the rule which the plaintiffs contended for, and it was also its duty to make this known to the parties in some way. The record upon this point is not as clear as it should be. It says: "Adopting either rule, I find from the evidence as to the value of the several properties that the result would be approximately the same." The fact implied in this statement, that the court had heard and considered evidence as to the value of both properties, would seem to indicate the adoption of the rule which the defendant contended for, while there are other things elsewhere in the record which seem to indicate that the court adopted the other rule. The record does not show, either expressly or by clear implication, which of the conflicting rules the court adopted and applied. Perhaps the fair import of the record is that in the process of assessing the damages the court applied both rules, and, finding the results approximately the same, did not decide which of them was the true rule, and exclusively applicable. It was the duty of the court to decide this question, however, and to make its decision manifest in some way to the parties, and this was not done. We think the court erred in this, but if, as is found, the application of either rule leads in this case to substantially the same result, it is difficult to see how the defendant has been harmed by the error, and for this reason we do not advise a new trial on account of it.

There is no error.

The other Judges concur, except **Hammersley, J.**, who dissents.

Hammersley, J., dissenting:

In an action of fraud the plaintiff can recover the amount of his actual damage. The elements of actual damage depend on the circumstances of each case, are widely variant, and can hardly be defined accurately in a general rule. Where a vendor warrants an article sold to be of a certain kind, he makes a special contract to indemnify the vendee for any loss by reason of the article not being of that kind; and so, in case of a breach of the warranty, he is bound, by force of the contract, to put the

vendee in the same position he would have occupied if the article had been as warranted. In other words, the damage to the vendee is the loss of the benefit of his contract. In a large class of sales of personal property, a contract of warranty may be established by proof of false representations. In such cases it has been held that, so far as the damage was concerned, it was immaterial whether the form of action was the one provided in case of fraud, or in case of breach of warranty; that in either case a contract was established by the same proof, and in either case the plaintiff was entitled to the benefit of his contract, but entitled to that benefit solely because the contract had in fact been validly proved. And so for this class of cases a special rule was recognized,—that in actions of fraud, where a sale had been induced by false representations, the plaintiff could recover the benefit of his contract. But it is evident that such rule implies an existing contract of indemnity, and cannot apply where such a contract is not proved. It might have been better if in such cases the courts had held the plaintiff to his action of contract when he merely sought to recover for its loss, but it is certain the rule cannot be extended beyond its reason without leading to unfortunate confusion in respect to the features which distinguish contract from tort. I do not understand the majority of the court to question this, but to hold that the present case is within the reason of this special rule. It seems to me, however, that it is not. False representations as to certain classes of personal property may establish a contract of warranty. This is not true

as to representations of the dimensions of land sold. A contract of warranty in such case can only be proved by the writing. The present plaintiff could not have recovered the alleged benefit of his contract in an action for a breach of contract. There was no legal contract of indemnity, and he could therefore prove no breach and no damage. There was a fraud which induced an exchange of land and he can recover for the damage resulting from that exchange, but not, as it seems to me, for the loss of the benefit of a contract which he has not made. I think, also, that the error in refusing to assess damages in accordance with a rule adopted by the court is fatal. If we assume that the judge made a separate assessment under each rule, and reached substantially the same result, yet he did not reach the same result, whatever latitude we may give to the word "substantially." The assessment adopted must have followed one or the other rule (for the judgment is clearly illegal, if he followed neither); and if his judgment, following the wrong rule, is a single dollar larger than it would have been, following the right rule, it involves the violation of a legal right. To sustain the judgment on the ground that no practical injury was done, the assessment under each rule must have been validly made; but the assessment under the rule claimed by the defendant was made, if not without evidence, yet in the absence of material evidence which the defendant was not permitted to introduce. I think there is error, and that a new trial should be granted.

MARYLAND COURT OF APPEALS.

Mayor, etc., of HAGERSTOWN *et al.*,
Appts.,

Frank WITMER *et al.*

(.....Md.)

1. Provisions for the summary destruction of dogs running at large contrary to statutes or ordinances are within the police power of the state.

NOTE.—Municipal power over nuisances affecting highways and waters.

- I. In general.
- II. Removal of garbage, etc.
- III. Obstructions of and encroachments on streets.
 - a. In general.
 - b. Stalls, show-cases, signboards, etc.
 - c. Buildings and fences.
 - d. Things overhanging streets, etc.
 - e. Trees on streets.
- IV. Nuisances relating to the use of streets.
 - a. Parades and noise on streets.
 - b. Animals running at large.
 - c. Vehicles.
 - d. Selling on streets.
 - e. Sliding in the streets.
 - f. Sidewalks.
 - g. Gas pipes.
 - h. Convict labor on the streets.
 - i. Betting on streets.
- V. Waters, watercourses, etc.

The general principles of the law relating to the power of municipal corporations to define, pre-
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utes or ordinances are within the police power of the state.

2. An ordinance prohibiting dogs from running at large on the streets and alleys of a city is within the general power to pass all ordinances necessary for good government, and for the preservation of peace and good order and the protection of the lives and property of citizens.

vent, and abate nuisances are treated of in the note to Grossman v. Oakland (Or.) 36 L. R. A. 598.

The question of the power of municipalities over nuisances affecting buildings and other structures will be found in note to Evansville v. Miller (Ind.) 38 L. R. A. 161.

A note upon the subject of the power of such authorities over nuisances affecting safety, health, and personal comfort accompanies the case of Harrington v. Providence (R. I.) 38 L. R. A. 305.

Cases of municipal power over nuisances affecting public morals, decency, peace, and good order form note to State v. Karstendiek, *ante*, 520.

The question of prescription in cases of nuisances, and the subject of the right of such authorities to relief in equity will form separate notes.

The question of municipal control over nuisances arising from particular trades or businesses will be found treated of in the note to *Ex parte Lacey* (Cal.) 38 L. R. A. 640, and the question of such control over nuisances arising from smoke will be found in note to *St. Louis v. Heitzberg Pkg. & Provision Co.* (Mo.) *ante*, 551.

This note is limited in its extent, and does not

3. An ordinance providing that a dog seized while running at large shall be killed if not ransomed by payment of \$1 before 10 o'clock of the morning after it has been detained twenty-four hours, and providing for a notice of the seizure to be given to the owner of any dog having a collar with the owner's name thereon, is not unconstitutional, or so unreasonable that the court can hold it void.

(June 23, 1897.)

cover the general power of municipalities over the subjects therein treated, in the full exercise of their police power. It is confined to the consideration of the extent of municipal power over the different matters passed upon as public nuisances, and to their regulation, prevention, or abatement as such.

Cases wherein a municipality has in general sought relief in equity against the obstruction or encroachment upon the streets of a public highway as a nuisance will be found specifically treated of in a later note.

For the question of municipal control over nuisances upon highways and streets created by street railroads and other electrical companies upon streets, see *note to Cape May v. Cape May*, D. B. & S. P. R. Co. (N. J.) *ante*, 609.

I. In general.

It may be stated that as a general rule municipalities have power to maintain such actions as may be appropriate to prevent and abate nuisances destructive of the highways or rendering them useless. *Stearns County v. St. Cloud*, M. & A. R. Co. 36 Minn. 425; *Hooksett v. Amoskeag Mfg. Co.* 44 N. H. 105; *Troy v. Cheshire R. Co.* 23 N. H. 88, 55 Am. Dec. 177; *Springfield v. Connecticut River R. Co.* 4 Cush. 63; *Easton & A. R. Co. v. Greenwich Twp.* 25 N. J. Eq. 565; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *Philadelphia v. Thirteenth and Fifteenth Streets Pass. R. Co.* 8 Phila. 648.

Public authorities may proceed in a summary manner to remove nuisances upon the public streets and highways when they are nuisances *per se*. *Bower v. Watertown*, 1 Pa. Dist. R. 116; *New Castle v. Raney*, 130 Pa. 545, 6 L. R. A. 737; *Easton, S. E. & W. E. Pass. R. Co. v. Easton*, 138 Pa. 505.

In *Howley v. Harrall*, 19 Conn. 142, 153, it is stated that it is the duty, and at the risk, of the city to see that its streets are clear of nuisances and obstructions; and if a street is legally established and opened, then the court of common council have full authority over it.

The public are entitled to the use of a street as it is originally made, and whoever, without special authority, obstructs it or renders its use hazardous by doing anything upon, above, or below the surface, is guilty of a nuisance. *Stephani v. Brown*, 40 Ill. 428, 432.

A turnpike road is a public highway established by public authority for public use, and the same proceedings lie for the abatement of a nuisance thereon as in the case of any other common highway. *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654.

The primary use of a highway is for the purpose of permitting the passing and repassing of the public, who are entitled to the unobstructed and uninterrupted entire width of the highway for that purpose, under temporary exceptions as to deposits for building purposes, and to load and unload wagons, and to receive and take away property for or in the interest of the owner of the adjacent premises. *Cohen v. New York*, 113 N. Y. 532, 535, 4 L. R. A. 408, Reversing 43 Hun, 345.

So, a city has the right to the whole width of the streets, and is charged with the duty of keeping

A PPEAL by defendants from a decree of the Circuit Court for Washington County enjoining them from enforcing an ordinance relating to the catching and killing of dogs. *Reversed.*

The facts are stated in the opinion.

Mr. A. C. Strite, for appellants:

Of all property dogs are more peculiarly the subject of police regulations than any other class.

the same in good repair and reasonable condition. It has also the right to remove rock or other material found upon any parts of such streets and placed there without its authority, but it cannot use such material in abating such obstructions as a nuisance, especially where it is not shown that the owner has abandoned it, and if it does so use it, it cannot recover the costs of repair from the owner. *Kemper v. Burlington*, 81 Iowa, 364.

In *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532, 539, it is said that the character of the nuisance to be removed from a highway must be such as would ordinarily require the interference of the public authorities for its removal, and not such as is merely transient in character, and will of itself in the nature of things soon disappear. In this case the action was brought to recover damages for an obstruction to the sidewalk in a street occasioned by ice and sleet.

The liability of a town to pay damages in case a person is injured by the obstruction of a highway is a sufficient interest in such way to enable it to appear as plaintiff in a complaint in equity to prevent the threatened obstruction. *Burlington v. Schwarzman*, 52 Conn. 181, 182, 52 Am. Rep. 571; *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 390; *Derby v. Ailing*, 40 Conn. 410; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *London v. Bolt*, 5 Ves. Jr. 129.

In *Centerville v. Woods*, 57 Ind. 192, the city authorities were allowed to recover damages they had been compelled to pay, and also the costs of the repairs they were put to through the defendant's negligence in maintaining a ditch or sewer across a public highway left in a dangerous and unsafe condition, and constituting a nuisance and an obstruction to travel.

There are many things which the courts, without proof, declare nuisances, such as the digging of a pit or the erection of a house or other obstruction in a public highway; and an ordinance passed by the town or city, having a general power over the subject, declaring such obstructions nuisances, is valid on its face, and a conviction may properly be had under it without any intrinsic proof to show the act complained of to be in fact a nuisance; and in such a case it is sufficient to show the existence of the act constituting the nuisance. *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 212, 218, 44 Am. Rep. 783.

Where the plaintiff sought to recover actual possession of land formerly a public highway in the city, which had been long used by the public as such, and had been uninterruptedly enjoyed by it, the court stated that the fruits of such action would subject the plaintiff to an indictment for a nuisance, the private right being directly hostile to the easement. *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 438, 8 L. ed. 452, 456; *Jarvis v. Dean*, 3 Bing. 447.

So, if a person unlawfully, injuriously, and with full knowledge of the facts exposes in a public highway a person infected with a contagious disorder such as smallpox, it is a common nuisance to all. *King v. Vantandillo*, 4 Maule & S. 73, 76.

As a general rule it may be stated that whatever interferes unreasonably and unnecessarily with the public use of the streets is a nuisance which a

Julienne v. Jackson, 69 Miss. 34.

Regulations of the most stringent character, and the most summary proceedings for the destruction of these animals kept contrary to such regulations, are entirely within legislative power, and free from constitutional objection, though the property of the owner is destroyed without notice or hearing in the execution of the law.

■ *State, Curtis, v. Topeka*, 86 Kan. 76, 59 Am.

city council may prohibit by ordinance. *White v. Kent*, 11 Ohio St. 550, 553.

So, it has been said that whatever menaces or puts in jeopardy citizens passing along the public highway is a public nuisance. *Bond v. Smith*, 44 Hun, 219, 222; *Cain v. Syracuse*, 95 N. Y. 83.

And anything which endangers the life of a person passing along the sidewalk is a nuisance which the city council may abate. *Parker v. Macon*, 39 Ga. 725, 729.

A person traveling upon a highway must do so in such a manner as not unnecessarily or unreasonably to interfere with the exercise of the same right by others, and if he does not exercise this right in a reasonable manner, he is guilty of a nuisance. *Turner v. Holtzman*, 54 Md. 148, 30 Am. Rep. 361; *Rex v. Cross*, 3 Campb. 230; *Rex v. Jones*, 3 Campb. 230; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709.

A public officer, such as the superintendent of the streets, has power to remove all nuisances from the same, and an authority or license granted by the mayor is of no avail as against such power. *Day v. Green*, 4 Cush. 433.

Where the nuisance sought to be abated is the use of the highway, and not a case of a permanent obstruction of the same, the question is one of inconvenience to the public, and unless such inconvenience is really the consequence of the act, there is no nuisance. *State v. Edens*, 85 N. C. 522, 526.

This is so for the reason that it is not a nuisance for anyone to use the public highway in such a manner as it has been ordinarily used, although much depends upon locality, the width of the highway, and the time it may be obstructed by the alleged nuisance, and therefore what would be a reasonably free passage for the public, and what would be a reasonably safe and convenient road for the accommodation of the public travel in a remote, sparsely populated rural district, might and generally would not be so in a compact city or a large and populous village. In a village or city what would be an obstruction in a broad street little frequented might be very objectionable, if not an absolute nuisance, in a narrow business thoroughfare. *Graves v. Shattuck*, 35 N. H. 257, 264, 69 Am. Dec. 536.

It is a public nuisance for a timber merchant to cut logs of timber in the streets adjoining his premises, even though he may not be able otherwise to get them into his premises or to carry on his business. *Rex v. Jones*, 3 Campb. 230.

In *Kittle v. Fremont*, 1 Neb. 337, it is said that the closing up of public streets or alleys, and the vacation of a public park, are in the nature of a public nuisance, and if done without lawful authority are remediable by a public prosecution instituted by the proper public officer on behalf of the people.

So, a drain and sewer pipe discharging sewage from private premises upon a public street is a nuisance abatable by the town authorities under the provisions of an ordinance for the abatement of nuisances, especially after notice has been given to the owner to abate the same, and the adjudication of the board of health is prima facie evidence of its existence. *Kirkwood v. Cairns*, 44 Mo. App. 88.

And the lack of a public sewer is no defense for 39 L. R. A.

Rep. 529; *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82; *Tower v. Tower*, 18 Pick. 262; *Carter v. Dow*, 16 Wis. 299; *Bishop v. Fahay*, 15 Gray, 61; *Kerr v. Seaver*, 11 Allen, 151; 18 Am. & Eng. Enc. Law, p. 755.

In *Morey v. Brown*, 42 N. H. 873, the court, replying to the argument that the act conflicted with the Constitution in that it was a taking of private property for public use, or

maintaining a nuisance, at least where it does not appear that the proprietor of the premises either has or can devise any other reasonable means of disposing of his sewage. *Kirkwood v. Cairns*, 44 Mo. App. 88.

Under the English highway act (5 & 6 Wm. IV. chap. 50, § 73), which provides that if any timber is laid upon a highway so as to be a nuisance, and is not removed after notice, the surveyor of highways, by the order of a justice, may remove the same, it was held, in an action against the magistrate, that the owner of the timber could not give evidence in contradiction of the order, to the effect that the *locus in quo* was not a highway. *Mould v. Williams*, 5 Q. B. 469, *Davidson & M.* 631.

A borough, as the instrumentality by which the governmental duty of constructing and maintaining highways is performed, as the guardian for the public of the highways dedicated to or purchased for its use, is entitled to an injunction against a private corporation which imposes a permanent structure upon the highways of such borough without legislative or municipal permission, for the sole reason that it is an unauthorized exclusion of the public from such portion of the way, regardless of the question as to the greater or less degree of inconvenience or danger or expense thence resulting to the public. *Stamford v. Stamford Horse R. Co.*, 56 Conn. 381, 395, 1 L. R. A. 375.

Where the managing county board is charged with the duty of general supervision of county roads, with power to appropriate county funds for opening, vacating, or resurveying, or otherwise improving, the same, there shall be implied the corresponding power to maintain actions to prevent or abate a public nuisance destructive of the highway or rendering it useless. *Stearns County v. St. Cloud, M. & A. R. Co.*, 36 Minn. 425, wherein it was sought to enjoin the railroad company from creating a public nuisance. To the same effect are the following cases: *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105; *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Springfield v. Connecticut River R. Co.*, 4 Cush. 67; *Easton & A. R. Co. v. Greenwich Twp.*, 25 N. J. Eq. 565; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *Philadelphia v. Thirteenth & Fifteenth Streets Pass. R. Co.*, 8 Phila. 648.

A town or city charter usually gives it power to open streets, etc., and to take control and the custody thereof, as well as of the public buildings and public grounds, and therefore it is the duty of the authorities to remove nuisances, and to prevent all obstructions in its public thoroughfares calculated to endanger the lives of those who are upon them. *James v. Harrodsburg*, 85 Ky. 191, 196.

And the supervisors of a town have power to cause the summary abatement and removal of any public nuisance found in any highway under their jurisdiction. *Hubbell v. Goodrich*, 37 Wis. 84, 86; *Neff v. Paddock*, 26 Wis. 546.

So, a city has a right to erect a rail or fence along a highway or street in order to prevent persons falling into a dangerous declivity, even though in so doing it may obstruct the entrance to a passageway of an abutting owner, as no one has a right to an open access to his land adjoining a street of such a character as to endanger persons lawfully using the street. *Alger v. Lowell*, 3 Allen, 402.

deprived the owners of their property in dogs, said the act had no such effect, but merely to regulate the use and keeping of such property in a manner that seemed to the legislature reasonable and expedient.

Messrs. William J. Witsenbacher and J. Marbourg Keedy, for appellees:

The charter of Hagerstown in the general grant of powers, § 171, art. 22, Code Pub. Gen. Laws, or elsewhere, does not in any par-

ticular contain a single provision authorizing the seizure, impounding, or destruction of dogs or other animals.

Without such express power it cannot be held to exist.

1 Dill. Mun. Corp. §§ 150, 348; 1 Beach, Pub. Corp. § 527.

Dogs are property.

Ten Hopen v. Walker, 96 Mich. 286; *Heiligmann v. Rose*, 81 Tex. 222, 13 L. R. A. 272;

And although the question of the right of the town to enter upon the land of an adjoining owner and remove a post was not passed upon by the court in *Cogswell v. Lexington*, 4 Cush. 307, yet the court stated that the city had the right, and it was its duty, to fence it off from the road so as to render the road safe.

An excavation adjoining a highway, or so near thereto that a person lawfully and with ordinary caution using the way may by accident fall into it, is *per se* a nuisance, and only ceases to be such when proper means are adopted to guard against the occurrence of such accidents. *State v. Society for Establishing Useful Manufactures*, 42 N. J. L. 504, 506. To the same effect, *Coupland v. Hardingham*, 8 Campb. 398; *Barnes v. Ward*, 9 C. B. 382, 2 Car. & K. 661, 19 L. J. C. P. N. S. 195, 14 Jur. 334; *Hardcastle v. South Yorkshire R. & River Dun Co.* 4 Hurlst. & N. 67, 28 L. J. Exch. N. S. 189, 5 Jur. N. S. 150, 32 L. T. 297, 7 Week. Rep. 326; *Hounsell v. Smyth*, 7 C. B. N. S. 731, 29 L. J. C. P. N. S. 308, 6 Jur. N. S. 697, 8 Week. Rep. 277; *Rinks v. South Yorkshire R. & River Dun Co.* 3 Best & S. 244, 32 L. J. Q. B. N. S. 26, 7 L. T. N. S. 350, 11 Week. Rep. 56; *Hadley v. Taylor*, L. R. 1 C. P. 53, 11 Jur. N. S. 979, 13 L. T. N. S. 388, 14 Week. Rep. 59; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Beck v. Carter*, 6 Hun. 604; *Temperance Hall Assn. v. Giles*, 33 N. J. L. 290; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603.

Yet an excavation made with the permission of public authorities does not constitute a nuisance *per se*, and therefore the persons making such excavation would be engaged in a lawful work, and could only become liable to the city for damages occasioned by means of such excavation upon their neglect to properly guard and protect it so as to prevent injury, the ground of liability in such cases being negligence; and the exercise of proper care would be a sufficient answer. *McNaughton v. Elkhart*, 85 Ind. 384, 387.

Under the Connecticut statute an excavation so near to a highway as to endanger the passage of travelers, and unguarded, is a public nuisance, whether it adjoins the highway or not, as it endangers passengers in such way, and it is the duty of the public to provide for travelers adequate security against such danger by the erection of a fence or railing between the excavation and the way, thereby in effect abating such nuisance. *Norwich v. Breed*, 30 Conn. 535, 549.

In *Norwich v. Breed*, 30 Conn. 535, 549, the court looked upon an unfenced excavation, made by the defendant upon his land adjoining a highway, as a public nuisance, and gave the city judgment for the amount it had been compelled to pay for damages occasioned to one using such highway.

As to excavations in sidewalks, see *infra*, IV. g.

As a city council has general control of the streets under the charter, it is a part of its duty to prevent the creation of any public nuisance within them. *Everett v. Marquette*, 53 Mich. 450, 451.

In *Hamilton v. Fond du Lac*, 40 Wis. 47, 51, it is said that the city council has always been clothed with power to abate public nuisances within the city, and therefore an ordinance of the city council declaring a certain branch of a river a public nuisance, and making provision for the abatement

of the same, by means of a new channel, is within the power of the city authorities to enact.

A town is the representative of the state in all matters pertaining to highways, and it has power to abate a nuisance, and in a proper case may resort to equity. *Hutchinson Twp. v. Filke*, 44 Minn. 538.

Prima facie, a person who appropriates any part of a public street or harbor to his own use exclusively, without the consent of the legislature or the municipal authorities, is guilty of a nuisance which may be abated by such authorities. *Hart v. Albany*, 3 Paige, 213.

A party, such as the mayor of a city, whose duty it is to prevent obstructions in a river, will be considered a party aggrieved, and may by his own act, without proceeding by way of indictment, abate or remove such nuisance. *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165.

Where a city charter confers upon the mayor and council full power and authority to keep the streets, lanes, alleys, sidewalks, and public squares of the city in good order, and to remove any buildings, posts, steps, fences, or other obstructions or nuisances, which power is for the public good, it is their duty to exercise it, and to keep such streets and other places in such condition that persons passing along or over the same may do so with safety and convenience, and therefore it is the duty of the city authorities to remove any nuisance from such streets. *Parker v. Macon*, 39 Ga. 725, 729.

Municipal corporations are the proper representatives of the equitable rights of the inhabitants of a village to the use of a public square so as to authorize the filing of a bill by the corporation in a court of equity to protect those equitable interests against the erection of a nuisance. *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80, 82.

In *Lanfear v. New Orleans*, 4 La. 97, 23 Am. Dec. 477, an ordinance of the city of New Orleans authorizing the sale, under the order of the mayor, of all property which was suffered to remain on the levee for a longer period than the police regulation of the city permitted, was held not to be within the powers conferred upon the corporation, and was not therefore constitutional, the power to abate nuisances arising from necessity and ceasing with that necessity, the corporation having the power to remove encumbrances as a nuisance at the expense of the proprietor.

In *Atty. Gen., Nepean Twp., v. Bytown & N. Road Co.* 2 Grant Ch. (U. C.) 626, it was held that a municipality had the right of prohibiting the proceeding with any road within the limits of their jurisdiction, and the making or improving thereof, by a road company formed under the statute 12 Vict. chap. 84, which was commenced before any opposition was made thereto, but without the permission of such municipality. Notice of such opposition, if duly given before the work was commenced, according to the 2d section of that statute, had the effect of an *interim* injunction to restrain the commencement of the road; but though such notice is not given in time for that purpose, the power of prohibition conferred upon the municipal council is not defeated. In this case it was contended that the interruption of the highway was illegal, and a public nuisance.

Harrington v. Miles, 11 Kan. 480, 15 Am. Rep. 355; *Washington v. Meigs*, 1 MacArth. 53; *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689.

If a special power is given by the legislature, and a general power should also exist, the special power controls and limits the general power, and the latter does not extend the former.

1 Dill. Mun. Corp. § 89, 815-817; *Huesing v. Rock Island*, 128 Ill. 465; *Price v. De Ford*,

18 Md. 489; *State, Taintor, v. Morristown*, 83 N. J. L. 61; Brice, *Ultra Vires*, 8d ed. 1893, 180.

The only mode of enforcing ordinances pointed out by charter is by fines not exceeding \$50. § 171; 1 Dill. Mun. Corp. § 339; 1 Beach, Pub. Corp. § 523, and authorities cited.

A forfeiture is penal and not civil in its nature.

1 Dill. Mun. Corp. § 150.

Yet it is a legal solecism to call that a public nuisance which is maintained by public authority. *Harris v. Thompson*, 9 Barb. 360; *Randle v. Pacific R. Co.* 65 Mo. 325.

A structure authorized by the legislature cannot be a public nuisance, as a public nuisance must be occasioned by acts done in violation of law, and a work authorized by law cannot be a nuisance. *Danville, H. & W. R. Co. v. Com.* 73 Pa. 29, 38; *Fletcher v. Auburn & S. R. Co.* 25 Wend. 468; *Drake v. Hudson River R. Co.* 7 Barb. 508; *Harris v. Thompson*, 9 Barb. 350; *King v. Pease*, 4 Barn. & Ad. 30; *Com. v. Pittsburg, Ft. W. & C. R. Co.* 5 Pittsb. L. J. N. S. 35, cited in 73 Pa. 29.

Necessity may justify actions which would otherwise be nuisances, and such necessity need not be absolute; it is sufficient if it be reasonable, and therefore a man may be justified in throwing wood, coal, or fuel into the street for the purpose of having it conveyed to his house, and it may lay there a reasonable time. And the rule is the same with respect to building materials, provided they be deposited in the most convenient manner; and so with respect to the goods of a merchant placed in a street for the purpose of being moved to his store, although he will have no right to keep them in the street for the purposes of sale. *Wood v. Mears*, 12 Ind. 515, 520, 74 Am. Dec. 222; *Com. v. Passmore*, 1 Serg. & R. 219; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709; *Cohen v. New York*, 118 N. Y. 532, 535, 4 L. R. A. 406, *Reversing* 43 Hun, 345.

See further, upon the question of necessity in questions of obstruction, *infra*, III. a.

Upon the question of public nuisances on highways and the abatement of nuisances, see *note* to *Charlotte v. Pembroke Iron Works (Me.)* 8 L. R. A. 829-831.

II. Removal of garbage, etc.

Highways, whether on land or water, cannot be made the receptacles of waste materials, filth, or trash, nor the depositories of valuable property even, so as to obstruct their use as public highways; and all such obstructions are in the eye of the law deemed unreasonable. *Gerrish v. Brown*, 51 Me. 256, 262, 81 Am. Dec. 569.

An ordinance prohibiting the throwing into or depositing upon any public street or highway of any glass, broken ware, dirt, rubbish, garbage, or filth was upheld in *Ex parte Casinello*, 62 Cal. 533, as dirt, rubbish, garbage, and filth were in their nature nuisances, glass and broken ware being also easily converted into nuisances,—especially if thrown about promiscuously.

A city by-law prohibiting the removal of house dirt and offal by unlicensed persons will be upheld upon the ground that if everyone was engaged in such a business there would be a continual moving nuisance in the city breaking up the streets by their weight, and poisoning the air with their effluvia; and such by-law is also binding upon strangers within the city limits. *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 361.

Yet a city ordinance prescribing duties and regulations for city scavengers, and providing for the restriction of the business to two persons selected 39 L. R. A.

by the mayor, has been declared void upon the ground that it created a monopoly by prohibiting a lawful calling, and for the reason that a town cannot deny to citizens the use of its streets to cross the town on any business that is inoffensive, and cannot by merely declaring an act to be a nuisance make it such. *Re Lowe*, 54 Kan. 757, 27 L. R. A. 545.

A board of health has no power to declare the removing of garbage, by one to whom it has not granted a permit, to be a nuisance, where the person so removing it adopts the precise means for the purpose prescribed by the city ordinance, under a statute giving such board discretionary power to declare the keeping of garbage and refuse matter on the streets, alleys, and premises of individuals a nuisance. *Philadelphia v. Lyster*, 3 Super. Ct. (Pa.) 475.

So, such board of health cannot declare the collecting of garbage and offal without a permit from such board to be a nuisance. *Philadelphia v. Lyster*, 3 Super. Ct. (Pa.) 475.

For monopoly in contract for removal of garbage, see *note* to *Smiley v. MacDonald (Neb.)* 27 L. R. A. 541.

As to garbage and filth as nuisances with respect to health, see *note* to *Harrington v. Providence (R. I.)* 38 L. R. A. 305.

III. Obstructions of and encroachments on streets.

a. In general.

Upon this section of the subject it may be stated that there are numerous cases upholding the right of municipal corporations to restrain and abate obstructions upon the public streets and highways within the town limits as being within the corporate powers, where such obstructions have not been specifically declared to be nuisances thereby, and the power has been exercised under the general welfare clause for the public safety and in exercise of the general police power. The cases constituting this class are not included in this section of the note which is intended to present, and to be confined to, the subject of municipal control over such obstruction strictly as nuisances, and the restraining and abatement of them as such.

Where the general assembly of a state has vested in cities, villages, and towns the right to control the use of highways, streets, and public grounds within their respective limits, they are invested with the authority of the Crown and of the state to file bills to prevent and remove obstructions from the streets, highways, and public grounds under their control. *Metropolitan City R. Co. v. Chicago*, 98 Ill. 620, 628; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540.

The general rule of law as shown by the authorities upon the subject is, that any obstruction of the public enjoyment in the use of streets and public thoroughfares is an indictable nuisance which, when a municipality is, by its charter or constituent act, given the control and supervision of the streets, may be abated and restrained by such authorities in their corporate name in any judicial proceeding instituted by them for that purpose. This principle

The power to "license and tax" does not confer the power to destroy.

Baltimore v. Radecke, 49 Md. 217, 38 Am. Rep. 239; *State v. Mott*, 61 Md. 303, 48 Am. Rep. 105; *Hooper v. Creager*, 84 Md. 195, 35 L. R. A. 202.

The municipality of Hagerstown has no power to define a nuisance, and designate any set condition of affairs as a nuisance.

is supported by the following authorities: *Yates v. Warrenton*, 84 Va. 337, 339; *People v. Vanderbilt*, 28 N. Y. 287; *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Pittsburgh v. Scott*, 1 Pa. 309; *Mankato v. Willard*, 13 Minn. 13, 97 Am. Dec. 208; *Dummer v. Den*, Jersey City, 20 N. J. L. 86, 40 Am. Dec. 213.

A city has the same right to maintain an action to prevent the unlawful obstruction of a street as the people of the state have. *People, Bryant, v. Holladay*, 33 Cal. 241, 249.

As it is the duty of the city to keep its streets in good repair and condition, and as in default thereof it is held responsible in damages for any injury suffered, it should have power to keep the streets clear and free from obstructions, and be permitted to use the appropriate remedies to that end. *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620, 627.

In *Mechling v. Kittanning Bridge Co.* 1 Grant, Cas. 416, 419, it is said that for a nuisance that is merely a public wrong only a public action can be brought, and that must be done by the proper public functionaries. In that case the action was brought by a private individual to recover for a public nuisance, but no special damage being shown it was dismissed.

In *Van Wyck v. Lent*, 33 Hun, 301, 303, it is said, highways of the state are made for, and devoted to, public travel, and the whole public have a right to their use in their entirety, and, when obstructions to public travel are found within their bounds, the commissioners of highways are clothed with power to remove them without waiting for the slow process of law, even though travel be not absolutely and entirely prevented.

So, highways, whether on land or water, are designed for the accommodation of the public for travel or transportation, and any unauthorized or unreasonable obstruction thereon is a public nuisance in law. *Gerrish v. Brown*, 51 Me. 256, 282, 81 Am. Dec. 569.

The primary purpose of a street is for passage and travel, and any unauthorized and illegal construction of its free use comes within the legal notion of a nuisance. *Simon v. Atlanta*, 67 Ga. 618, 622, 44 Am. Rep. 739.

Whoever, without special authority, materially obstructs a highway or renders its use hazardous by doing anything upon, above or below the surface, is guilty of a public nuisance. *Babbage v. Powers*, 130 N. Y. 261, 285, 14 L. R. A. 308.

An obstruction is anything set in the way, whether it totally closes the passage, or only hinders progress, and it is the duty of the municipal corporation, charged with the care of the streets in different towns, to see that they are not unlawfully obstructed either by itself or by others. *Atty. Gen. v. Lombard & S. Street Pass. R. Co.* 1 W. N. C. 489.

An obstruction is an obstacle, an impediment, a hindrance, that which impedes progress. *Patterson v. Vail*, 43 Iowa, 142, 145.

And any obstruction or encroachment upon a public street or highway is a public nuisance. *Columbus v. Jaques*, 30 Ga. 506, 512; *State v. Carpenter*, 68 Wis. 135, 173, 60 Am. Rep. 848; *State v. Teaver*, 62 Wis. 362.

So, any obstruction of a street, or encroachment thereon which interferes with its use for the purposes of public travel and transportation, is a public

State v. Mott, 61 Md. 303, 48 Am. Rep. 105.

There exists no evidence that a dog, since the earliest glimmerings of human history, the companion and friend of man, is *per se* and intrinsically and inevitably a nuisance, as contemplated in *Boehm v. Baltimore*, 61 Md. 263,—especially when so declared within the narrow limits described in the 9th section of the ordinance.

lic nuisance, although there may be interruptions and obstructions of the public streets which may be justified by necessity. *Callanan v. Gilman*, 107 N. Y. 390, 395.

To obstruct a highway it is not necessary that it should be impassable. *Patterson v. Vail*, 43 Iowa, 142, 145.

And this is so for the reason that any erection or obstruction placed in any part of a public road or street which deprives the public of the use of any part thereof is a nuisance. *People v. St. Louis*, 10 Ill. 351, 371, 48 Am. Dec. 359.

Unauthorized erections or obstructions in the public streets or squares of a city are public nuisances. *Webb v. Demopolis*, 95 Ala. 116, 135, 21 L. R. A. 62.

And the law regards an unauthorized obstruction of a highway as a nuisance *per se*. *Davis v. New York*, 14 N. Y. 506, 529, 67 Am. Dec. 186.

So, an unauthorized and illegal obstruction of the public ways of a town or city is a public nuisance. *State v. Louisville*, N. A. & C. R. Co. 86 Ind. 114, 116.

And an unauthorized encroachment on, or an illegal appropriation of, a public highway, is a nuisance *per se*, and may be regarded as a purpresture which is both general and special; general because it is an attack upon that in which everyone has an interest, and special, as to citizens who sustain injury or inconvenience greater than the community at large suffer. *Philadelphia v. Thirteenth & Fifteenth Streets Pass. R. Co.* 8 Phila. 648.

An obstruction of the highway is an offense at common law and a nuisance, and the Pennsylvania act of April, 1802, does not extinguish such offense, but inflicts an additional penalty for a distinct offense, namely, the nonremoval of the nuisance after notice from the supervisors. *Kelly v. Com.* 11 Serg. & R. 345, 346.

Such an obstruction or nuisance is an injury to the public. *Atty. Gen., Stickle, v. Morris & E. R. Co.* 19 N. J. Eq. 396, 392.

And any permanent obstruction of the highway is a public nuisance *per se*. *State v. Berdetta*, 73 Ind. 185, 193, 38 Am. Rep. 117.

So, a permanent or habitual obstruction of a street without authority of law is a nuisance. *Ely v. Campbell*, 59 How. Pr. 333, 335.

And anything which permanently obstructs the use of a street amounts to a public nuisance, unless the same be placed there by operation of law or authority of the public officers. *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601.

So, even a temporary obstruction of the highway may become a nuisance. *State v. Berdetta*, 73 Ind. 185, 193, 38 Am. Rep. 117.

Any erection or obstruction placed without authority in any part of a public road or street, which deprives the public of the use of any part thereof, is a nuisance. *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620, 626; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 359.

And any unreasonable obstruction of a highway is a public nuisance, yet it is not every obstruction in a highway that constitutes a nuisance *per se*. *Allegheny v. Zimmerman*, 95 Pa. 287, 293, 40 Am. Rep. 649.

The obstruction of a highway in any form is *prima facie* a public nuisance, punishable by the

Where exercise of power may result in destitution and transfer of property, it must be clearly given and strictly pursued.

St. Mary's Industrial School v. Brown, 45 Md. 838; *State v. Rowe*, 72 Md. 550; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110.

If the enforcing part of the ordinance is *ultra vires* or void, the ordinance is void.

Com. v. Kelliher, 12 Allen, 490.

public authorities by indictment. *Com. v. Old Colony & F. River R. Co.* 14 Gray, 98; *Com. v. Nashua & L. R. Corp.* 2 Gray, 54.

It is of no consequence that a permanent structure or private enjoyment in a street or highway is confined to a part little used or not used at all; it becomes a nuisance as an encroachment upon the public right. *Laing v. Americus*, 86 Ga. 756, 757; *State v. Berdette*, 73 Ind. 185, 38 Am. Rep. 117; *Wilbur v. Tobey*, 16 Pick. 177; *Emerson v. Babcock*, 66 Iowa, 257.

A street can no more be obstructed partially than closed altogether. *Com. v. Moorehead*, 118 Pa. 344, 354.

Any permanent or habitual obstruction in a public street or highway is an indictable nuisance, even though room is left for carriages to pass, and it is not less so though the thing which constitutes the obstruction is not fixed to the ground, but is capable of being, and actually is, removed from place to place in the street. *Davis v. New York*, 14 N. Y. 506, 524, 67 Am. Dec. 186.

So, any obstruction placed in a public highway without right is a nuisance, and courts will not inquire whether the advantage arising from the act complained of would compensate for all the injury and inconvenience which the public would suffer from it. *People v. Vanderbilt*, 38 Barb. 288, 293.

When a private person or corporation constructs a ditch or canal across a public highway, such act gives him no right to destroy the way as a throughfare, but he is bound, both by common law and by the statutes of Idaho, to restore or unite the highway at his own expense by some reasonable, safe, and convenient means of passage, and to keep the same in good repair, and the obligation is the same whether the canal or ditch cuts the highway or street within or without the limits of a city or village; and the city authorities may therefore proceed for the abatement of such canal as a nuisance where it obstructs or interferes with the public rights on the highway. *Lewiston v. Booth* (Idaho) 34 Pac. 800.

And every unauthorized obstruction of a highway to the nuisance of the King's subjects is a public nuisance. *Rex v. Cross*, 3 Campb. 226.

Again, any unreasonable obstruction of a highway is a public nuisance; yet it is not every obstruction in a highway that constitutes a nuisance *per se*. *Allegheny v. Zimmerman*, 95 Pa. 287, 293, 40 Am. Rep. 649.

So, the placing or maintaining a building, stones, or other obstruction in a public highway without lawful authority is a nuisance at common law. *Com. v. Blaisdell*, 107 Mass. 234; *Com. v. King*, 13 Met. 115; *Stoughton v. Porter*, 13 Allen, 191; *Hyde v. Middlesex County*, 2 Gray, 287.

The unlawful obstruction of the free passage or use of a public street in the customary manner is, under the provisions of §§ 8479, 8480, of the California Civil Code, a public nuisance. *San Francisco v. Buckman*, 111 Cal. 25, 31.

Where the particular charge is the obstruction of a highway, the question of nuisance or no nuisance depends upon the fact whether its passage is rendered "less commodious," and if it is so rendered the obstruction therein placed constitutes a nuisance abatable by the public authorities. *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

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It has been a favorite exercise of the police power of the state to impose a license upon dogs, to operate as a check upon the keeping of these animals.

Mitchell v. Williams, 27 Ind. 62; *Carter v. Dow*, 16 Wis. 299; *Tenney v. Lenz*, 16 Wis. 556; *Holt v. Roe*, 39 Ohio St. 340, 48 Am. Rep. 459; *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 601.

Any obstruction of a public road or highway which renders its passage less commodious is a nuisance. *Hoole v. Atty. Gen.* 22 Ala. 190, 194.

A permanent obstruction erected upon a highway without lawful authority, which renders the highway less commodious than before to the public, is an unlawful act, and a public nuisance at common law. *Reg. v. United Kingdom Electric Teleg. Co.* 31 L. J. M. C. N. S. 167, 2 Best & S. 447, note.

The question as to whether or not an obstruction or encroachment upon a highway constitutes a nuisance is to be determined by the jury in every case, although every encroachment is not necessarily a nuisance, but if it renders the highway less commodious it is a nuisance. *State v. Merrit*, 35 Conn. 314, 318; *Burnham v. Hotchkiss*, 14 Conn. 311.

So, if the obstruction tends to annoy those living near the highway, or to render the passage of the same more difficult, thus incurring the danger of injury, it constitutes a nuisance restrainable by the public authorities. *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

An opening in a much-frequented street which is dangerous in its character is properly charged as a public nuisance. *Beatty v. Gilmore*, 16 Pa. 463, 469, 55 Am. Dec. 514.

If the obstruction be permanently, or even habitually, in the highway, it is a nuisance which must be restrained by the authorities. *Cohen v. New York*, 112 N. Y. 532, 535, 4 L. R. A. 406, *Reversing* 43 Hun, 345.

The following cases are the same in effect: *People v. Cunningham*, 1 Denio, 524; *Davis v. New York*, 14 N. Y. 506, 524, 67 Am. Dec. 186; *Callanan v. Gilman*, 107 N. Y. 360; *Rex v. Jones*, 3 Campb. 230; *Rex v. Cross*, 3 Campb. 224; *King v. Russell*, 6 East, 427; *Clifford v. Dam*, 81 N. Y. 52.

So, a mere encroachment upon some portion of the highway limits may, by being placed in the traveled path, as effectually obstruct the passage of carriages as if it extends across the whole highway, and thus become a nuisance abatable by the authorities. *State v. Merrit*, 35 Conn. 314; *State v. Knapp*, 6 Conn. 415, 16 Am. Dec. 68.

Yet the question of an obstruction or nuisance upon a highway is not limited to the traveled path. *State v. Merrit*, 35 Conn. 314, 318; *Burnham v. Hotchkiss*, 14 Conn. 311.

So, it is no answer to the charge of a nuisance that even with the obstruction in the highway there is still room for two or more wagons to pass, nor that the obstruction itself is not a fixture. *Cohen v. New York*, 112 N. Y. 532, 535, 4 L. R. A. 406, *Reversing* 43 Hun, 345.

And if the structure is placed on the highway so as to obstruct public travel, the commissioners of highways of the town, in the discharge of their duty to keep the same in order and remove all obstructions therefrom, may summarily remove the same. *Van Wyck v. Lent*, 33 Hun, 301, 303.

Again, the obstruction of the use of a street so as to unreasonably impede travel and render its use inconvenient or dangerous to the traveler may become a common nuisance. *Jackson v. Castle*, 82 Me. 579, 581, 50 Me. 119; *Holmes v. Cortheill*, 80 Me. 31.

When it is apparent that an obstruction to a highway actually exists, and that it is of such a

Boyd, J., delivered the opinion of the court:

The appellees filed a bill against the appellants to restrain and enjoin them "from doing or performing any act or acts contemplated to be by them done or performed" by an ordinance entitled "An Ordinance Regulating the Running at Large, Catching, Impounding, and Killing Dogs within the Corporate Limits of Hagerstown." The object of the proceeding

character as to constitute a public nuisance, the power of the municipality, under its charter, to abate the same in a summary manner is constitutionally conferred and legally resorted to. *Delaware, L. & W. R. Co. v. Buffalo*, 4 App. Div. 562.

A city is armed with ample authority to remove from its streets and thoroughfares every obstruction or impediment to their free use as such by the public, unless legalized by the authority of law. *Philadelphia v. Philadelphia & R. R. Co.* 58 Pa. 253, 253.

The government of every incorporated town has a right to improve the streets for public purposes, whether as highways or places for cisterns or wells. *Barter v. Com.* 3 Penr. & W. 253, 259.

A city has power to prevent an improper obstruction of its streets and sidewalks, and to remove nuisances occasioned thereby. *Terre Haute v. Turner*, 36 Ind. 522, 527.

The power of such authorities to remove obstructions on streets was also recognized in *Grand Rapids v. Hughes*, 15 Mich. 54, although the question of nuisance was not raised in that case.

So, the case of *Dudley v. Frankfort*, 12 B. Mon. 610, upholds the right of municipal corporations to abate and remove an obstruction upon the public street although the question of nuisance does not arise therein.

Again, in *Hart v. Broomfield Twp.* 15 Ind. 226, the court upheld the right of the municipal authorities to prevent and abate obstructions on a public highway, although in that case the question of nuisance did not arise.

In *Ex parte Taylor*, 87 Cal. 91, the defendant, who was convicted and fined for the violation of an ordinance which prohibited the obstruction of the streets or sidewalks and provided a penalty therefor, contended that such ordinance was unconstitutional and void as contrary to § 6 of art. 11 of the state Constitution, which provides that a municipal corporation cannot be created by special laws, and that all charters theretofore granted should be controlled by general laws, and that the municipality had no authority to determine and declare what should constitute a nuisance upon a public street, or to provide for the punishment thereof for the reason that the general law had so provided. The court held that the ordinance was not in conflict with the law, as it proceeded upon the theory that the state law itself had declared the obstruction of the street to be a nuisance or a misdemeanor and simply forbade the obstruction or declared it to be unlawful in the exercise of its police power, and the authority expressly granted by the charter, the penalty inflicted not being different in character or in excess of the one prescribed by the general law, although less in degree.

It has been stated that it is enough if the road obstructed be a public one *de facto*, in order to make the obstruction a public nuisance. *State v. Spinbour*, 19 N. C. (2 Dev. & B. L.) 547; *State, Dawes, v. Hightstown*, 45 N. J. L. 127.

A thoroughfare or way leading from one highway to another is a highway, the stopping or obstructing of which is a nuisance, and punishable as such. *State v. Duncan*, 1 McCord, L. 352.

All roads laid out by public authority must be regarded as public roads in the obstruction of

is to test the validity of the ordinance, and therefore we need not stop to discuss any technical objections that might be urged to the form of the bill, or other pleadings, especially as the only point suggested has been remedied by an agreement filed in this court to correct an omission from the record. The ordinance, after enacting that dogs shall not be permitted to run at large within the corporate limits of Hagerstown, provides for the appointment of

which a public nuisance may be committed. *State v. Mobley, McMull*, L. 44, 48.

The power of a municipality to remove encroachments and nuisances from highways is only an exercise of police power ministerial in its nature, designed to relieve the public from such obstructions in streets as are apparent or readily ascertainable without the necessity of adjudications. *State, Dawes, v. Hightstown*, 45 N. J. L. 501.

In giving power to regulate the use of the streets and passages, and to remove obstructions therefrom, a city charter contemplates the preservation of actual, and not theoretical, easements, and the protection of the community against actual nuisances which interfere with the accustomed use of the passages. *Jackson v. People*, 9 Mich. 111, 122, 77 Am. Dec. 491.

A duty is devolved upon a common council of a city in their legislative capacity to prevent, by adequate laws, all improper encroachments upon the highway, and to provide for the removal of all obstructions, and also to prevent other nuisances which may injuriously affect the health, property, or rights of the citizen. *Giffin v. New York*, 9 N. Y. 456, 461, 61 Am. Dec. 700.

An unlawful obstruction placed upon a street is a nuisance which may be abated by any citizen if he proceeds in a proper manner, provided the nuisance is one which the law holds to be such, and not merely declared so by any board or individual. *Hoffman v. Schultz*, 31 How. Pr. 385, 394, 395.

The powers conferred upon boards of health under the New York act of 1866, chap. 74, do not justify tearing down or removing a public market in the city of New York as a nuisance or an obstruction to the streets, their powers under that act being limited to the removal of such nuisances as are detrimental to the public or dangerous to life or health. *Hoffman v. Schultz*, 31 How. Pr. 385, 394, 395.

Under § 103, N. Y. Rev. Stat., as amended by chap. 125 of the Laws of 1870, relating to encroachments upon highways laid out or ascertained, described, and entered of record in the town clerk's office, the notice to remove the obstructions from such highways must specify the breadth of the road originally intended, and therefore an order which required the supposed encroachment to be removed so that such highway may be of the breadth of 3 rods is defective as not showing the breadth originally intended. *Cook v. Covil*, 18 Hun. 288, 290.

And any obstruction in or encroachment upon a highway which unnecessarily impedes or incommodates the lawful use of such highway by the public is a public nuisance, and may be summarily abated. *Hubbell v. Goodrich*, 37 Wis. 84, 86, citing *Angell on Highways*, §§ 223, 274.

Again, encroachments upon the right to pass along a public highway which amount to public nuisances may be prosecuted on behalf of the public, and damages obtained therefor. *Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L. R. A. 823.

An obstruction placed in a street or other highway without authority of law, such as a building or a fence across it, is a nuisance, and may be removed by the lawful authorities. *Compton v. Waco Bridge Co.* 62 Tex. 715.

not more than three persons to "seize and kill, subject to the subsequent provisions of this ordinance, all dogs running at large within the corporate limits of the city of Hagerstown. All dogs so seized by them shall be detained in a suitable place, to be provided by him or them, for a period of twenty-four hours. They shall notify every owner of any dog who has a collar upon his dog's neck with the owner's name engraved thereon, of such seizure, that the same

may be ransomed upon the payment of the fees hereinafter specified." It is further enacted by § 3 "that any owner of any dog seized under the provisions of this ordinance may redeem the same upon the payment to the person so seizing and impounding said dog the sum of \$1. All dogs not redeemed shall be killed as hereinafter required," and by § 5 "that it shall be the duty of every man appointed to seize dogs under the provisions of

So, erections upon a public square are public nuisances. *Rung v. Shoneberger*, 2 Watts, 23, 26, 28 Am. Dec. 93.

Yet conductors of eave spouts and bay windows are not necessarily obstructions to a highway when so elevated as to be withdrawn from it, but the erection and use of any fixture or a deposit of any timber or other article thereon is a public nuisance. *Hyde v. Middlesex County*, 2 Gray, 267.

Steps projecting over the line of a highway are obstructions on the surface and nuisances. *Hyde v. Middlesex County*, 2 Gray, 267.

Again, a stairway extending into a public hallway in a manner detrimental to the public is a preasure, and a nuisance *per se*. *Pettis v. Johnson*, 56 Ind. 129.

And a tent of such a size and character as to obstruct travel, permitted to stand within the limits of a highway, partly upon the traveled path of the principal thoroughfare, for some days, and calculated to frighten horses of ordinary gentleness, is a nuisance rendering the highway unsafe and inconvenient. *Ayer v. Norwich*, 39 Conn. 376, 379, 12 Am. Rep. 306.

Again, the exhibition of effigies by one in the window of his house, thereby drawing large crowds in the street, and so obstructing the use of the same by the public generally, creates a public nuisance, though the same may not be of a libelous character. *Rex v. Carlile*, 6 Car. & P. 636; *Com. v. Haines*, 4 Clark (Pa.) 17.

In *Conestoga & B. S. Valley Turnp. Road Co. v. Lancaster City*, 151 Pa. 543, it was held that a toll gate erected across a turnpike road within the city limits under the authority of a turnpike act, and in existence over twenty years without objection, was not a public nuisance which the municipal authorities could summarily remove, the court relying upon the prior decision in *Easton, S. E. & W. Pass. R. Co. v. Easton*, 133 Pa. 505.

So, a toll gate across a highway leading to a bridge was held a nuisance, in *Columbus v. Rodgers*, 10 Ala. 37.

And a gate erected across a highway pursuant to legislative authority, under which the party so erecting has a right to toll for a limited period, becomes a nuisance after the expiration of such period, which may be abated by any person. *Adams v. Beach*, 6 Hill, 271, 275.

In *James v. Hayward*, Cro. Car. 184, a new gate erected across a public highway was held a common nuisance and abatable as such, even though it was not fastened.

Again, an object situated in a highway in such a way as to frighten horses of ordinary gentleness amounts to a public nuisance. *Dimock v. Suffield*, 30 Conn. 129. *Clinton v. Howard*, 42 Conn. 295, and *Ayer v. Norwich*, 39 Conn. 376, 12 Am. Rep. 306, to the same effect.

And a wheel on the outside of a mill near to the highway, so situated as to frighten horses passing there, is a public nuisance. *House v. Metcalf*, 27 Conn. 681. In this case, however, the action was of a private nature. See also *Smith v. Stokes*, 4 Best & S. 84, 32 L. J. M. C. N. S. 199, 8 L. T. N. S. 425, 11 Week. Rep. 753, *infra*.

In *Runyon v. Bordine*, 14 N. J. L. 472, it is said that no man may dig a ditch in a lane of a city 39 L. R. A.

without authority, and that a ditch so dug is a common nuisance.

Inclosing a portion of a public common was held to be a nuisance as against the public, in *State v. Woodward*, 23 Vt. 92, 100.

And the fencing in of a part of a street has been held to be a public nuisance. *Lingsdale v. Bonton*, 12 Ind. 467.

In *Lowell v. Short*, 4 Cush. 275, the city was allowed to recover against the defendant damages which it had been compelled to pay by reason of the defendant's nuisance, consisting in a deposit of earth, stones, and gravel in a street, thereby creating a nuisance.

And a similar action was upheld in *Lowell v. Spaulding*, 4 Cush. 277, 50 Am. Dec. 775, where an open cellarway constituted the nuisance.

So, in *Indianapolis v. Miller*, 27 Ind. 394, a deposit of sand and gravel in the street under a license for an unreasonable time, and not removed after notice, is a public nuisance.

Leaving a pile of wood in the road, through the breaking down of a wagon in which it is drawn, creates an obstruction of the road and becomes a nuisance if left there for an unreasonable time, *Northrop v. Burrows*, 10 Abb. Pr. 366.

And a portable steam engine upon wheels and drawn by horse power, placed within 4 yards of the center of a road between such road and a barn, and used to drive a threshing machine in the barn, but not fixed thereto or to the soil, and not protected by any building, screen, or other cover, and calculated to frighten horses, is a nuisance and an obstruction to the highway, within the provisions of the English statute 5 & 6 Wm. IV. chap. 50, § 70, the object of which act is to prevent danger to passengers, horses, and cattle. *Smith v. Stokes*, 4 Best & S. 84, 32 L. J. M. C. N. S. 199, 8 L. T. N. S. 425, 11 Week. Rep. 753.

And in support of the power of a municipal authority to proceed in a summary manner for the abatement of nuisances under the provisions of its ordinance, made pursuant to the provisions of the charter, it has been stated that to force the municipal authorities to a suit in the courts to secure the removal of obstructions from a street, where such obstructions are declared to be a nuisance, would to a considerable extent defeat the objects and purposes contemplated in the creation of municipal government. *Compton v. Waco Bridge Co.* 82 Tex. 715.

So, when the boundaries of a highway are certain the continuance of a building in such highway cannot be justified by any length of time less than forty years, but the same may be abated as a nuisance. *Com. v. Blaisdell*, 107 Mass. 234.

A permanent obstruction, such as trees standing within a sidewalk or traveled street, or stone columns which may interfere with public travel, constitutes *per se* a public nuisance, and may be summarily removed by direction of a common council. *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553.

The question whether a particular use is or is not an unreasonable one and a nuisance is a question of fact for the jury. *Allegheny v. Zimmerman*, 95 Pa. 287, 293, 40 Am. Rep. 649; *People v. Carpenter*, 1 Mich. 273, 280.

this ordinance to kill all dogs not ransomed at 10 A. M. of the morning of the day after they shall have been detained twenty-four hours in the most humane manner possible." The charter of Hagerstown contains no express provision prohibiting dogs from running at large. The only reference made to them is a power "to levy a tax and impose a license on dogs." It does, however, vest the mayor and council with power "to pass all ordinances necessary for

the good government of the town; to prevent, remove, and abate all nuisances or obstructions in or upon the streets," etc. And, after enumerating the above and other powers § 171 of article 23 of the Local Code, which includes this charter, provides that "for the purpose of carrying out the foregoing powers, and for the preservation of the cleanliness, health, peace, and good order of the community, and for the protection of the lives and property of the citi-

A private person or corporation constructing a ditch or canal across a public highway or street so as to render the highway or street of a town or city unsafe or inconvenient for public travel, and maintaining such a ditch without a bridge or other safe and convenient way of crossing, is guilty of maintaining a public nuisance under § 3620, Idaho Rev. Stat. *Lewiston v. Booth* (Idaho) 34 Pac. 809.

In *Denver v. Mullen*, 7 Colo. 345, 354, wherein the city authorities sought to abate a ditch across a certain street as a nuisance, it was held that, even if it were admitted that such ditch, by reason of its obstruction to the use of the streets, was a nuisance, yet it was not a nuisance *per se*, being constructed for a necessary, useful, and lawful purpose and used for such purpose, and was therefore in its nature not a nuisance as a matter of law, neither was it such as a matter of fact, there being no hurt, detriment, or offense to the public or to any private citizen, the only reason by which it had become a nuisance being the change of circumstances brought about either by the ditch itself or its use, there being no bridge over it at street crossings; and therefore the question whether the reason of the growth of the town, beyond the ditch, thereby causing the laying of streets across its course, had made it a nuisance, was a matter of fact which must first have been ascertained by judicial determination before it could be lawfully abated either by the public or by a private person.

In *State, Dawes, v. Hightstown*, 45 N. J. L. 127, the common council passed an ordinance ordering the removal of certain obstructions and encroachments on certain streets within a given time, and notice was given to the owner requiring him to remove such encroachments and obstructions within sixty days. It did not, however, appear that the place where such obstructions were alleged to exist was a street *de facto*, or had ever been used as part of a street, the owner having been in possession of the same for twenty-five years, and it not appearing that he had any positive notice of a meeting of the council at which such order was passed, or that the meeting was designed to adjudge that his property was a nuisance. It was held that the proceedings of the council were void, as he had no opportunity to be heard, the power of the common council to prevent and remove all encroachments upon the streets being only a police power and not extending to cases of a doubtful or uncertain nature which require to be first lawfully determined.

The Connecticut statute preventing and abating nuisances upon highways, rivers, and watercourses and fining the persons so erecting buildings obstructing a highway, does not apply to one continuing to use such erection not so constructed by himself, where it has been used by the party erecting it for more than thirty years. *State v. Brown*, 16 Conn. 54, 57.

So, the Michigan Compiled Laws, chap. 23, § 2, amended by the act of 1861 (Session Laws 1861, p. 153), gives power to institute proceedings in cases of encroachments on a highway "when a highway shall have been laid out and opened," and does not apply to a highway existing only by dedication or user, but only to highways actually laid out and opened under such statute. *Roberts v. Cottrellville* 89 L. R. A.

Highway Comrs. 25 Mich. 23, 27. Following *Parker v. People*, 22 Mich. 93.

In *Campau v. Button*, 33 Mich. 625, the highway commissioners proceeded under the Michigan Statute, chap. 27, as amended by act 65 of the Laws of 1875, to establish the existence of an encroachment on an asserted highway or street, but as the record showed no evidence that the supposed encroachments were within a platted street or laid-out highway, and as the main question was whether the place occupied by such encroachment was a public or private ground, and as it did not appear that the erection touched any laid-out and opened highway, the court quashed the proceedings, jurisdiction only attaching in regard to something done against the highway, and not to any real controversy respecting the existence of the highway itself.

The Michigan Compiled Laws of 1875, §§ 1290, 1291, p. 94, relative to encroachments upon highways, extend only to such ways as are laid out under the statute, and not to those which exist merely by user. *People v. Smith*, 42 Mich. 138.

So, in *Gregory v. Stanton*, 40 Mich. 271, where the proceedings were by way of certiorari to bring up proceedings taken by the commissioners of highways to establish the existence of an encroachment upon a highway, but the exact location of the road was disputed, the court dismissed the proceedings, as the question of encroachment or no encroachment depended upon first ascertaining the location of the road, the court relying upon the prior cases of *Parker v. People*, 22 Mich. 93; *Roberts v. Cottrellville Highway Comrs.* 25 Mich. 23, 27; *Campau v. Button*, 33 Mich. 627.

And in *Gregory v. Knight*, 50 Mich. 61, the highway commissioners sought to remove an encroachment from a highway, but the defendant denied both the encroachment and the existence of the highway as one regularly laid out, and did not appear or recognize the validity of the inquest. Neither the notices nor the finding of the jury furnished any means of ascertaining the extent of the alleged encroachment or the distance from what was claimed to be the true highway line as required by Mich. Comp. Laws, § 1290. The court quashed the proceedings, holding that in such cases the encroachment must be so described as to show in what direction and how far it extends beyond the line of the highway, so as to enable everyone to know what is the line to which it must be removed, and what are the road bounds, no jurisdiction existing by such special and summary proceedings to determine disputes concerning private estates or boundaries, the determination of which must be by legal process, as it is only when the existence and bounds of the highway are not really questionable that the question of encroachments can be thus summarily settled.

The *ex parte* action of surveyors and commissioners of highways cannot affect vested rights or settled controversies although they may be useful witnesses upon questions of encroachments upon highways when they speak of matters with which they are familiar, but they have no greater right than anyone else to determine starting points or boundaries. *Gregory v. Knight*, 50 Mich. 61.

zens, and to suppress, abate, or discontinue, or cause to be suppressed, abated, or discontinued, all nuisances within the corporate and sanitary limits of said town,—they may pass all ordinances or by-laws from time to time necessary." To insure the observance of such ordinances, it authorizes the imposition of fines, and imprisonment in default of the payment of fines imposed. If dogs by running at large had become nuisances, or offended any

of the other provisions of the charter quoted above, it would seem clear that the mayor and council could adopt reasonable measures to abate the nuisance or remedy the evil, although there is no express provision in the charter prohibiting them from running at large. We held in *Cochrane v. Frostburg*, 81 Md. 54, 27 L. R. A. 728, that the mayor and city council of Frostburg had power to prevent cattle from running at large under the general authority to

But every obstruction to a highway is not a nuisance. *People v. Carpenter*, 1 Mich. 273, 289; *Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am. Rep. 649; *Com. v. Hauck*, 103 Pa. 536, 537; *Gitt v. Hanover*, 4 Pa. Dist. R. 606.

Neither is every obstruction of a street or highway objectionable, but if unreasonably continued or without direct legal right it becomes such, and therefore a public nuisance. *Ely v. Campbell*, 59 How. Pr. 333, 335.

In *King v. Russell*, 6 Barn. & C. 566, it is said that, so long as the alleged obstruction is for the public convenience, there can be no reasonable ground of complaint.

It is not every obstruction, irrespective of its character or purpose, that is illegal though not sanctioned by express legislative or lawful authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations. *Simon v. Atlanta*, 67 Ga. 618, 622, 44 Am. Rep. 739.

Obstructions of a partial and temporary character from the necessity of the case and for the convenience of mankind will be justified, when such obstructions occur in the customary or contemplated use of the highway, and the question of their necessity and reasonableness and of the customary or contemplated use is one for the consideration and determination of the jury under all the circumstances of each particular case. *Graves v. Shattuck*, 35 N. H. 257, 264, 60 Am. Dec. 536.

Yet obstructions to streets, in order to render them legitimate, must be such as are reasonably necessary, and those exercising the right must do so, so as to discommode others as little as is reasonably practicable, and they must remove the obstruction or impediment within a reasonable time, having regard to the necessities and circumstances of the case. *Simon v. Atlanta*, 67 Ga. 618, 622, 44 Am. Rep. 739.

If one occupies the public street in connection with the purposes of his trade or business, for an unreasonable time, and thus causes inconvenience and a nuisance to the public, he is guilty of creating a public nuisance, and he cannot justify his occupation of such road by reason of the inconvenience of his own premises. *Rex v. Jones*, 3 Campb. 220.

And a license by the legislative act legalizing obstructions in the streets of a municipality, which otherwise would be nuisances, is dependent upon the legislative will, and may be withdrawn. *Winter v. Montgomery*, 83 Ala. 569, 568.

In *Graves v. Shattuck*, 35 N. H. 257, 264, 60 Am. Dec. 536, it is said that a jury must determine from all the circumstances of each particular case whether any object permanently placed, temporarily left, or slowly moving in a public highway, is or is not a common nuisance, and at common law such determination must depend upon their finding of the fact whether the given object, under all the circumstances accompanying its occupation of the highway, did or did not necessarily obstruct the free passage of the public over and upon such highway.

A water tank used for watering purposes, erected in the streets under authority of the municipality, cannot be removed without compensation to the
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owner unless it proves a nuisance, as it is not one *per se*. *Savage v. Salem*, 23 Or. 381, 24 L. R. A. 787.

So, every encroachment upon a highway is not a nuisance *per se*; a nuisance must be something that annoys the public. *Griffith v. McCullum*, 46 Barb. 561, 564; *Burnham v. Hotchkiss*, 14 Conn. 311; *State v. Merritt*, 35 Conn. 314, 318.

And therefore an encroachment which does not prevent the use of the street for ordinary purposes is not an obstruction constituting a nuisance. *Howard v. Robbins*, 1 Lans. 63.

A sleigh left standing for ten or fifteen minutes for the purpose of unloading goods ought not to be regarded as an obstruction or nuisance in a village street, the streets being intended for the purpose of permitting the transportation of goods and the like in vehicles which may be unloaded upon the sidewalks. *Sikes v. Manchester*, 59 Iowa, 65, 69.

Yet a city has no power to authorize the placing of any encroachment or obstruction upon any street or sidewalk except the temporary occupation thereof during the erection or repairing of a building on a lot opposite the highway. It cannot legalize a nuisance. *Cohen v. New York*, 113 N. Y. 533, 537, 4 L. R. A. 406; *Ely v. Campbell*, 59 How. Pr. 333; *People, O'Reilly, v. New York*, 59 How. Pr. 277; *Lavery v. Hannigan*, 20 Jones & S. 463.

Temporary obstructions in a street which are reasonable and necessary for the erection of a building upon an adjacent lot do not constitute a nuisance provided they are not unreasonably prolonged, but such obstructions are justified only so long as they are reasonable and necessary, and will not justify the owner of the lot in leaving an excavation in the street in an unsafe condition. *Stuart v. Havens*, 17 Neb. 211.

If the city has been compelled to pay damages for injuries sustained by reason of an excavation in a highway which created a nuisance, it may recover against the party occasioning the same, and are not *in part delicto* as they are bound to keep the same free from nuisances. *Portland v. Richardson*, 54 Me. 46, 39 Am. Dec. 720.

As to an authorized excavation, see *McNaughton v. Elkhart*, 85 Ind. 384, 387, *infra*, IV.

Where the city council have no authority given to extend the steps of a building in a particular street, and the ordinance specially forbids it, any extension thereof by the owner is an unauthorized obstruction of a public highway, and a nuisance which the public authorities have a right to abate. *Norfolk City v. Chamberlain*, 29 Gratt. 534, 539.

Where the charter confers power to prevent the obstruction and encroachment upon a public street as a nuisance, and to remove the same after notice to the owner, any authority or license given by the authorities for the erection or extension of the front steps of a building into the highway is *ultra vires*, and cannot bind such corporation. *Norfolk City v. Chamberlain*, 29 Gratt. 534, 539.

A city has a right to maintain an action to prevent the unlawful obstruction of a street, where such obstruction amounts to a public nuisance. *San Francisco v. Buckman*, 111 Cal. 25, 31.

So, although an obstruction or invasion of a public street may, at common law, or by reason of some act prohibited by ordinance, create and con-

pass ordinances to remove nuisances from the streets, and to ordain and enforce all ordinances, rules, and regulations necessary for the peace, good order, health, and safety of the town, and of the people and property therein. That being so with reference to such animals as cows, it would seem to be equally clear that, under such powers as the mayor and council of Hagerstown have, dogs can be prohibited from running at large on the streets and alleys of the city.

It was said by the learned judge who de-

cided the case below, that "I am not to be understood as deciding that the municipal authorities have not the power to provide for the impounding of all dogs or other animals running at large upon the streets, for the killing of such as have no owners, and for the removal and suppression of those having owners from the streets and highways of the town;" but he was of the opinion that the ordinance was void, because it did not provide for notice to the owners of the dogs taken under its provisions. It seems to us that when it is deter-

stitute a nuisance *per se*, and though the city may have the power to abate it without judicial ascertainment, yet the right to proceed by way of suit also exists as a cumulative remedy to abate a nuisance and to cause the removal of the obstruction. *Liano v. Liano County*, 5 Tex. Civ. App. 132, 134.

The removal of obstructions in, or changing the grade of, a street is incidental to the power to keep the street in repair and free from nuisances if it is necessary for the adequate exercise of that power. *Wabash R. Co. v. DeFrance*, 167 U. S. 88, 42 L. ed. 87.

Under a city charter empowering the council to make regulations to secure the general health of the inhabitants and prevent and remove nuisances, and to open, alter, abolish, extend, establish, etc., the streets of a city, an ordinance directing the marshal to remove obstructions in certain streets which prevent the public from free access to and crossing the river at certain points used as public fords, can be properly enforced. *Compton v. Waco Bridge Co.* 62 Tex. 715.

In *Skaggs v. Martinsville*, 140 Ind. 478, 33 L. R. A. 781, an ordinance prohibiting the flowing of water from a flowing well or spring upon any street or alley was held to be within the grant of power to control streets and enforce sanitary regulations, and was not unconstitutional, the public health and safety being a proper subject of legislation.

But where power is given to regulate the use of alleyways, and to remove obstructions from them, a city charter contemplates the preservation of actual and not theoretical easements, and the protection of the community against actual nuisances which interfere with the accustomed use of such passages. *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491, 497.

A municipal corporation may proceed by way of injunction to restrain a nuisance, such as the obstruction of a public highway, the injury being to the property of such corporation immediately. *Moyamensing Comrs. v. Long*, 1 Pars. Sel. Eq. Cas. 143.

Permitting a raft of wood to lie longer in a place than the regulations of the city authorities require is productive of a nuisance, public in its character, and which the city authorities have power to abate, inasmuch as it obstructs or annoys such things as are of daily convenience and use. *Tourne v. Lee*, 8 Mart. N. S. 548, 20 Am. Dec. 261.

So, an action will lie by a city against a county, to abate and remove a county jail and the cesspool connected therewith from a public square of the city, the same being an obstruction in the nature of a purpresture, a public nuisance, and also for an abatement of the cesspool as a nuisance, resulting from its improper construction, the same being dangerous to the public health. *Liano v. Liano County*, 5 Tex. Civ. App. 132.

Where the statutes point out the remedies given to the board of highway commissioners of the town for the removal of encroachments upon a highway, they must adhere to such remedies, and cannot cause such obstruction to be otherwise removed upon the ground that it is a nuisance. *Griffith v. McCullum*, 46 Barb. 561, 564. *Hubbell v. Goodrich*, 39 L. R. A.

37 Wis. 84, 86, and *Wyman v. State*, 13 Wis. 664, *infra*, to same effect.

In *People, Chandler, v. Smith*, 93 Cal. 490, the action was brought to abate a nuisance caused by the obstruction of a public street in a city, but as the question turned upon the admissibility of a judgment recovered in a former action brought against the city, by which action the plaintiff established his title to the land in question, the question of the power of the authorities to abate such a nuisance was not determined.

Water pipes laid by the water commissioners, exposed above the surface and therefore not in the required position, and liable to injury and destruction from frosts and the effects of public travel, are a public nuisance, and may be removed by such commissioners, and also, in case of their refusal or neglect to interfere, by the public authorities, the same being an obstruction to the highway and a public nuisance. *Jersey City Water Comrs. v. Hudson*, 13 N. J. Eq. 420, 425.

In that case, however, the court refused to proceed by way of injunction to abate such nuisance, for the reason that although equity has jurisdiction by way of injunction to restrain a public nuisance, yet it will not interfere in cases where the object can be attained in ordinary tribunals.

But if the obstruction or encroachment is not a public nuisance, and is not wilfully placed in the highway, the supervisors have no power to cause the summary removal thereof; and in such a case if a remedy is given by statute it must be resorted to. *Hubbell v. Goodrich*, 37 Wis. 84, 86; *Wyman v. State*, 13 Wis. 664.

The obstruction or encroachment contemplated by § 1326 of the Wisconsin Revised Statutes must be placed intentionally, wilfully, and maliciously. *Pauer v. Albrecht*, 72 Wis. 416; *State v. Leaver*, 62 Wis. 387; *Hubbell v. Goodrich*, 37 Wis. 84; *State v. Preston*, 84 Wis. 675; *Childs v. Nelson*, 69 Wis. 125.

In *Fresno v. Fresno Canal & Irrig. Co.* 98 Cal. 179, 180, action was brought by the city to abate as a nuisance a certain ditch or canal which ran through parts of certain streets of the city, which canal had been constructed at great expense more than five years before the incorporation of the city and in the face of and without objection of the supervisors of the county or of the public, and the court held that under such circumstances if the nuisance existed merely in the manner in which the canal was conducted or managed it was a nuisance which could be remedied without a total destruction of the property, and therefore the company should be enjoined from conducting the canal in such a manner as to make it a nuisance, but that a total destruction of the property should not be decreed, and the court reversed the order of the court below which ordered the canal to be entirely abated, filled up, and destroyed as a nuisance *per se*. In this case the canal had existed for over eleven years prior to the abatement of the nuisance.

As to authorized obstructions on streets, see note to *Spencer v. Andrew* (Iowa) 12 L. R. A. 115.

Upon the question of proceedings by way of mandamus to compel the removal of obstructions from highways, see note to *People, Brokaw, v.*

mined, as we do, that the power was vested in the mayor and council to prevent dogs from running at large, and to enforce it by impounding them, the case is practically determined in favor of the city. It is true that dogs are now generally recognized as property. At common law civil actions could always be maintained for their recovery, although they were not regarded as the subjects of larceny. But they are of a qualified kind of property, and such as is peculiarly the subject of police regulations. They have never ranked with such do-

mestic animals as horses, cattle, and sheep, in which the owner has an unqualified and complete property. Various reasons have been assigned for the distinction, among which are that dogs are not used for food, husbandry, or as beasts of burden, but are generally used either for the mere whim or pleasure of the owner, or for such purposes as are calculated to arouse their natural ferocity to some extent, such as hunting, protection, etc. But probably the most potent reason for subjecting them to more control than other domestic ani-

Bloomington Twp. Highway Comrs. (Ill.) 6 L. R. A. 161.

b. Stalls, show-cases, signboards, etc.

In *Lavery v. Hannigan*, 20 Jones & S. 463, the displaying of goods upon the sidewalk, and the structures erected therefor, were held to amount to a nuisance, and an obstruction of the street restrainable by injunction.

Business cannot be conducted upon the public streets, and the constant placing of show-cases for the exhibition and sale of goods thereon is unauthorized and illegal. *Simis v. Brookfield*, 13 Misc. 569.

A fruit and confectionery store placed upon the sidewalk of a public street is a public nuisance which the authorities can remove. *Com. v. Wentworth*, *Brightly* (Pa.) 318.

So, under a charter giving power to remove buildings, posts, steps, fences, or other obstructions or nuisances in the public streets, lanes, alleys, sidewalks, or public squares of the city the authorities have power to summarily remove a fish box erected upon the sidewalk by the authority of the city officials, especially after notice. *Laing v. Americus*, 86 Ga. 756, 757.

In *People, Bentley, v. New York*, 18 Abb. N. C. 124, a mandamus was granted to compel the removal of a certain show-case as an obstruction to the street and a nuisance, the court declaring show-cases upon a sidewalk extending beyond the house line and taking up the space intended for the use of the public a nuisance removable by the proper authorities.

And in *Simis v. Brookfield*, 13 Misc. 569, the court upheld the action of the public authorities in removing certain show-cases in front of business premises which caused an obstruction to the sidewalk as being illegal and unauthorized. In this case, however, such show cases were not specifically declared to be nuisances by the ordinance under which they were sought to be restrained, although the cases relied upon in the opinion dealt with such and similar obstructions as nuisances.

Under Mass. Gen. Stat. chap. 18, § 11, Pub. Stat. chap. 27, § 15, towns have power to make such necessary orders and by-laws, not repugnant to the laws of the state, for directing and managing their prudential affairs, preserving the peace and good order, and maintaining the internal police thereof, as they may judge most conducive to the welfare of the town, and therefore an ordinance which prevents the placing of show-boards and signs upon the sidewalk so as to obstruct it, and also the carrying of placards and signs for the purpose of displaying them, the tendency of which may be to collect crowds and thus interfere with the use of the sidewalk by the public and lead to disorder, is reasonable. *Com. v. McCafferty*, 145 Mass. 384. In this case, however, it did not further appear whether the carrying or displaying of such placard or sign was a public nuisance.

So, an ordinance of a city council forbidding the erection of a horse rack or place for hitching horses on a public square or street or alley of a city, enacted under the charter, is sufficient to authorize

the public authorities to abate a nuisance by the destruction of such racks. *Samuels v. Nashville*, 3 Sneed, 296.

And stands and booths erected upon the sidewalks and streets for the purposes of trade, without the sanction of the legislature, are public nuisances. *Ely v. Campbell*, 59 How. Pr. 333, 335.

In *Costello v. State*, 108 Ala. 45, 35 L. R. A. 303, a permanent and exclusive appropriation of a portion of a sidewalk next to a building for a fruit stand was said to constitute an indictable nuisance although erected on the covering of an open way to a cellar which had existed without objection for several years, and was erected under a license from the city.

So a fruit and vegetable stand extending 3 feet on a sidewalk used by a store keeper in connection with the store and in front thereof is a public nuisance abatable by the city authorities. *City v. Daub*, 1 Lanc. L. Rev. 306.

But the board of health of the city has no power under the New York act of 1866 to interfere with or remove stalls or stands on the sidewalks and streets of a city attached to a public market, either on the ground that the same obstruct a public street or are a nuisance, the act being construed as applicable only to such obstructions as are dangerous to life or health, and if such obstructions are not of that character the act does not apply. *Hoffman v. Schultz*, 81 How. Pr. 385, 386.

An ordinance providing that the sidewalk shall be of a certain width on one side of the street, and that so many feet of it next to the traveled part of the street shall be of a uniform grade and kept clear of all obstructions, permanent or temporary, leaving a certain space next to the stores without any grade to be kept for the use of the stores, which latter space is occupied by the owners of the stores and protected on the sides by iron rails (in which space the defendant placed a lemonade and ice-cream stand), is unreasonable and void, and cannot be upheld, upon the ground that such use of the street is an obstruction of the enjoyment of the same by the public and therefore a nuisance. *Barling v. West*, 29 Wis. 307, 315, 9 Am. Rep. 576.

In the above case of *Barling v. West*, 29 Wis. 307, 315, 9 Am. Rep. 576, the court stated that the trade of a lemonade and ice-cream stand was in itself perfectly lawful, and its restraint and regulation were not demanded by the public welfare, nor for the good order of the village, nor for the benefit of trade and commerce, nor for the health of the citizens, and that such an ordinance was an invasion of private rights, an unwarranted interference with an entirely innocent and lawful business; the law not allowing any right of property to be invaded under the guise of a police regulation for the preservation of health when it is manifest that such is not the object and purpose of the regulation.

In *Hall's Case*, 1 Mod. 76, 2 Kebble, 848, Vent. 169, it was held that a booth for rope dances erected in a public street was a public nuisance as occasioning broils and fighting and drawing rogues to the place.

And in *New Orleans Gaslight Co. v. Hart*, 40 La. Ann. 474, the court recognized the right of a municipality to cause the removal of lamp posts as an

mals is the fact that they are so subject to hydrophobia, which is so readily communicated not only to other animals, but to human beings, when bitten by a dog afflicted with that most terrible disease. Fortunately, cases are rare, as compared with the number of dogs that are to be found in most places, but the damage that may be done by one mad dog is fearful to contemplate. Conceding, then, that the appellant corporation has the power to prohibit dogs from running at large, and knowing that the law does make a distinc-

tion between them and other domestic animals, courts cannot say, as a question of law, that an ordinance of this character is wholly unreasonable and void, as we would have to do to set it aside. We cannot assume that it may not be reasonably necessary to prohibit dogs from running at large in a city the size of Hagerstown, nor can we say that can be accomplished without some such provisions as those included in this ordinance. There are various kinds of dogs. Some are very valuable, others utterly worthless; some whose owners

obstruction to the streets, although it did not appear that the same were removed as nuisances.

In *Spencer v. Andrew*, 82 Iowa, 14, 12 L. R. A. 115, action was brought to contest the right of the defendant to set up, maintain, and use a weighing scale in the streets of the town, and to restrain the use of the same as an obstruction to the street and a nuisance, but the court distinguished the case from that of *Emerson v. Babcock*, 66 Iowa, 258, upon the ground that in the case then before the court the scales were put up by permission for the purpose of serving the public need, while in the previous case there was no permission, and the maintaining of the scales was a trespass.

Yet any obstruction to the right of passage through or to the proper use of any alley by those entitled thereto cannot be considered as a public wrong, and it cannot be assumed as a matter of course that a platform erected in such an alley is an obstruction or a public nuisance,—especially where it does not cause any unusual inconvenience, an alley not being considered as a public highway or governed by the rules relating thereto. *Bagley v. People*, 43 Mich. 355, 38 Am. Rep. 122.

See also *White v. Kent*, 11 Ohio St. 550, 553, and *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, *infra*, IV. g.

See, further, as to selling upon the public streets as a nuisance, IV. e, *infra*.

c. Buildings and fences.

In *People, Wooster, v. Maher*, 141 N. Y. 330, it is said that a building projecting into the street and so creating an obstruction and a public nuisance, even though originally built with the consent of the city, may be abated by the public as a public nuisance.

No private person has a right to erect any structures upon the public streets of an incorporated town for business purposes, and if he does so he may be required to remove the same and will not be thereby deprived of any right, and any permit for such purpose must be taken as a mere license and therefore revocable under § 4089 of the Iowa Code declaring buildings or other structures upon public highways to be nuisances, which § 456 gives the town council power to abate. *Emerson v. Babcock*, 66 Iowa, 258. In this case platform scales were removed from the streets by the city authorities under its ordinance.

Where power is given to the trustees of an incorporated village to exercise the powers and duties of highway commissioners within the limits of such village so far as such powers are consistent with other parts of the act giving power to highway commissioners, such board may proceed to remove structures which have become obstructions and nuisances upon streets without giving notice,—especially where there is a provision in the act requiring such a board so to do. *Walker v. Caywood*, 31 N. Y. 51, 64.

Where a building is erected so as to obstruct the public travel upon a public highway it is the duty of the highway commissioners to remove the same even in a summary manner, upon the ground that in case of such a building entirely obstructing a

highway it would be absurd to hold that such commissioners must leave it until some individual who was specially injured by the nuisance, should tear it down or remove it. *Cook v. Harris*, 61 N. Y. 443, 454.

In *Bybee v. State*, 94 Ind. 443, 447, 48 Am. Rep. 175, it is said that the permanent and exclusive use and occupancy of any public street or highway by any person by the erection or maintenance of any structure thereon or beneath or above the surface, which wrongfully obstructs, or may obstruct, such street or highway, is a misdemeanor within the meaning of the Indiana statute (Rev. Stat. 1881, § 1964), punishable as a public nuisance, and that the question whether or not the particular structure obstructs or may obstruct wrongfully the public street or highway is a question of fact for the court or jury. To the same effect, *Grove v. Fort Wayne*, 45 Ind. 429, 15 Am. Rep. 262; *Centerville v. Woods*, 57 Ind. 192; *Logansport v. Dick*, 70 Ind. 66, 86 Am. Rep. 166.

If a building erected in a street constitutes a public nuisance, the city, through its common council, has power to abate such nuisance as often as it may be repeated, and it may also institute judicial proceedings to prevent or remove such obstructions. *Cheek v. Aurora*, 82 Ind. 107, 112, 113. In this case it was sought to restrain the action of the public authorities, acting under notice served by them, in pulling down, destroying, and removing certain wooden buildings with sheds and wooden structures connected therewith, which obstructed the street and excluded the public from the use thereof, but the court denied relief and upheld the proceedings of the public authorities.

So, if a street is legally established and opened, the common council of a city has full authority to order the removal, and, in case of refusal to obey the order, to remove wooden buildings standing in a street and constituting a nuisance thereon, it being the duty of the city to see that its streets are clear of nuisances and obstructions. In this case the action was in trespass against the city to recover damages for the tearing down and demolishing of the plaintiff's wooden building, but the right of the city was maintained. *Hawley v. Harrell*, 19 Conn. 142, 153.

Where the erection or structure itself constitutes a nuisance, as where it is put up in a public street, its removal is necessary for the abatement of a nuisance. *Barclay v. Com.*, 25 Pa. 503, 506, 64 Am. Dec. 715.

So, where a building or structure is erected, or encroaches upon the highway, the same has been held to be abatable by the municipal authorities as a nuisance.

But a municipal corporation, before it can, by its mere declaration that a dwelling house is a nuisance, subject it to removal, must first resort to some proper judicial proceeding, giving the owner or occupant an opportunity to be heard. *Tease v. St. Albans*, 38 W. Va. 1, 19 L. R. A. 802, in which case it was sought to restrain the action of the city authorities in tearing down the plaintiff's house, which was alleged to encroach on a public street.

And under the Georgia Code, notice is necessary

might readily come to their relief if seized for running at large, while there are others that either have no owners, or, if they have, would not be acknowledged by them if a fine might be the result of such recognition. In the case of *Sentell v. New Orleans & C. R. Co.* (decided by the Supreme Court of the United States on April 26, 1897), 166 U. S. 698, 41 L. ed. 1169, the court said it was practically impossible by statute to distinguish between valuable and worthless dogs, and, "acting upon the principle that there is but a qualified property in them.

and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police power of the several states." Again, it was said that legislation on the subject "is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him

before a house can be pulled down or destroyed by such authorities in order to abate a nuisance. *Pruden v. Love*, 87 Ga. 190, 192.

Any permanent obstruction to a public highway, such as that caused by the erection of a fence or building thereon, is not of itself a nuisance although it may not operate as an actual obstacle to travel, or work a positive inconvenience to anyone. *State v. Edens*, 85 N. C. 522, 526.

So, the public are not deprived of their rights by encroachment. Buildings erected on public grounds or on highways acquire no right either on account of time or expenditure. *Philadelphia v. Philadelphia & R. R. Co.* 58 Pa. 268, 268.

A building or a fence placed across a street or other highway without authority of law is a nuisance which may be abated by the proper authorities. *Compton v. Waco Bridge Co.* 62 Tex. 715.

In *Garland v. Towne*, 55 N. H. 55, 60, it is said that the erection or continuance of a building upon or over any highway is a nuisance. In that case, however, the action was brought by a private individual to recover damages for injury sustained by the falling of snow and ice from the roof of the building upon the plaintiff.

So, buildings and fences erected upon a public square, obstructing the public in the use of the same as a square are nuisances which a municipality has a right to abate and to restrain. *People v. Bryant*, 93 Cal. 248.

In *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564, the erection of a market place in the middle of a public street was restrained as a nuisance to the public, as interfering with their enjoyment of the streets.

So, the erection of a market house in the public streets or squares of a city will be restrained in equity as a nuisance at the instance of the public. *Columbus v. Jacques*, 39 Ga. 506, 512.

And in *Com. v. Rush*, 14 Pa. 186, a private dwelling house dedicated to a specific public use, mentioned in the act of legislature, erected upon a public square, was held to be a nuisance restrainable by injunction or by indictment, and not justifiable by any authority derived from the city council, the facts showing that the damage was irreparable.

Again, a building standing on wheels, and implements of machinery used in removing the same, left standing upon a highway so as to encumber and render the same unsafe, may be removed by the superintendent of streets, as a public officer of a municipal corporation, as a nuisance. *Day v. Green*, 4 Cush. 433.

And again, a stone walk 85 feet long and 5 feet wide inclosing an areaway to a basement erected in the highway is a nuisance *per se* which cannot be legalized by a license from the public authorities without express authority. *Smith v. McDowell*, 148 Ill. 51, 22 L. R. A. 393.

So, a building extending 10 feet 5 inches into a public road is a public nuisance removable by the highway commissioners, even though it does not entirely obstruct the road. *Van Wyck v. Lent*, 38 Hun. 301, 303.

And in *Lutterloh v. Cedar Keys*, 15 Fla. 306, a 39 L. R. A.

building erected in the center of a street 60 feet wide immediately in front of a building occupied as stores and sleeping apartments and suitable for dwelling purposes, for the purpose of a public market and as a pound for confining swine and other animals, was deemed a public nuisance. In this case, however, the action was against the municipal authorities to restrain their using the market for the purposes of creating a nuisance.

Again, in *State v. Leaver*, 62 Wis. 387, 392, a barn, erected within the limits of the east side of a street in the city, although it did not necessarily stop travel on the highway, was held to be an obstruction which might be summarily removed by the overseer under § 1336 of the Wisconsin Revised Statutes, although in that case the court did not expressly hold such obstruction to be a nuisance.

In *Cook v. Covil*, 18 Hun. 288, 290, it was said to be doubtful whether the New York Revised Statutes relating to encroachments upon highways as amended by chap. 125 of the laws of 1870, which referred only to encroachments by fences, had reference to encroachments upon a highway by means of a barn, so that proceedings could be had under such statute for the removal thereof.

A building or other obstruction of a like nature, erected upon a street without the sanction of the legislature, is a public nuisance, and, in the absence of such legislative grant, no power exists in the municipal authorities to grant permission to erect the same,—especially where the charter confers no such power. *Daly v. Georgia Southern & F. R. Co.* 30 Ga. 793, 797. In this case the erection consisted of a street railroad erected longitudinally upon the street.

And a city ordinance prohibiting the erection of private hospitals within the city limits upon the ground that the same may be injurious to health and so become a nuisance has been upheld in *Milne v. Davidson*, 5 Mart. N. S. 409, 16 Am. Dec. 189, 191.

A stone wall erected across a highway is a public nuisance. *Allen v. Lyon*, 2 Root. 213.

Again, a house standing upon a highway, ruinous and likely to fall down, is a public nuisance for which the occupier is answerable to the public, the danger concerning the public. *Reg. v. Watts*, 1 Salk. 357.

In *Daublin v. New Orleans*, 1 Mart. (La.) 185, the court justified the proceedings taken by the city authorities whereby they pulled down and removed a house built by the plaintiff beyond the line marked out by the city surveyor, the same being a nuisance as an obstruction of a street.

And a county jail and cesspool in connection therewith, erected in the public square of the city, is an obstruction in the nature of a public nuisance which may be abated by the public authorities. *Liano v. Liano County*, 5 Tex. Civ. App. 132.

So, a wall two stories high, exposed to the weather after the house is burned, situated upon the edge of a sidewalk, insecure and dangerous, is a nuisance which the municipality are bound to abate,—especially where it is shown that it cannot fall in the direction of the sidewalk without falling upon

from the common herd." To show how far the courts of other states have sustained laws of this character, we will briefly refer to some of the cases. In *Jenkins v. Ballantyne*, 8 Utah, 245, 16 L. R. A. 689, it was held that an ordinance making a dog liable to be killed by any person unless registered and collared as provided by the ordinance, is not in violation of the constitutional provision against depriving a person of property without due process of law, but is a valid police regulation. In *Nehr v.*

State, 85 Neb. 688, 17 L. R. A. 771, a statute was declared valid which provided that, if a dog be found running at large without a good and sufficient collar, with a metallic plate on which the name of the owner is plainly inscribed, no action could be maintained for killing him. In *Blair v. Forehand*, 100 Mass. 186, 1 Am. Rep. 94, 97 Am. Dec. 82, it was decided that authority to regulate the keeping of dogs under the penalty of having them summarily destroyed, without previous adju-

it. *Parker v. Mason*, 39 Ga. 725, 729, 99 Am. Dec. 486.

Under a charter giving power to municipal authorities over the streets, and to remove, *inter alia*, buildings or other structures or nuisances therefrom, the city is justified in removing a wall at the edge of the sidewalk left in a dangerous condition by reason of fire. *Parker v. Macon*, 39 Ga. 725, 729, 99 Am. Dec. 486.

And a wall extending 10 feet into a highway, even though it leaves sufficient room to pass and repass safely, is a nuisance abatable by the public authorities under the Connecticut General Statutes. *State v. Knapp*, 6 Conn. 415, 16 Am. Dec. 68.

So, the Tennessee act of January 29, 1879, condemning all buildings, cisterns, wells, privies, and other erections in the taxing district, which on inspection are found to be unhealthy, as nuisances, does not conflict with the provisions of the Constitution. *Thellan v. Porter*, 14 Lea, 622, 62 Am. Rep. 173.

Where the city based its claim to relief in equity upon the ground that the encroachment complained of was a public nuisance, and impeded and interrupted the travel upon the streets, and interfered with business upon them, and that it narrowed the streets to the injury of the public and of the property owners in the vicinity, and averred that the injury to the streets and other property in the city was irreparable, but there was no finding in the decree of the court below in accordance with such allegation, and no proof in the record to sustain them, the decree of the court directing the walls of the buildings to be torn down because they encroached 44 inches upon the street was reversed. *Big Rapids v. Comstock*, 65 Mich. 78.

And it has been held that when the boundaries of a highway are certain, the continuance of a building in such highway cannot be justified by any length of time less than forty years, but the same may be abated as a nuisance. *Com. v. Blaisdell*, 107 Mass. 234.

The fact that the ashler or true wall of the front of a building is upon the line of a street as regulated by act of assembly and given to the defendant by the surveyor of the district, and that it is only an ornamental portion of the front which projects over the line from 6 to 15 inches, does not constitute the same a nuisance,—especially where it is shown that such custom has existed for years, and that the common council have not passed upon the subject. *Philadelphia Presbyterian Bd. of Publication*, 9 Phila. 469.

Yet even if an encroachment upon a highway by means of a building extending 6 feet into the street is a nuisance, it will justify only such a degree of abatement as will enable the public to enlarge the right of way. *Howard v. Robbins*, 1 Lans. 63.

Under a city ordinance declaring, *inter alia*, the obstruction of the public street to be a nuisance, the erection of a structure on a certain street, contrary to the provisions of the ordinance, is a nuisance, to abate which the proceedings may be brought in the name of the commonwealth for the use of the city, and the defendant cannot

be arrested under a warrant in the first instance. *Scranton v. Frothingham*, 5 Pa. Dist. R. 639.

But the placing of a stepping stone on or near to the edge of a sidewalk for public convenience, if properly placed, does not constitute an obstruction or nuisance which the public authorities are bound to remove or become liable for damages occasioned thereby. *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804.

A fence in a highway or street is a nuisance at common law. *Gregory v. Com.* 2 Dana, 417; *State v. Merritt*, 35 Conn. 314.

Such an erection is *prima facie* an obstruction and a nuisance. *State v. Merritt*, 35 Conn. 314, 317; *Hubbard v. Deming*, 21 Conn. 366.

And a fence so erected is removable by the supervisors of a town in a summary manner as a nuisance. *Neff v. Paddock*, 23 Wis. 544.

The obstruction of a public highway is an act which in law amounts to a public nuisance. *Wakeman v. Wilbur*, 147 N. Y. 667, 663. In this case the defendant had erected fences within 14 or 2 feet of the wagon track of the highway, and so near the same as to obstruct the highway and to hinder and prevent the free use of the same, rendering it difficult and sometimes impossible to travel thereon.

By Ohio Stat. April 15, 1857 (1 Swan & C. 880, § 2), it is declared that the obstructing or encumbering by fences, buildings, structures, or otherwise any of the public highways or streets or alleys of any city or village shall be deemed a nuisance. *Little Miami R. Co. v. Green County Comrs.* 21 Ohio St. 338, 348. Affirmed *Lawrence R. Co. v. Mahoning County Comrs.* 35 Ohio St. 8.

So, one is liable to the penalty prescribed by Ill. Laws 1874, § 58, p. 921, for encroaching upon a public highway by means of a fence erected and maintained in a longitudinal manner, the act applying to all obstructions and encroachments whether they wholly or partially obstructed or encroached upon the highway, after notice to remove the same, even though the original obstruction may have been barred by the statute of limitations. *Boyd v. Farm Ridge*, 108 Ill. 403. In this case however, it did not appear that the fence was specially declared a nuisance.

Yet, before the public authorities can remove a fence as an obstruction or encroachment upon a highway, they must justify their action and show that the fence is actually within the lines of the way, their power to act being confined to that territory, the mere fact of a road being traveled or legally established not justifying the removal of fences not within the lines of the way. *Owens v. Crossett*, 105 Ill. 354.

In *Burlington v. Schwarzman*, 52 Conn. 181, 183, 52 Am. Rep. 571, the court upheld the power of the municipal authorities to remove a fence erected across a public highway.

So, the mayor and aldermen of a town have power under the Mississippi statutes to remove a fence extending across a highway or street. *Nixon v. Biloxi* (Miss.) 5 So. 621.

And a fence erected within the limits of a highway, even though it may not extend across it, is a

dication, is within the police power vested in the legislature by the Constitution of the commonwealth. In *Morey v. Brown*, 42 N. H. 278, a statute providing that dogs may be summarily killed if found uncollared, etc., was held to be constitutional. In *Julienne v. Jackson*, 69 Miss. 84, it was held that a municipal corporation may, in the exercise of the police power, provide by ordinance that unmuzzled dogs running at large shall be killed; that such ordinance did not violate the

constitutional right of the owner, although his property is destroyed without notice. In *State, Curtis, v. Topeka*, 36 Kan. 76, it was decided that statutes and ordinances regulating, restricting, or prohibiting dogs from running at large in cities, and authorizing the summary killing of those so running at large were constitutional. In the case of *Sentell v. New Orleans C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, many of the cases we have cited were referred to, and the principles announced by

nuisance, restrainable by the public authorities. *State v. Merrit*, 85 Conn. 814; *Langdale v. Bonton*, 12 Ind. 467.

Again, where the public authorities have merely allowed a fence to remain across the street until there seems to them a need for the public use of the same and for the removal of such fence, such an erection is a mere encroachment upon the public street which the authorities may remove. *Lake View v. Le Bahn*, 120 Ill. 92, 104.

The action of the sergeant of the town in entering upon the land and tearing down the fence erected thereon, which fence was an encroachment and obstruction and therefore a public nuisance upon the street, was upheld in *Yates v. Warrenton*, 84 Va. 397, even though an adverse use and title by prescription was claimed by the plaintiff who sought to restrain the action of the authorities by injunction, there having been a proper dedication of the street to the public.

So, in *Bequette v. Patterson*, 104 Cal. 282, the court upheld the action of the defendant who claimed to be road overseer of the district in removing a fence as an obstruction and a nuisance upon the highway under an order from the board of supervisors, although it was contended that he was not such overseer at the date of the alleged trespass for the reason that his official bond was not approved until the day after the trespass, but it appeared that he had taken the oath of office and that his bondsman had qualified, and that he testified that in so removing he acted as road master and by the direction of the supervisors, the court considering him as an officer *de facto*, and stating that even if he was not, yet as the board of supervisors had charge of the roads and the obstruction was illegal he might lawfully remove it under their direction.

In *Childs v. Nelson*, 69 Wis. 125, the plaintiff alleged that the defendant wrongfully entered upon his premises and cut and broke down a fence thereon. The defendant justified his action under authority received from the aldermen of the city under a resolution passed pursuant to the provisions of their charter, which gave them the power to remove in a summary manner any nuisance, obstruction, or encroachments upon the streets of the city, and, it appearing that the fence was maintained within the street intentionally and wilfully after the plaintiff had knowledge that such street was a lawful one, the court upheld the summary procedure of the authorities, relying upon the previous cases of *State v. Leaver*, 62 Wis. 387; *Hubbell v. Goodrich*, 37 Wis. 84; *State v. Preston*, 34 Wis. 675.

Under a general borough law giving the corporate officers power to prohibit and remove any nuisance or offensive matter in the highways, or in public or private ground, it was held that the public authorities had power to pass an ordinance prohibiting the erection of barbed-wire fences within the limits of the borough, and declaring those already erected to be nuisances, and providing for their removal after notice to the owners. *Bower v. Watsontown*, 1 Pa. Dist. R. 116.

Where a barbed-wire fence was erected prior to the passing of an ordinance abating such fences whether previously erected or not, as nuisances, 39 L. R. A.

and was situated in the principal thoroughfare of the town at a place where there was no pavement but the streets were there used in their entire width by the traveling public, and were in a populous part of the borough and immediately opposite the depot, it was held that such fence was a nuisance *per se* and removable by the public authorities under the borough act after notice to the owner to remove the same. *Bower v. Watsontown*, 1 Pa. Dist. R. 116.

So, the Pennsylvania borough act of 1851 (Pamph. Laws, 326), does not authorize a town council to notify property owners to set back their fences along a certain street, and to remove obstructions therefrom, and to empower the borough officers to remove them in case of noncompliance, and therefore the remedy of the property owner is at common law. *Gilmore v. Connellsville*, 15 W. N. C. 342.

Where the authorities have power to abate nuisances after notice, the notice must direct the removal of the nuisance itself, and therefore, where the authorities after directing the removal of a fence, remove the same themselves, their action is invalid, the nuisance not consisting in the offense itself but in the use of the land behind the same. *Verder v. Ellsworth*, 59 Vt. 354.

And under the power to abate nuisances and to prevent the obstruction of streets, given by a city charter, municipal authorities have no right to require the summary removal of a fence as an encroachment, where the fence is situated on a line nearly parallel to the street and does not incommode the public use of the street as a highway for teams and foot passengers, for the reason that such offense is neither a public nuisance nor an obstruction to the street, such finding being substantially that such fence does not incommode the public use of the street for any purpose, the city charter not authorizing a summary removal of a fence that is a mere encroachment, especially where a special verdict of a jury takes from it the character of a public nuisance. *Pauer v. Albrecht*, 72 Wis. 416.

In order to justify the summary removal of a fence as an obstruction and a nuisance and encroachment upon a highway, under § 1826 of Wis. Rev. Stat., it must be shown that the obstruction or encroachment was placed there intentionally, wilfully, and maliciously. *Pauer v. Albrecht*, 72 Wis. 416; *State v. Leaver*, 62 Wis. 387; *Hubbell v. Goodrich*, 37 Wis. 84; *State v. Preston*, 34 Wis. 675; *Childs v. Nelson*, 69 Wis. 125.

Where the defendant maintained a fence inclosing part of the public street intentionally and wilfully with full knowledge of the claim of the public thereto, it was held that the corporate authorities might proceed in a summary manner for the removal of such fence, special provisions being made by the city charter giving the aldermen power to remove in a summary manner any nuisance, obstruction, or encroachment upon the streets of the city. *Childs v. Nelson*, 69 Wis. 125, 135.

In *Henshaw v. Hunting*, 1 Gray, 203, 218, the defendant, the superintendent of the city streets, justified his action in forcibly entering plaintiff's close and tearing down and removing the fences, upon the ground that the fence was situated upon

them fully sustained. Among other reasons for such legislation that court said: "Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy, and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible.

In short, the damages are usually such as are beyond the reach of judicial process and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the state. It ordinarily takes the form of a license tax, and the identification of a dog by a collar and tag, upon which the name of the owner is sometimes required to be engraved; but other remedies are not uncommon." In *Hubbard v. Preston*, 90 Mich. 221, as reported in 15 L. R. A. 249, there is

a part of a public street or way which the corporate authorities had ordered to be completed under the direction of such superintendent. The plaintiff claimed title to such land by reason of his possession thereof for upwards of twenty years, although he had no conveyance thereof. The court held that such possession of the land over which the street had been laid out by the authorities, under Mass. Stat. 1803, chap. 111, did not affect the rights of the public authorities to complete such road, as the very nature of the rights vested in the town by the laying out of the streets rendered it impossible that there should be, as against them, any adverse possession until an official order and adjudication was made that the streets should be completed, or until some act or acts were done which were equivalent thereto.

In *Parker v. People*, 22 Mich. 93, action was brought by the authority of the supervisors against the defendant to recover a penalty for an encroachment upon a highway by means of a fence, under Mich. Stat. 1861 (Laws 1861, p. 153), relative to obstructions and encroachments on highways, which defendant contended was erected before the highway was laid out. The plaintiffs offered in evidence a survey bill marking the line, and a certificate of the commissioners of highways showing that they had established a public highway as described in the survey bill on a certain date. The evidence was objected to upon the ground that it purported to be a survey bill of a certificate of a road established since the commission of the offense charged as an encroachment, and that it was not competent for the commissioners to lay out a road on their own motion, and that it purported to establish a road. The court stated that as the penalty sued for was only given for encroachments upon such highways as were "laid out" the evidence of user admitted on the trial to prove the existence of the way was immaterial and not pertinent to the issue, the statute only applying to such roads as were laid out by the commissioners, and not to those established by user.

In *Sheldon v. Kalamazoo*, 24 Mich. 383, the marshal of the city, pursuant to resolution of the village board, had entered plaintiff's premises and thrown down his fence on a claim that he was occupying part of the village street. In an action against the city for the acts of the marshal in so doing, the court held the city liable upon the ground that where a person had been in peaceable possession under color and claim of right, it was not consistent with legal policy to allow him to be forcibly ejected without legal process, as in all cases of encroachments on highways outside of municipalities, provisions were made by the Michigan statute for having the question disposed of by a peaceable legal proceeding, before anyone can be so disturbed, the court further stating that, even under the power to pass ordinances preventing encroachments and compelling their removal, such corporations could not, any more than individuals, violate the public peace, and the forcible entry was therefore not justified.

The proceedings for the summary removal of en-

croachments upon highways, provided for by Mich. Comp. Stat. chap. 27, cannot be instituted where the contest appears to be real and in good faith, a question of the existence of the highway claimed or a question involving the title to real estate rather than a question of encroachment upon a highway admitted to exist or the existence of which is not in good faith seriously contested or so clearly shown as to admit of no real and bona fide contest, and in such a case the proceedings should be dismissed as beyond the jurisdiction. *Willson v. Gifford*, 42 Mich. 454, 456. In which case the proceeding was brought for encroaching upon a highway by means of fences.

In *People v. Smith*, 42 Mich. 133, defendant was sued for not removing a fence charged to have been an encroachment on a highway after receiving notice from the highway commissioners to do so. Sections 1290, 1291, Comp. Laws 1875, p. 94, authorized the commissioner, where a highway had been laid out and opened, to order the removal of any fences or other encroachments within thirty days, the order to specify "the width of the road, the extent of the encroachment, and the place or places in which the same shall be with reasonable certainty." The court stated that the object of the order and notice was to point out clearly the extent of the supposed encroachment by declaring how far the fence was from where it ought to be and that a notice merely stating where the theoretical line was drawn on paper gave no information concerning its position relative to the encroachment, and that therefore the order issued was a nullity and the defendant was not informed of the extent of the commissioner's claim.

In *Peckham v. Henderson*, 27 Barb. 207, a fence which had existed in a highway for over thirty years was held not to be a public nuisance abatable as such by the highway commissioners, especially where there was no evidence of annoyance or inconvenience to the public and the statute of limitations, had pointed out the time of remedy, and there had been an adverse holding, the statute making a distinction between obstructing a highway and encroaching upon it by fences, the court stating that either might be made a public nuisance when of such a character as to produce annoyance of a real and substantial nature.

In the above case of *Peckham v. Henderson*, 27 Barb. 207, the court looked upon the case of *Wetmore v. Tracy*, 14 Wend. 250, where the fence was built in or near the center of a road 3 feet wide for the distance of 35 rods, and was declared to be a public nuisance abatable by the public authorities as properly decided, although it stated that it did not think it an authority for holding that all encroachments, however slight and without regard to public inconvenience or annoyance, were public nuisances.

In *Waterloo v. Union Mill Co.* 72 Iowa, 437, wherein the city sought to abate a nuisance caused by the construction of a mill race in the street which had been in use for over twenty years and was uncovered so that the street at that place could not be used by the public and was therefore

an excellent note on the subject, where many authorities are collected. The cases are practically unanimous in holding that laws providing for the summary destruction of dogs at large contrary to statutes or ordinances are constitutional, and within the police power of the state.

The ordinance before us requires notice of seizure to be given to the owner of any dog upon which there is a collar with the owner's name engraved thereon, so it can be redeemed by the payment of the sum of \$1. The

same protection against the destruction of dogs is thus given owners as is done in cases above cited, where collars were required to be worn as evidence of the payment of the license fees. Section 3 provides that any owner of any dog seized may redeem the same upon the payment to the person so seizing and impounding said dog the sum of \$1. A reasonable construction of that section would require that when the owner is known he at least be notified of the seizure of his dog. If a dog be of any value to his owner, its absence

a nuisance, it was held that the right of the city and the public to the use and occupancy of the street was not barred by the statute of limitations, as the city was invested by the legislature with governmental powers and held the fee of the streets or an easement thereon in trust for the public, and the court therefore upheld the plaintiff's relief.

An act incorporating a city, which provides that any buildings heretofore erected within the original plan of the said city encroaching on any of the said streets shall not be deemed nuisances or abatable as such, is intended to prevent a continuance of such encroachments after such buildings shall have decayed or required rebuilding, and does not apply to buildings previously erected which are not in such a condition as to require rebuilding, the rebuilding of such as are decayed and require reconstruction being a public nuisance and abatable as such under the statute. *Com. v. McDonald*, 16 Serg. & R. 390, 401.

But temporary obstructions in a street, which are reasonable and necessary for the erection of a building upon an adjoining lot, do not constitute a nuisance, provided they are not unreasonably prolonged. *State, Beatty, v. Omaha*, 14 Neb. 265, 45 Am. Rep. 106.

Materials to be used in building may be placed in a street in the most convenient manner, and suffered to remain for a reasonable time, and such right arises from necessity in building. The right to partially obstruct a street does not, however, appear to be limited to a case of strict necessity, it may extend to purposes of convenience or ornament, provided it does not unreasonably interfere with public travel. *Allegheny v. Zimmerman*, 95 Pa. 287, 293, 40 Am. Rep. 649.

A temporary occupation of the street or highway by those engaged in building, or in receiving or delivering goods from stores or warehouses, or the like, may be allowed from the necessity of the case; but a systematic and continued encroachment upon the street, though for the purpose of carrying on a lawful business, is unjustifiable and a nuisance. *Gerrish v. Brown*, 51 Me. 256, 262, 81 Am. Dec. 569; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709.

In *McCarthy v. Chicago*, 53 Ill. 38, 42, where it was sought to recover a penalty on a penal bond for the violation of a city ordinance relating to the use of the streets or sidewalks by the depositing building materials thereon and for building purposes, it is said that, as the obstruction of the streets with building materials and the sinking of deep pits in the sidewalk for the purpose of erecting houses is always attended with inconvenience to the public, and is not usually free from danger, the right to use the streets and sidewalks for such purposes must be controlled by some power in order that the public may be rendered safe and that nuisances shall not be thus created.

Where the ordinance prohibited the obstruction of any street for the purpose of building "without first obtaining a written license from the mayor and aldermen, or some person authorized by them," it was held that although such ordinance was rea-

sonable and proper and within the powers conferred on the city council by the charter to make "salutary and needful by-laws," yet an authority given and signed by the mayor alone was of no effect. *Lowell v. Simpson*, 10 Allen, 88. In that case, however, it did not appear that the building was specifically declared a nuisance.

And in order to proceed in a summary way under § 1326 of Wis. Rev. Stat. an obstruction or encroachment on a highway must be so placed intentionally, willfully, and maliciously. *Pauer v. Albrecht*, 72 Wis. 416.

Upon the question of buildings in general as nuisances, and the powers of municipal corporations over them, see note to *Evansville v. Miller* (Ind.) 38 L. R. A. 161.

As to obstructions on streets or sidewalk for business or building purposes, see note to *Flynn v. Taylor* (N. Y.) 14 L. R. A. 556.

As to right of abutting owner to place building material on street, see note to *Raymond v. Kieselberg* (Wis.) 19 L. R. A. 643.

d. Things overhanging streets, etc.

In *STATE v. CLARKE*, an ordinance prohibiting an awning, except with a suitable frame, was held unconstitutional and void on the ground that it did not state what constituted such a frame or delegate the determination of the question to anyone, and it was further said to be doubtful whether a city had the power, by such an ordinance, to declare that to be a nuisance which was not so in fact, although the court did not pass upon such awning specially as a nuisance.

A by-law intended to restrain and regulate erections over a portion of the traveled way is within the legitimate scope of the power confined to towns and cities. *Pedrick v. Bailey*, 12 Gray, 163; *Re Goddard*, 16 Pick. 511, 28 Am. Dec. 259.

The projection into, and over the line of, the street for a short distance, of doorways, cellarways, and particularly of the eaves or cornices of houses, is a common thing in cities, and is regulated, if not entirely restrained, by municipal authorities; yet such projections when constructed with due care and proper precaution cannot be said to be nuisances in themselves, although they may undoubtedly become nuisances if in extent unreasonable, or if not properly constructed. *Chambers v. Ohio Life Ins. & Trust Co.* 1 Disney (Ohio) 327, 335.

A barrier stretched above the roadway or the bough of a tree overhanging it may constitute a nuisance. *Barber v. Roxbury*, 11 Allen, 320.

A bay window built in a second story, 16 feet above the sidewalk, projecting 3 feet 6 inches over the building line, is a nuisance which may be abated by injunction at the instance of the public authorities. *Reimer's Appeal*, 100 Pa. 182, 45 Am. Rep. 373.

So, bay windows projecting into and upon the street for which no permit has been obtained pursuant to a city ordinance were held to be unauthorized and within the power of the city authorities to remove as encroachments upon the city, the same being of a substantial nature, two of the windows

for twenty-four hours or more will most likely be observed by himself, or some member of his family, and he can inquire at the pound for it. The worst that is likely to happen in such cases will be the payment of the dollar as a ransom fee. The mayor and council can forbid dogs from running at large, and impose heavier penalties than that fee for the violation of the law; or they can, under the express provisions of their charter, require licenses to be taken out, and, if necessary or proper for the enforcement of

such requirement, direct that unlicensed dogs be killed, and that, too, without notice to the owners. But, while this is true, an ordinance embracing such drastic features should be very cautiously enforced. As many of the provisions of the one before us are, to say the least, severe, it should be construed liberally in favor of the owners of dogs, if any cases arise under it, and it ought not to be extended beyond what is absolutely required by its terms. But under the authorities we cannot say that it is unconstitutional,

extending nearly 6 feet out from the house line. *Simis v. Brookfield*, 13 Misc. 569. In this case, however, it does not appear that the ordinance specifically declared such encroachments to be nuisances, but the court relied upon several cases holding such encroachments and obstructions to be nuisances.

And the power of a city to regulate the use of its streets, and to permit obstructions upon its sidewalks by means of cellar-doors, awnings, bay windows, and other projections of a like nature, was recognized in *Livingston v. Wolf*, 136 Pa. 519, in which case the court did not consider a bay window extending 27½ inches over the street line to be an obstruction, but in this case the court did not pass upon the question of nuisance.

So, a cornice projecting from a brick building and overhanging a sidewalk in such a manner as to be dangerous and liable to fall is a nuisance which may be abated by a city, inasmuch as it interferes with the safe use of the sidewalk below. *Grove v. Fort Wayne*, 45 Ind. 429, 15 Am. Rep. 262, 269.

In *Augusta v. Burum*, 93 Ga. 68, 26 L. R. A. 340, it is said that as a municipal government could not, in the absence of express legislative authority, grant the right to erect and perpetually maintain awnings over the sidewalk of the city, the rightful existence of such awnings can be accounted for only upon the assumption that they were erected under a license, express or implied, from such government, and however long they may have been in existence their continuance must be referred to the original license or to a renewal or repetition of the same. No lapse of time will render the license irrevocable, but there would be an equitable estoppel against a needless or capricious revocation until sufficient time had lapsed after the expense of erecting the structures was incurred to allow those who incurred such expense to realize in the way of use and enjoyment a fair return for their outlay. When such time has elapsed the license to continue the structure may be revoked, and unless after reasonable and fair warning they are removed by the owners, the city authorities may remove them as encroachments upon the streets no longer authorized.

Awnings are a proper subject of municipal control, as the same may create a nuisance rendering the authorities liable for damages. *Drake v. Low-eil*, 13 Met. 292.

Yet a wooden awning is not a nuisance *per se*. *Hawkins v. Sanders*, 45 Mich. 491.

An awning erected over a sidewalk is not *ipso facto* an illegal structure, and is not subject to abatement by a municipal corporation merely because it is an encroachment on the street, and is not necessarily an illegal encroachment. *Hisey v. Mexico*, 61 Mo. App. 248, 253.

Under § 87, Mo. Rev. Stat., power is conferred on cities of the third class to prevent and remove all obstructions and encroachments in the streets or sidewalks, and power is also given to the city council to regulate awnings, awning posts, upon the sidewalks in any public streets or public place in the city, and § 88 of the same also confers power on such cities to pass ordinances for the removal of

nuisances. In *Hisey v. Mexico*, 61 Mo. App. 248, 253, it was held that the above sections of the statute in substance enacted that awning posts were not necessarily illegal obstructions, and that therefore the right of a city to tear them away could not be justified under the general power of the city to declare and abate nuisances, and that it was only when the structure was a nuisance *per se* that the decision of the municipal authorities as to its character was conclusive, and that therefore the owner might successfully contest the right of abatement by showing that the matter complained of was not a nuisance. In fact, the court following the prior decisions in *St. Louis v. Stern*, 3 Mo. App. 48; *St. Louis v. Schnuckelberg*, 7 Mo. App. 536.

Where, in an action to restrain the action of the city authorities in tearing down the plaintiff's awning or veranda as an encroachment and nuisance upon the sidewalk, the evidence showed that the structure in no wise interfered with the free use of the street and was securely built and therefore not dangerous, and that such verandas and awnings had existed in the city since its incorporation and had been in many ways recognized by the municipal authorities as legal structures,—it was held that as against the city such an awning might be maintained so long as it was a safe structure and did not materially interfere with the use of the streets, but the public authorities might in the future regulate it, although they could not abolish it merely because it encroached upon the street. *Hisey v. Mexico*, 61 Mo. App. 248, 253.

A city ordinance making it unlawful for any person to erect an awning before his house in any street in the city, except as provided for by such ordinance, is lawful, the municipal government having the right to secure a free and uninterrupted passage through its streets, such law being salutary and needful, and the proceedings of the mayor by virtue of the authority vested in him and also pursuant to a vote of the common council in the removal of such awning, are legal and valid, the same being a nuisance as an obstruction of the street, erected in violation of the city ordinance. *Pedrick v. Bailey*, 12 Gray, 161.

Again, under the charter of the city of New York of 1870, subdivision 10, § 21, which vests the common council with power to regulate the use of the streets and sidewalks for signs, sideposts, awnings, awning-posts and horse troughs, an awning erected in front of the plaintiff's premises is a nuisance and an unauthorized obstruction of the street which the commissioners of public works and the superintendent of encumbrances are bound to remove; and in such a case the court will not restrain the action of the public authorities in removing the same. *Farrell v. New York*, 22 N. Y. S. R. 469; *Brinkman v. Elsler*, 40 N. Y. S. R. 865.

So, a permanent wooden awning or roofing covering the street is a public nuisance which the public authorities have power to remove as such, after notice that the same exists, the same being obviously a nuisance in a highway which is prohibited by the city ordinance. *Hume v. New York*, 74 N. Y. 264.

In *Simis v. Brookfield*, 13 Misc. 569, it was held that

and cannot hold it to be so unreasonable in its terms as to justify us in declaring it void. It may not be a wise law, and may possibly work hardship on some owners of dogs, but, if that be so, it can be remedied by the people themselves, as the mayor and council are only their representatives. It is not subject to our control; certainly not as the case is now presented to us. So far as we are informed by the record, nothing has been attempted to be done under it; yet we are asked to declare

the whole ordinance null and void on its face. This we cannot do for the reasons we have given. Being of the opinion that the mayor and council had the power to pass an ordinance on this subject, and that the one before us is not unconstitutional, or in conflict with the charter, or so plainly unreasonable as to justify us in declaring it void, the decree will be reversed, and the bill dismissed.

Decree reversed, and bill dismissed, with costs to the appellants.

an awning with a roof of boards covered with a preparation of tar resting on a light wooden framework supported by ten wooden posts near the curb line, made dangerous in case of fire, from the roof of which was suspended a gas pipe with numerous jets having porcelain shades with numerous advertising cards attached thereto, and displaying articles of merchandise, was properly abatable by the city authorities under an ordinance forbidding such structures without a permit and unless made of metal or canvas. In this case, however, the awning was not specifically declared to be a nuisance although the court in its opinion relied upon several cases declaring such awnings to be nuisances.

Where, in an action against a city to recover damages occasioned by an awning overhanging the street, the city sought to free itself from liability for the reason that the common council had neglected to pass an ordinance upon the subject although § 2, subchap. 4, subd. 13, of the city charter gave such council authority by ordinance to remove and abate every nuisance, obstruction, or encroachment upon the streets or highways of the city, the court held that such omission of duty did not free the city from liability, the city still having authority to regulate and control the use of the streets. *Bohen v. Waseca*, 32 Minn. 176, 180, 50 Am. Rep. 564. It would therefore appear from that case that the city would have the authority to remove such an awning as a nuisance.

In *Fox v. Winona*, 23 Minn. 10, it was sought to restrain the action of the city authorities enforcing an order of the common council and removing a wooden awning in front of plaintiff's building. The city charter authorized the council to prevent the encumbrance of streets, and under such charter the city passed an ordinance providing that all wooden awnings theretofore erected so as to overhang or project into or over any sidewalk or street should be removed within two years after the passing of the ordinance. The court held that the word "encumbrance" was used in the sense of an obstruction, and that the authority conferred to prevent the encumbrance in the street by carriages, lumber, etc., or by "any other material or substance whatever" was an authority, not only to remove or cause to be removed anything actually obstructing the street or sidewalk, but also to take measures to prevent anything from becoming an obstruction, and therefore authorized the common council, not only to forbid the setting of posts in the street to support an awning, and to remove and cause to be removed posts already set in a street for that purpose, but on account of their liability to forbid the erection of wooden buildings whether supported by posts or not, and to remove the same or cause them to be removed. In this case the encroachment or obstruction on the highway in the manner specified was not specifically held to be a public nuisance, although similar cases have held such an obstruction to be a nuisance.

A decree in an action to restrain the proceedings of the public authorities, in tearing down an awning as an encroachment and a nuisance upon the street pursuant to the resolutions and ordinances of the municipality, from interfering in any man-

ner or under any circumstances with the awning, is too broad, inasmuch as such a structure may become dangerous or may prove to be an actual obstruction or hindrance to the use of the street, and the court will therefore modify such decree so as to restrain the action of the municipal authorities in interfering with or removing such awning so long as it is maintained as a safe structure and does not materially interfere with the free use and enjoyment of the street. *Hisey v. Mexico*, 61 Mo. App. 248, 253.

And in *Hoey v. Gilroy*, 129 N. Y. 182, Reversing 37 N. Y. S. R. 784, the court upheld the power of the city authorities to permit the erection of an awning over the street, and restrained the action of the police authorities in removing the same as an obstruction. The question of nuisance, however, did not arise in that case.

In a case involving the question of the liability of a city for damages occasioned to the plaintiff's intestate through the falling of a sign suspended over the highway, it is stated that if the effect of the city charter and by-law is such as to constitute the flag and weight attached thereto a nuisance to the highway, it is a public nuisance, and the duty to remove it, whether imposed or assumed, is a public governmental duty. *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342, 346.

The main question involved in that case, however, was the liability of the city for the damages occasioned. *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342, 346.

In *Hexamer v. Webb*, 101 N. Y. 377, 385, 386, 54 Am. Rep. 703, it was held that a ladder suspended from the roof of a building upon which were two planks fastened to the ladder by ropes, thus furnishing a scaffold for workmen which was shifted from place to place as the work progressed, was not a nuisance as it was not necessarily injurious or dangerous or an obstruction to the street, and if properly used might well be employed for the purpose intended, which was the painting of the building; neither was it a violation of an ordinance prohibiting the hanging of any goods, wares, or merchandise, or of any other things, in front of any building at a greater distance than 1 foot. In this case, however, the action was to recover damages for personal injuries sustained by the plaintiff, who was struck by the falling of such scaffold while walking on the sidewalk.

And in *Cushing v. Boston*, 128 Mass. 330, 35 Am. Rep. 333, it is stated that under Mass. Gen. Stat. chap. 19, § 13, the city authorities of Charleston have power to maintain rules for, and to regulate the erection of, balustrades, or other projections, upon the roofs or sides of buildings as the safety of the public require, and that the construction of such section shows that it is intended to deal with those parts of a building which may project near or over a line of a highway, and which, if not properly constructed and maintained, may endanger the safety of the public; and that it does not attempt to deal with those additions to, or parts of, the building which may occupy the highway itself, such as a projecting doorstep, or obstruct travel thereon, and thus constitute a nuisance in the highway if not authorized by law. In other words,

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut
v.
Dennison W. CLARKE, *Appt.*

(69 Conn. 371.)

An ordinance prohibiting the maintenance of an awning over a sidewalk "except the same be upon a suitable frame,"

cities are authorized to regulate the erection and maintenance of such projecting parts of a building which do not in any way obstruct the use of the highway, or constitute a defect therein, although under some circumstances they may endanger the safety of the public; but they are not authorized to regulate the erection and maintenance of permanent structures or additions to a building which stands in the highway itself, or create an obstruction therein.

A local government act for the promotion of health and the regulation of buildings in a borough, enacted, after making various provisions for the prevention of nuisances upon the pavements of streets, that no projection should be made in front of any building over or upon the pavement, was held not to apply to projections on the front of a building which were too high up to interfere with free passage along the footpath. *Goldstraw v. Duckworth*, L. R. 5 Q. B. Div. 275, 49 L. J. M. C. N. S. 73, 42 L. T. N. S. 440, 23 Week. Rep. 504, 44 J. P. 410.

The English nuisance removal act of 1855, chap. 121, being a sanitary act, applies only to such nuisances as are injurious to health, and therefore where rainwater collects on a railroad bridge and rains through the planks dripping onto the highway and onto persons using the street, such nuisance is not within the provisions of the act so as to be subject to abatement by the authorities thereunder. *Great Western R. Co. v. Bishop*, L. R. 7 Q. B. 550, 41 L. J. M. C. N. S. 120, 26 L. T. N. S. 305, 20 Week. Rep. 989.

The power of a municipality over buildings in general will be found treated of in *note* to *Evansville v. Miller* (Ind.) 28 L. R. A. 181.

As to right to maintain awnings in a highway. see *note* to *Augusta v. Burum* (Ga.) 26 L. R. A. 340.

e. Trees on streets.

The cases considered in this section are confined exclusively to those holding trees upon the public streets and highways to be nuisances. There are other cases, however, of a somewhat similar nature, which treat of the question of municipal power over such trees, but do not enter into the consideration of the question from a nuisance standpoint, of which authorities *Mt. Carmel v. Shaw*, 155 Ill. 37, 27 L. R. A. 580, is one.

The question of the ownership and control of trees in highways will be found in *note* to *Chase v. Oshkosh* (Wis.) 15 L. R. A. 553; and the rights of abutting owners over trees is also treated in *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671; *Daily v. State*, 51 Ohio St. 348, 24 L. R. A. 724; *State v. Avis*, v. Vineland, 56 N. J. L. 474, 23 L. R. A. 685; *Mt. Carmel v. Shaw*, 155 Ill. 37, 27 L. R. A. 580; *Bradley v. Southern New England Teleph. Co.* 66 Conn. 559, 32 L. R. A. 280.

In *Burnham v. Hotchkiss*, 14 Conn. 311, it is said that a tree or a post in a highway is *prima facie* a nuisance, but the question of nuisance in a particular case is for the jury.

But it has been stated that, independent of statute, trees in a street or highway are not necessarily a nuisance, and that in order to become such 39 L. R. A.

without specifying what should be a suitable frame, or delegating the power to determine the question to any person or tribunal, is void for uncertainty.

(July 13, 1897.)

APPEAL by defendant from a judgment of the Superior Court for Middlesex County convicting him of violating an ordinance

there must be an obstruction to the traveling public. *Everett v. Council Bluffs*, 46 Iowa, 66. To the same effect, *Bills v. Belknap*, 36 Iowa, 583; *Patterson v. Baumer*, 43 Iowa, 142.

A tree in a highway is not a nuisance *per se*, and only becomes such when it constitutes an actual injury or obstruction, and therefore it cannot be removed by a commissioner of highways, unless it be shown to be such, and he must justify his action, not upon his belief merely, but upon the actual fact; and therefore before such trees can be removed the owner thereof should have an opportunity to take them away, remove, and transplant them. *Clark v. Daseo*, 24 Mich. 88, 88.

Shade trees may stand between the sidewalk and the central part of the street without constituting a nuisance *per se*, yet they may become a nuisance by disease or decay, although the mere partial obstruction of a part of a street, when in fact such obstruction does not interfere with the public use, does not create a nuisance, as it does not work any hurt, inconvenience, or damage to the public necessary to constitute a nuisance. *Allegheny v. Zimmerman*, 95 Pa. 287, 293, 40 Am. Rep. 649.

In *White v. Godfrey*, 97 Mass. 472, 475, it is stated that since the passing of Mass. Gen. Stat. chap. 44, §§ 6, 8, the powers given to highway surveyors have been limited, and shade trees are no longer liable to be treated as a nuisance, and looped or cut down at the discretion of every such officer, the statute in question giving the mayor and other officers power to authorize the planting of shade trees when they do not interfere with the public travel or private rights, and especially providing that the trees so planted are not to be deemed a nuisance; but upon complaint made they may be ordered to be removed if public necessity seems to so require.

In order to allow a city to remove trees in order to abate an obstruction of the public street or sidewalk, it is not essential that such trees should completely obstruct the walk or occupy the entire width thereof, the question of the degree of obstruction which will justify their removal being a question for the city. *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L. R. A. 287.

Very large trees standing immediately in the center of a sidewalk, thereby necessitating the public travel passing along the narrow edges or spaces left on either side thereof instead of allowing the public to pass and have the enjoyment of the entire width and surface of the walk, is an obstruction which constitutes a nuisance *per se*. *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L. R. A. 287; *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553.

Under a charter giving the common council the general care, custody, and control of the streets, with power to lay out the same and cleanse and repair them, and make regulations for the protection of health and safety, and to define, prevent, and remove nuisances, the city authorities have power to cause the removal of anything causing obstruction to the street or sidewalk, such as a tree standing in such sidewalk, and abate it as a nuisance, for the reason that everything which is an obstruction to the free use of a street is a public

against maintaining an awning over the sidewalk. *Reversed.*

The facts are stated in the opinion.

Mr. Frank D. Haines, for appellant:

This ordinance is in derogation of private right, and in its nature and effect a penal statute, and as such must be construed strictly, *i. e.*, must not include anything not within the letter of the same, as well as the spirit.

Endlich, Interpretation of Statutes, p. 454; *Wallingford v. Ball*, 45 Conn. 350; *Hallenbeck*

v. Getz, 63 Conn. 387; *State v. Costello*, 61 Conn. 499; *Smith v. Spooner*, 3 Pick. 229; *State v. Powers*, 36 Conn. 78; *Gould v. Banks*, 53 Conn. 415, 55 Am. Rep. 143; *Sutherland*, Stat. Constr. § 400.

All statutes should be free from uncertainty and in such plain language as to apprise any intelligent man of his rights or duties thereunder.

17 Am. & Eng. Enc. Law, p. 253; *Lee Bros. Furniture Co. v. Cram*, 63 Conn. 438.

nuisance. *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L. R. A. 287. *Taylor v. Reynolds*, 92 Cal. 573, and *Marini v. Graham*, 67 Cal. 130, to the same effect.

A city charter expressly vesting in the city power "to suppress all nuisances" must be so construed as to apply to cases of nuisances clearly so to the detriment of public health and public convenience, and therefore where the overhanging limbs of trees on the sidewalk are not shown to have been so declared by law or ordinance, or even considered as a nuisance, they cannot be removed as such. *Tissot v. Great Southern Teleg. & Teleph. Co.* 39 La. Ann. 996.

Where, however, a city charter on the subject of encroachments and obstructions of streets and sidewalks gives very extensive and comprehensive powers to the common council of a quasi and legislative character, but without any particular directions as to the manner of their exercise, and such powers are peculiarly adapted to the needs of a growing and populous village or city, and clearly extend to the cutting down and removal of trees which are manifestly an obstruction to the sidewalk, even though room is left on the walk for foot travelers to pass, the same may be removed by the common council as a public nuisance. *Chase v. Oshkosh*, 81 Wis. 313, 15 L. R. A. 553.

So, the determination of a city council that trees growing on a sidewalk of a city are an obstruction to travel is conclusive under a charter giving them general control of the streets with power to define, prevent, and remove nuisances. *Vanderhurst v. Tholcke*, 113 Cal. 147, 35 L. R. A. 287.

Though a tree be planted subject to the right of the city to destroy it in the exercise of its continuing power to improve its streets, it is nevertheless the property of the owner of the fee, and when any change of grade is ordered the governing authorities of the town have the right to remove it only on the ground that it obstructs the highway and is therefore a public nuisance, or after condemnation and the payment of compensation ascertained in a mode pointed out by law. *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671, 675.

So, the destruction of shade trees standing on the outer edge of the sidewalk in front of a residence because the municipal authorities regard them as an obstruction of the walk and injurious to health does not render the city or its authorized agents liable for damages to the abutting proprietor, and the power of a city in this respect may be delegated to the city committee composed of the board of aldermen. *Tate v. Greensboro*, 114 N. C. 392, 24 L. R. A. 671.

Where a public road of a certain width was set out across a common by the English inclosure commissioners, and allotments of the land on either side were made, but 25 feet only allotted by the commissioners was used as the actual road, and the sides were left uninclosed and became covered with furze and heath, and fir trees were allowed to grow there for twenty-five years or more, which the highway board cut down and advertised for sale, it was held that the right of the public was to have the whole width of the road, and not merely that part which had been used as 39 L. R. A.

the *via trita*, preserved free from obstructions and nuisances, and that such right had not become extinguished from the fact that the trees had been allowed to grow there for such a period. *Turner v. Ringwood Highway Bd.* L. R. 9 Eq. 417, 21 L. T. N. S. 424, 18 Week. Rep. 745.

In upholding the plaintiff's claim for damage against the defendant for the unlawful removal of trees upon the plaintiff's land which the defendant alleged were a public nuisance by reason of their close standing causing dampness and unhealthiness to the public, the court stated that although the defendant had no right to remove the trees himself, he had the right, if he thought they were a nuisance to the public, to complain to the selectmen of the town under the provisions of Mass. Gen. Stat. chap. 48, § 4, and that it was the duty of such selectmen to decide the question whether such trees should be removed as nuisances. *Bliss v. Ball*, 90 Mass. 597.

But a borough ordinance passed under N. J. borough act 1878, p. 407, which declared healthy growing trees, which had been planted over twenty-five years by the owner of land on or near the edge of the roadway or a street in the borough, a nuisance and obstruction, and directing their removal as such, was declared void in *State, v. Vineland*, 58 N. J. L. 474, 23 L. R. A. 685.

Where the plaintiff had planted a tree in front of his house at the edge or curb line of the sidewalk as it then existed, and subsequently the borough authorities caused the pavement around the public square to be widened and laid in circular forms at the angles thereof, and such change threw the curb line in the sidewalk over 3 feet beyond the tree which had then attained considerable dimensions, but so that there was sufficient space on either side of the tree to conveniently accommodate the ordinary travel of the sidewalk, although it was shown that the trunk of the tree was an obstruction to passage owing to the extensive space it occupied, and if moved would afford much more space for passers-by, and the borough authorities had by resolution ordered the plaintiff to remove such tree and condemned it as a nuisance, yet it was held that the borough authorities had no power by such resolution and order to condemn the tree as a public nuisance, for the reason that such resolution was not general in its application nor adopted for the enforcement of any general borough ordinance or regulation, and for this reason the court restrained the proceedings of the borough authorities. *Gitt v. Hanover*, 4 Pa. Dist. R. 606.

In *Gitt v. Hanover*, 4 Pa. Dist. R. 606, it is said that, although boroughs are clothed with ample powers under Pa. act April 3, 1861, § 2, subsec. § 3, 4, to prohibit and remove obstructions in streets and sidewalks, yet such authority must, as a general rule, be exercised by virtue of ordinances of general application, and that the form of the enactment, whether by ordinance, resolution, or mere motion is not important, the material consideration being the generality of the application, and that therefore municipalities cannot by special ordinances applicable to one individual or one case

A statute ought to be so construed that no man who is innocent can be punished.

4 Bacon, *Abr. Statutes*; *Gould v. Banks*, 58 Conn. 415, 55 Am. Rep. 148; Beach, Pub. Corp. § 515, p. 521; *Tappan v. Young*, 9 Daly, 357; *San Francisco Pioneer Woolen Factory v. Brickwood*, 60 Cal. 166; *Becker v. Washington*, 94 Mo. 380; *Com. v. Roy*, 140 Mass. 482; *State, Center, v. Barenstein*, 66 Iowa, 249; *Endlich*,

Interpretation of Statutes, p. 31; *Com. v. Bank of Pennsylvania*, 8 Watts & S. 173; *McConvill v. Jersey City*, 39 N. J. L. 38.

The authority of the city must be exercised in a reasonable and impartial manner, and for reasons which can be justified by public necessity.

Croft v. Danbury, 65 Conn. 294; Beach, Corp. §§ 89-91, pp. 104-106.

permit to one person what is denied to another, or deny to one what is permitted to another. In this case the court restrained the proceedings of the borough authorities in destroying the plaintiff's shade tree under a resolution passed by the borough authorities which condemned it as a nuisance.

Under an act creating a new township, and providing that the township's committee shall have power to pass ordinances, by-laws, and regulations as they may judge proper, to direct the planting, rearing, and trimming of shade or ornamental trees, and to abate and remove all nuisances in the streets and public places of the township, and under a supplemental act conferring more ample powers upon such township committee to provide by ordinance for the regulations of the use of the public streets and to direct and regulate the planting, rearing, and trimming and preservation of shade trees on the streets and public places of the township, and to authorize or prohibit the removal or destruction of such trees, and to restrain and punish persons injuring or defacing the same,—it was held that an ordinance providing that no person should cut, trim, or break any tree, limb, or twig thereof standing upon a public street or highway of the township without first obtaining permission of the township committee or their authorized agent, and imposing a penalty for a violation thereof, was a proper exercise of the power vested in such township, and was valid as a reasonable exercise of such power. *State, Consolidated Traction Co. v. East Orange Twp.* (N. J.) 38 Atl. 803. In this case it was sought to restrain the action of the railroad company operating its cars through the streets from cutting off the limbs and branches of such shade trees in order to make room for its wires and poles.

IV. Nuisances relating to the use of streets.

a. *Parades and noises on streets.*

This section of the note is confined to the consideration of municipal authorities to declare parades and noises on the streets public nuisances, and to abate them as such. There are numerous cases wherein swearing, cursing, and other acts of a similar nature, attracting crowds of people, and causing obstructions upon the public streets, have been dealt with and punished by the municipal authorities under ordinances passed pursuant to the general exercise of police power, wherein such acts have not been specially declared nuisances nor have they been abated as such, and these are therefore not included herein.

A procession upon a public street or highway, which is lawful in itself and does not unnecessarily obstruct the use of the highway for other purposes, does not constitute a nuisance; to constitute a nuisance in such a case, the streets must be so blocked as to hinder or prevent travel or passage, and must be obstructed for a longer period than the occasion calls for, and it also seems that there must have been a criminal intent. *State v. Hughes*, 72 N. C. 25, 27; *State v. Baldwin*, 18 N. C. (1 Dev. & B. L.) 197.

Parades and processions upon the streets of a city are not necessarily productive of danger and disorder so as to render them *per se* the creators of public disturbances, nor are they necessarily nul-

lances. *Chicago v. Trotter*, 136 Ill. 430, Affirming the decision of the appellate court.

It is only when political, religious, social, or other demonstrations create public disturbances, or operate as nuisances, or create or manifestly threaten some tangible public, or private mischief, that the law will interfere; and it then interferes by reason of the evil done, or apparently menaced, and not because of the sentiments or purposes of the movement, if not otherwise unlawful; and things absolutely unlawful are not made so by local authority, but by general law. *Re Frazee*, 63 Mich. 396, 405.

So, public parades are not unlawful in their intent, purpose, and result; they are not *mala in se*, and if they are to be *mala prohibita*, it ought to be by some general law and not by local regulation. Yet such parades are subject to the operation of the laws upon the subject of riots, mobs, unlawful assemblies, and nuisances, whenever they become so. *Anderson v. Wellington*, 40 Kan. 173, 178, 179, 2 L.R. A. 110.

A procession in a public street is not necessarily a public nuisance, and therefore, when the members of the Salvation Army parade the streets and sing and display a flag, which is the means they ordinarily use to attract attention and procure followers to their quarters, such use of the street does not amount to a disturbance of the public peace within the meaning of the city ordinance and charter under which the common council have power to abate and remove nuisances of every kind. *People, Cartmill, v. Rochester*, 44 Hun, 166.

Under a city charter prohibiting the parading and marching of any procession upon the public streets without first obtaining a permit, the general incorporation act giving the city authorities power to declare what shall be deemed a nuisance and to abate the same, a procession by the Salvation Army cannot be said to be a nuisance of itself. Although processions may become disorderly and riotous and degenerate into a mob, or a parade may be so conducted, in the banners which it displays, or the objects or purpose of its march, or the disorderly or abhorrent noises in which it indulges, as to invite a breach of the peace, or so render itself a nuisance, yet such will be exceptional circumstances, and the individuals will be subject to punishment under the law. *Trotter v. Chicago*, 33 Ill. App. 206, 208, Affirmed *Chicago v. Trotter*, 136 Ill. 430.

In this case the ordinance which provided that no parades or processions should be allowed upon the streets of a city, nor open-air meetings upon any ground abutting upon any street or avenue of the city, without a permit from the police department, which was to be issued without fee, designating the route to be followed upon the streets, was held invalid upon the ground that it gave such authorities power to discriminate, and was a delegation of power to the police authorities which it was not within the province of the common council to delegate, a municipal body having no power to transfer its legislative prerogatives and the public stress imposed upon it to a mere executive officer. *Chicago v. Trotter*, 136 Ill. 430, Affirming the decision of the appellate court.

In *Rich v. Naperville*, 42 Ill. App. 222, the court

It is the policy of the law to require of municipal corporations a strict observance of their powers.

1 Dill. Mun. Corp. § 16, p. 34, § 28, p. 42; 15 Am. & Eng. Enc. Law, p. 1041; *Willard v. Killingworth*, 8 Conn. 247, Approved in *Higley v. Bunce*, 10 Conn. 436.

The city council cannot interfere with the property rights and privileges of abutting owners without the sanction of a resulting public

benefit, and the right to protect one's store from the sun by an awning suited to that purpose, and interfering with no one, is a right of property within the meaning of the Constitution.

Gilbert Elev. R. Co. v. Kobbe, 70 N. Y. 361; 3 Kent, Com. p. 438; 2 Dill. Mun. Corp. §§ 656a, 656b, p. 777, note 2, pp. 835, 836, 878; *Story v. New York Elev. R. Co.* 90 N. Y. 123, 43 Am. Rep. 146; *Shelton Co. v. Birmingham*, 62 Conn.

followed its prior decision in the case of *Chicago v. Trotter*, 136 Ill. 430, in declaring the city ordinance which prohibited street parades without permission of a city council void as being unreasonable, oppressive, unfair, and partial, such not being nuisances *per se*, and abatable as such by the public authorities.

But where processions were for an unreasonable time obstruct travel on the streets, or injuriously affect business, and be carried on to such an extent and for such time as to be an annoyance and a nuisance to the public, the city may by ordinance prohibit them and punish the person making such an unreasonable disturbance. *Charlton v. Simmons*, 87 Iowa, 226.

Noises in the street occasioning damage to all the citizens of the commonwealth there inhabiting, being, and residing, constitute a public nuisance. *Com. v. Smith*, 6 Cush. 80.

The collection of a crowd of noisy and disorderly people to the annoyance of the neighborhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver of such entertainment is liable to an injunction, although he may exclude all improper characters from the grounds, and the amusements may be conducted in a manner satisfactory to the police. *Walker v. Brewster*, L. R. 5 Eq. 25, 37 L. J. Ch. N. S. 33, 17 L. T. N. S. 135, 16 Week. Rep. 59.

In *Fairbanks v. Kerr*, 70 Pa. 86, 92, 10 Am. Rep. 664, it is stated that although a street pavement may be used in the strictness of law for public speaking, yet it may not be occupied for preaching or public worship before another's house so as to annoy him, but yet it does not follow that everyone who speaks or preaches in the street or happens to collect a crowd therein by other means is therefore guilty of a nuisance; his act may become a nuisance by his obstruction of the public highway, but it is not a nuisance *per se*.

The singing of an obscene song in a loud boisterous manner for ten minutes near a public street in the hearing of divers people, even though on a single occasion, is a public nuisance. *State v. Toole*, 106 N. C. 736; *State v. Chrisp*, 85 N. C. 623.

So the making of a great noise, clamor, and outcry in the public streets, by which people are drawn together and the highway obstructed, is a public nuisance; and in such a case it is sufficient if the inconvenience result as an immediate consequence of any public exhibition or act. *Com. v. Spratt*, 14 Phila. 365.

In *Com. v. Harris*, 101 Mass. 29, the defendant was found guilty of creating a nuisance by uttering loud exclamations and outcries in the public streets, thereby drawing together large numbers of people, and creating a common nuisance.

The case of *Com. v. Harris*, 101 Mass. 29, was followed by the subsequent case of *Com. v. Oaks*, 113 Mass. 8, which holds that the nuisance may exist even though the noise complained of disturbed but a single person.

A city ordinance prohibiting and forbidding all disorderly shouting, dancing, or disorderly assemblies on the part of slaves and free negroes in streets, etc., both on Sundays and other days, was held a valid exercise of the power to prevent and

abate a nuisance. *Washington Comrs. v. Frank*, 46 N. C. (1 Jones, L.) 436, 440.

In *Washington Comrs. v. Frank*, 46 N. C. (1 Jones, L.) 436, 440, it is stated that the commissioners of every incorporated town have a right to establish any and every regulation which in their judgment is needful to the comfort of the citizens; and therefore an ordinance which has for its object the prevention of noise and disorder in the public places of the town is a valid exercise of the power vested in such authorities.

So, the collecting in the streets of a city of large numbers of people by reason of loud and indecent language addressed to those passing and repassing on such streets is a nuisance which may be dealt with by the public authorities. *Barker v. Com.* 19 Pa. 412.

And a continuous or daily beating of drums on the streets of a city will amount to an intolerable nuisance, endangering the safety of teams and the occupants of vehicles drawn by animals, as well as of pedestrians liable to be injured by runaways, and stunning the ears with din so constant as to be almost insufferable, and as such may be abated by the public authorities, but there is usually no objection to such noises on a few special occasions. *Re Flaherty*, 105 Cal. 558, 561, 27 L. E. A. 523.

Again, a state statute prohibiting the beating of a drum in any town except by command of a military officer is valid, and the fact that the act is done in the performance of a religious service in accordance with a religious belief is no defense, even though there is no actual disturbance of the peace. *State v. White*, 64 N. H. 48.

But the beating of a drum and the blowing of a fife upon the public streets do not *per se* constitute a nuisance, and to render such an act a public nuisance it must be so inconvenient and troublesome as to annoy the whole community. *State v. Hughes*, 72 N. C. 25, 27; *State v. Baldwin*, 13 N. C. (1 Dev. & B. L.) 197.

A town ordinance which forbids loud and boisterous cursing and swearing in a street, house, or elsewhere in the city is valid, not upon the ground that such conduct amounts to a nuisance which would be punishable under the state's jurisdiction, but upon the ground that it is disorderly conduct. *State v. Caiman*, 94 N. C. 880, and *State v. Debnam*, 98 N. C. 712.

So, police regulations respecting the use of the streets by itinerant musicians have been enforced, the provisions applying against a member of the Salvation Army who was playing upon a cornet although he did not make any actual disturbance. *Com. v. Plaisted*, 143 Mass. 375, 2 L. R. A. 142.

The regulations made by the park commissioners with reference to the holding of public meetings and the making of orations or loud outcries therein are valid, and within the powers of the commissioners, under Mass. Stat. 1875, chap. 85, § 3, which gives them power to govern and regulate the parks, and to make rules for the use and government thereof, the purpose being for the preservation of the public peace and to protect the public grounds from injury. *Com. v. Abrahams*, 156 Mass. 57.

So, an ordinance of the city of Boston, which prohibits any person, except with the permission of

456; *Spaulding v. Lowell*, 28 Pick. 71; *Teutonia Ins. Co. v. O'Connor*, 27 La. Ann. 371.

The mere declaration by a city council that a certain structure or thing is a nuisance is of no effect unless the structure or thing did, in fact, have that character.

Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 670, 24 L. ed. 1040; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108

U. S. 338, 27 L. ed. 745; *Boston Beer Co. v. Massachusetts*, 97 U. S. 33, 24 L. ed. 992; *Bills v. Belknap*, 36 Iowa, 588; *Patterson v. Vail*, 43 Iowa, 148; *Everett v. Council Bluffs*, 46 Iowa, 66; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984.

Even where the authority to declare what shall be considered nuisances is conferred upon a city council by the charter in express terms, the power to declare a structure a nuisance

the committee of the city council, from delivering a sermon, lecture, address, or discourse on the common or other public ground of the city, has been upheld as being passed for the purpose of preventing nuisances in preserving the public peace. *Com. v. Davis*, 140 Mass. 485.

Under § 2840, Ohio Rev. Stat., giving the city council the care, supervision, and control of all public highways, etc., within the corporation, and imposing upon them the duty of keeping the same open and in repair and free from nuisances, the court held that the word "nuisance" as therein used did not include an assemblage of persons engaged in an unlawful act, but referred to something which was in a sense fixed or permanent, as a defect in a street. *Robinson v. Greenville*, 42 Ohio St. 625, 630, 51 Am. Rep. 857. In this case it was sought to make the corporation liable for the firing of a cannon by disorderly people in the public streets, upon the ground that the corporation had not abated or restrained the congregation of such assemblages as nuisances as by the powers conferred upon them by the statute.

The validity of ordinances relating to street parades will be found considered in note to *Re Garra-bad* (Wis.) 19 L. R. A. 858.

b. Animals running at large.

In the principal case, *HAGERSTOWN v. WITMER* (Md.) ante. 647, an ordinance providing for the summary destruction of all dogs found running at large on the public streets was upheld as within the powers possessed by municipal corporations, and as constitutional, even though it provided for the killing of such animals, if not ransomed, as therein provided, the charter giving the authorities power to pass all ordinances necessary for the good government of the town, to prevent, remove, and abate all nuisances and obstructions in or upon the streets.

Ordinances passed restraining and prohibiting animals running at large in the streets of cities have been held constitutional as a valid exercise of the police power, although in many cases they have not been specifically declared nuisances, neither have the ordinances declared them to be such. Such would seem to be the case of *Burdett v. Allen*, 35 W. Va. 347, 14 L. R. A. 387, and many other cases in the same line, but it is not proposed to deal with them in the present note, which is confined to the consideration of municipal control over them as nuisances.

In *Petersburg v. Whinnack*, 48 Ill. App. 663, the city ordinance declared it unlawful for any horse or other animals to be at large in the city, and prescribed a penalty against the owner or possessor of such animal knowingly suffering or permitting it to go at large, or in any way permitting such animal to graze on the streets or alleys of the city. It was held that, in order to show a violation of the ordinance, it was not necessary to show an intentional suffering or permitting of such animals to be at large, and that the ordinance was violated when a grazing in the street was permitted, although a mere incidental and trifling act of grazing would not be sufficient, as there must be something substantial, and it must be permitted, notwithstanding the fact that it was not necessary to show a design

or intention, a permission being sufficient. In this case, however, the act was not specifically declared to be a nuisance.

Stock running at large in the public streets of a city is a nuisance which may be abated by a summary proceeding under a city ordinance passed pursuant to its charter, the same being absolutely necessary to protect the public in the use of the highways. *Folmar v. Curtis*, 86 Ala. 354.

There must, however, be some guilty intent or wilful neglect before a party can be made liable to the penalties imposed by an ordinance impounding animals found running at large; there must be a permission or suffering of such animals to run at large. *Kinder v. Gillespie*, 63 Ill. 88; *Case v. Hall*, 21 Ill. 632, to the same effect.

In *Kelley v. Milwaukee*, 18 Wis. 83, 86, it is said that hogs or other animals running at large are not necessarily a nuisance in the legal sense of the term, although they are subject to such regulations as the municipal authorities may determine, and the annoyance from them may become so great that they may be declared nuisances.

Yet hogs running at large contrary to lawful prohibition are regarded in the light of a nuisance. *Gosselink v. Campbell*, 4 Iowa, 296, 301.

So, the running at large of hogs in a town may be regarded as a public nuisance, therefore a city by-law which provides for the abatement of the same is valid. *McKee v. McKee*, 8 B. Mun. 433.

The right of regulating the use of streets by droves of cattle is within the power of the common council or other local authorities, independently of statute, upon general principles, they being considered nuisances. *Metropolitan Bd. of Health v. Heister*, 37 N. Y. 661.

And the legislature has power to vest the trustees of the town with power to pass by-laws to prevent hogs running at large in the town, and to abate the same as a nuisance. *McKee v. McKee*, 8 B. Mun. 433.

And therefore an ordinance relating to the running at large of hogs in the streets of a town as a nuisance will be upheld. *Whitfield v. Longest*, 23 N. C. (6 Ired. L.) 268.

Under a charter giving power to pass all necessary rules, regulations, and ordinances as deemed advisable with respect to animals at large in the city streets, and to remove nuisances, and to pass all laws and ordinances necessary for the peace, good order, etc., of the city, a city has power to pass an ordinance impounding animals running at large within the corporate limits. *Cartersville v. Lanham*, 67 Ga. 753.

In *Fort Smith v. Dodson*, 46 Ark. 296, 298, 299, 35 Am. Rep. 589, an ordinance passed under the general powers given to cities and towns by § 757 of Mansfield's Digest, which ordinance prohibited the running at large of hogs and other animals in the city limits, and established a pound, and authorized the city marshal or policeman to seize and impound such animals, and gave a fee for the service performed in impounding, feeding, and caring for the same, and made it a duty of the marshal to sell them after five days' notice by posters in the city, the proceeds, after defraying expenses, to go to the owner of such animal, was upheld as a valid exercise of the police power, as animals

which is not such at common law or has not been declared such by statute, is denied, and the question whether an act upon a highway constitutes a nuisance is one of fact.

Burnham v. Hotchkiss, 14 Conn. 318; 1 Dill. Mun. Corp. p. 454.

It has been held that a wooden awning over a sidewalk in front of a store is not *per se* a nuisance.

Hawkins v. Sanders, 45 Mich. 491. See also *Baltimore v. Redecke*, 49 Md. 217, 33 Am. Rep.

running at large contrary to lawful prohibition are regarded as nuisances.

And, under a city charter giving the municipal authorities power to adopt ordinances, and conferring not only a general authority to declare, prevent, and remove nuisances, but also express power to prevent stock of any kind from running at large in the public streets and alleys of the city, an ordinance so passed is a valid exercise of the police power and violates no constitutional principle, and the exercise of such power, being a summary proceeding, is absolutely necessary to protect the public use of the highways, — especially where the owner will not take suitable means to prevent his own animals from running at large in the streets. *Folmar v. Curtis*, 86 Ala. 354.

Again, a city ordinance declaring swine running at large within the corporate limits to be a nuisance, and providing for the abatement thereof will be upheld, even though the defendant set up a right of common under the laws of the state, as, even admitting the right of common, it is not such a right as that it is not within the legislative control, and it may therefore be abridged or destroyed wherever and whenever the law-making power thinks the public good requires it. *Roberts v. Ogle*, 30 Ill. 459, 461, 83 Am. Dec. 201.

And again, a city ordinance which declares the running at large of cattle, horses, mules, goats, and sheep within the corporate limits a nuisance, and imposes a fine for each violation of the same, will be upheld where the provisions of the city charter confer authority upon the city to abate and remove all nuisances. *Quincy v. O'Brien*, 24 Ill. App. 561.

So, a town ordinance especially authorizing the impounding of hogs running at large is valid as preserving the health, cleanliness, and safety of the city, such running at large of hogs properly constituting a nuisance under such ordinance, even though such hogs are owned by one not a resident of the city, and have merely strayed into the city limits. *Gosselink v. Campbell*, 4 Iowa, 296, 301.

In *Cochrane v. Frostburg*, 81 Md. 54, 27 L. R. A. 723, under article 2, § 144, Md. Code Pub. Local Laws, the mayor and city council have authority to pass such ordinances not contrary to law as they may deem beneficial to the town, and such authority gives them power to remove nuisances and obstructions from the streets, lanes, alleys, and also to ordain and enforce ordinances necessary to preserve the peace, good order, health, and safety of the town, and therefore they have power to prevent animals from running at large upon the streets of the city, the same being a nuisance.

And a city has authority under a power to make all necessary by-laws not repugnant to the laws of the commonwealth, to make and pass by-laws prohibiting cows and other animals going at large, or stopping to feed in streets and highways of the city, such authority not depending upon Mass. Stat. 1867, chap. 82. *Com. v. Bean*, 14 Gray, 52.

Again, an ordinance which prohibits any person from permitting any horse, cattle, swine, or sheep under his care to go upon any sidewalk in the street, or otherwise occupy, obstruct, injure, or encumber any such sidewalk so as to interfere with

239; *Teutonia Ins. Co. v. O'Connor*, 27 La. Ann. 371; *Zylstra v. Charleston*, 1 Bay, 382.

Messrs. John M. Murdoch and M. Eugene Culver, for appellee:

A suitable frame means such a frame as in the opinion of the common council of the city of Middletown the safety and convenience of the public demanded.

Worcester v. Railroad Comrs. 118 Mass. 151; *Crowell v. Londonderry*, 63 N. H. 48.

Provisions that are strictly penal are strictly

the convenient use of the same by all passengers, comes within the provisions of the city charter, which authorized the council to make all such salutary and needful by-laws as towns, by the laws of the commonwealth, have power to make, and such ordinance is therefore valid. *Com. v. Curtis*, 9 Allen, 286.

These last two cases, however, do not show that the act of allowing cattle to run at large on the streets was expressly declared a nuisance, but they are in line with other cases wherein such acts have been so expressly declared.

Under an act which gives the city authorities power to make ordinances for the removal of public nuisances, and also such necessary rules as may tend to the advantage, improvement, and good government of the town, not inconsistent with the laws and Constitution of the state, if the commissioners deem it to the advantage of the town to prohibit the hogs of citizens from running at large within the corporate limits, such authorities may pass any reasonable by-laws to effect that end; and therefore a law which prohibits such running at large and provides for the seizure of such animals in such cases, and for the advertising of the sale thereof, and enables the owner to redeem the same by paying all charges, and in case of sale provides that the money, after deducting the expenses, shall be paid over to the owner, is reasonable and will be upheld. *Hellen v. Noe*, 25 N. C. (3 Ired. L.) 493, 499.

In *Hellen v. Noe*, 25 N. C. (3 Ired. L.) 493, 499, the court drew a distinction between that case and the prior case of *Shaw v. Kennedy*, 4 N. C. (Taylor's N. C. Term Rep. 591), 158, and *infra*, upon the ground that in the latter case the ordinance authorized the taking of private property without notice to the owner, or trial of his right, while in the case then before the court the ordinance did not attempt to deprive the owner of his property but provided for his having notice, and secured to him every right which he could claim by allowing him to redeem his property, and the court therefore in that case upheld the ordinance which prohibited hogs running at large.

So, in *Crosby v. Warren*, 1 Rich. L. 385, an ordinance declaring it to be unlawful for hogs to run at large in the streets, requiring the marshal to seize and impound them, and, after giving two days' public notice, calling on the owners to prove property, to sell them unless the owners pay certain fines fixed by the ordinance, was upheld as being within the powers conferred by the charter to abate and suppress nuisances within the city limits.

The powers granted to municipal authorities by the provisions of the South Carolina statutes incorporating a town are a sufficient authority to enable such authorities to make any public regulations which in their judgment may be necessary to prevent nuisances, by restraining hogs and goats from running at large, the accumulation of filth, and the butchering of hogs or cattle within the town. *Kennedy v. Sowden*, 1 McMull. L. 323, 326.

Under the 3d section of the act under which Memphis is created a taxing district, it has power by ordinance to provide for the impounding of

construed, but ordinary police regulations, even though a penalty be attached, are not subjected to so close a scrutiny.

Beach, Corp. § 517.

If an ordinance is susceptible of two constructions, that one must prevail which will preserve its validity, in preference to a construction that will render it invalid, and this

must be done although the construction adopted may not be the most obvious or natural one.

Com. v. Dow, 10 Met. 382; *Baltimore v. Hughes*, 1 Gill & J. 480; *Newland v. Marsh*, 19 Ill. 876; *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221; *Johnson v. Philadelphia*, 60 Pa. 445.

animals running at large in the streets of the city, the same being considered in the light of a nuisance. *Moore v. State*, 11 Lea, 35.

Again, an ordinance for the removal of the nuisance of hogs from streets, alleys, and other places within a city is within the provisions of the Texas act of January 27, 1858, Paschal's Digest, art. 5263, which gives a board of aldermen control over the streets and public places of a town, with power to prevent any nuisances within the limits of the corporation, and cause them to be removed at the expense of the person causing them. *Waco v. Powell*, 32 Tex. 258.

So, a city ordinance which provides for the impounding of animals found running at large on the streets, and for the sale thereof without any judicial inquiry or determination, is not unconstitutional as authorizing a forfeiture of property without due process of law, although under such charter and ordinance the penalty imposed upon the owner cannot be made a charge upon such animals when impounded, nor can such penalty be made payable out of the proceeds of the sale. *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 675.

And in *Grover v. Huckins*, 26 Mich. 476, an ordinance relating to the restraining and impounding of animals running at large was upheld, although in that case they were not specifically declared to be nuisances.

And again, in *Whitlock v. West*, 26 Conn. 408, the town's right to pass by-laws impounding cattle found at large in the public streets was upheld as within the power conferred by § 30 of title 8 of the Connecticut statutes.

And the same was the holding of the court in *Gilchrist v. Schmidling*, 12 Kan. 263, where the ordinance of a city of the second class authorized the impounding of animals found at large in the streets of the city between sunset and sunrise, the same being within the provisions of Kan. Stat. 1872, relating to second-class cities.

So, in *Moore v. State*, 11 Lea, 35, the court upheld an ordinance providing for the impounding of animals running at large in the city streets under the section of an act giving power to the taxing district to define, prevent, and remove nuisances.

And, in *Campau v. Langley*, 39 Mich. 451, 39 Am. Rep. 414, an ordinance relating to animals running at large, providing for their seizure and sale and for payment of the expenses thereof out of the proceeds of such sale, the balance to be handed over to the owner of the animal, who was to have time to redeem same before sale, was upheld as constitutional, although such animals were not specifically declared to be a nuisance.

In *Marietta v. Fearing*, 4 Ohio, 427, 431, it was held that straying animals owned by nonresident persons could not be subjected to the provisions of ordinances passed by incorporated towns declaring the same nuisances.

But the cattle of a stranger, straying into a town and there becoming nuisances, may be removed by way of abating the nuisance, and may be distrained and impounded until the owner shall pay the expense. *Whitfield v. Longest*, 28 N. C. (6 Ired. L.) 268; *Plymouth Comrs. v. Pettijohn*, 15 N. C. (4 Dev. L.) 591.

So, a town ordinance, declaring and prohibiting the running at large of hogs in the town as a nuisance, and directing that such animals so found

running at large shall be taken up by the police constable and placed in a pound, will apply where the hogs of one residing half a mile without the limits of the town are found running at large within the town and are impounded, such impounding being lawfully within the provisions of the ordinance. *Friday v. Floyd*, 63 Ill. 50.

And an ordinance passed under the provisions of the act of incorporation to prevent or abate all nuisances on public or private property, declaring hogs running at large within the corporate limits to be nuisances, requiring the marshal to seize the same, and inflicting a penalty upon the owner upon having the same restored to him, is valid, and applies to a case wherein the owner of the animal resides outside of the city limits, although it is not designed to punish people for the inevitable escape where they use requisite diligence to reclaim the animals and regain their possession. *Spitler v. Young*, 63 Mo. 42, 45.

Again, under an act incorporating a village, giving the authorities power to make rules, by-laws, and ordinances respecting the streets and ways for the security, welfare, and convenience of the village, and for preserving the health, and also to abate and remove nuisances within its limits, the town council have power to declare hogs running at large in the streets nuisances, no matter whether they belong to residents or nonresidents, and their seizure by the party authorized under such ordinance is valid. *Crosby v. Warren*, 1 Rich. L. 365.

And, again, under a city charter giving power to the corporation to enact and pass laws and ordinances necessary to preserve the health of the town, and to prevent and remove nuisances, the authorities have power to pass an ordinance impounding stock of a nonresident found running at large in the streets of a city, and to sell the same after notice by publication. *Knoxville v. King*, 7 Lea, 441.

But where the statutory provisions pertaining to the question give the board of trustees power to declare what shall constitute a nuisance, and to prevent, abate, and remove the same, and take such measures for the preservation of the public health as they shall deem necessary, and also to restrain from running at large cattle, sheep, swine, or other animals, a town, incorporated under the general laws of the state, has no power to provide by ordinance for the impounding and sale of animals found at large in the streets and other public places within such town, and under the provisions of such statute such ordinance cannot be maintained. *Slessman v. Crozier*, 80 Ind. 457.

And a city ordinance authorizing a constable to seize all hogs running at large in a city as nuisances is void, for the reason that it authorizes the taking of private property without a hearing. *Shaw v. Kennedy*, 4 N. C. (Taylor's N. C. Term Rep. 591) 158.

In answer to the contention of the city authorities in the case of *Shaw v. Kennedy*, 4 N. C. (Taylor's N. C. Term Rep. 591) 158, that hogs in a town were a nuisance, the court stated that the authorities which proved hogs a nuisance spoke of them as in a sty or pen which necessarily produces a stench and consequently an inconvenience to the neighboring public.

In that case, however, there was a dissenting opinion to the effect that the running at large of

By-laws are usually more inartificially expressed than other laws, and are entitled to a reasonable construction.

Whitlock v. West, 26 Conn. 414.

That footways are the subject of municipal control cannot be questioned.

Livingston v. Wolf, 136 Pa. 519; *Pedrick v. Bailey*, 12 Gray. 163; *Goddard, Petitioner*, 16

hogs in the streets of a town are within the definition of the term "nuisance," and cause a nuisance as much as many acts which have been decided to be nuisances, as all the inconveniences produced by them show that, upon principles of common law and common sense, they answer the definition of a nuisance.

Under the provisions of a city charter giving the trustees power to enact ordinances and by-laws providing for the good health, order, comfort of the people, and the safety of property, and for the abatement or prevention of nuisances, and for the public good, an ordinance making it unlawful for hogs to run at large in the city streets, fining the owner and making it the duty of the city marshal to seize, advertise, and offer them for sale, and after paying the expenses hand the balance to the owner of such hogs, is not authorized, inasmuch as the right to adjudge the forfeiture of such animals running at large without notice is not plainly conferred by the charter. *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 238.

So, an ordinance making it the duty of the marshal to cause hogs let loose or running at large in the streets of a city to be taken up and impounded and sold within thirty days, having first caused the sale to be proclaimed by hand bills through the city, is invalid, no notice to the owner being provided for, although the provisions of the city charter give the authorities power to require and compel the abatement and removal of all nuisances within the city limits under such regulations as they may prescribe by ordinance. *Rosebaugh v. Saffin*, 10 Ohio, 31.

And under the general laws of the state containing no prohibition against swine, cattle, horses, or other animals running at large, but defining the duties of persons taking up stray animals, and enacting that no person shall be allowed to take up any neat cattle, sheep, or hogs between certain dates annually, a city ordinance which prohibits such animals from running at large cannot be enforced, even though the act of incorporation gives the authorities power to make such by-laws and ordinances, consistent with the Constitution and laws of the state, as they shall deem necessary for the regulation, interest, health, cleanliness, convenience, and advantage of the inhabitants, and also to require and compel the abatement of nuisances. *Collins v. Hatch*, 18 Ohio, 523, 525, 51 Am. Dec. 465.

In *Rosebaugh v. Saffin*, 10 Ohio, 31, 35, exception was taken to a city ordinance relating to the question of animals running at large in the streets, and making it the duty of the marshal to seize and impound the same, and to sell them and to pay the money realized into the city treasury after deducting expenses. The city charter by § 12 authorized the abatement of nuisances, and § 13 gave power to prohibit all hogs, etc., from running at large; and the court stated that if such last section had been omitted there would be reason to hold that it was intended to embrace the evil complained of under the head of nuisances, but § 13 absolutely excluded such inference, as it precisely and definitely withdrew the mischief complained of from the head of nuisances and the matter was therefore disposed of under the 13th section of the act.

In *Johnson v. Daw*, 53 Mo. App. 372, 374, the action was in replevin by the owner of certain horses, 39 L. R. A.

Pick, 511, 28 Am. Dec. 259; *Jones v. New Haven*, 34 Conn. 1.

Especially is it within their province to regulate the construction of awnings, inasmuch as they are liable for damages occasioned to passers-by through any defect or insufficiency in the construction.

Drake v. Lovell, 13 Met. 292.

and the defendant justified his detention by showing that, as marshal of the town, he found them running at large upon the streets contrary to the terms of the ordinance, and thereupon impounded them under the provision thereof. It was attempted to sustain the ordinance under the charter provision as to the prevention and removal of nuisances, but the court stated that this could not be done in the light of the fact that special provision was made in terms concerning animals running at large, and that in such a case it was proper to look to the terms of such special provision for the power asserted, but that if the regulation of animals running at large had not been specially provided for, the power might be looked for under the nuisance provision, the court citing and relying upon *Rosebaugh v. Saffin*, 10 Ohio, 32.

So, an ordinance regulating the keeping of dogs was said to be within the police powers, in *Faribault v. Wilson*, 34 Minn. 254, for the reason that from their nature they are liable to become nuisances. The following cases are to the same effect: *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94; *Morey v. Brown*, 42 N. H. 373; *Mitchell v. Williams*, 27 Ind. 62; *Carter v. Dow*, 16 Wis. 299; *Tenney v. Lenz*, 16 Wis. 566; *Ex parte Cooper*, 3 Tex. App. 490, 30 Am. Rep. 152.

Under a charter giving power to declare what shall constitute a nuisance, and to prevent, abate, and remove the same, an ordinance providing for the muzzling of dogs or for the keeping of the same upon the owner's own premises, and authorizing the killing of such as are found at large, was held valid in *Haller v. Sheridan*, 27 Ind. 494.

In *Leech v. Elwood*, 3 Ill. App. 453, 457, an ordinance giving the city authorities power to kill dogs running at large in the public streets, passed pursuant to a charter giving power to abate nuisances, was upheld as constitutional, the court stating that the owner of such an animal could be compelled to keep it in such a manner as not to endanger the rights of others, and that if the animal was running at large in violation of the ordinance after having been declared a nuisance by being allowed to do so, the city authorities had the right to abate the nuisance, and the fact that the most effectual way of accomplishing this purpose was taken, cannot, upon principle or reason, be considered an unauthorized proceeding.

As to liability for permitting animals on streets, see *note to Cochrane v. Frostburg* (Md.) 27 L. R. A. 728.

And upon the question of the right to kill dogs, see *note to Hubbard v. Preston* (Mich.) 15 L. R. A. 249.

The question of nuisances relating to the keeping of animals will be found treated of in *note to Harrington v. Providence* (R. I.) 38 L. R. A. 305.

c. Vehicles.

Regulations regarding the use of streets by public carriages, such as omnibuses, made by a corporation as a means of regulating the use of the streets, are valid matters of public safety and convenience, and tend to prevent nuisances and obstructions upon the streets. *Com. v. Stodder*, 2 Cush. 532, 48 Am. Dec. 679.

A wagon placed close to the curb in a street, out of which the defendant was selling produce, is a

The city may lawfully cause the removal of any obstruction in a public street or encroachment upon it, or over, or under it, which in any measure interferes with the safety or convenience of the public in the use of it.

Wood, Nuisances, p. 774, and cases cited; *Pedrick v. Bailey*, 12 Gray, 161.

public nuisance which may be summarily removed. *State v. Laverack*, 84 N. J. L. 201.

A deputy sheriff may abate a nuisance in a highway, such as its obstruction by vehicles, he being a common-law officer. *Turner v. Holtzman*, 54 Md. 148, 29 Am. Rep. 361.

An ordinance of a city prohibiting the owner, driver, or other person having the care or ordering of a vehicle, from stopping in the street for more than twenty minutes is a valid police regulation, and the fact that the defendant has a license from the state as a hawker and peddler is immaterial, such license not authorizing him to violate the ordinance or police regulation of the city, even though in the prosecution of such business he is not maintaining or creating a nuisance of any kind. *Com. v. Fenton*, 139 Mass. 186.

The holding of the court in *Com. v. Fenton*, 139 Mass. 186, with regard to the city ordinance regulating the stopping of vehicles in the street, was followed and approved in the later case of *Com. v. Lagorio*, 141 Mass. 81.

In *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 708, the systematic and continuous encroachment upon the street by the defendant in using the same so as to render the passage less convenient, and allowing teams and wagons to collect thereon for purposes connected with his business, constituted a nuisance, the same impeding the free passage of the streets, even though the business carried on by him was lawful, the use of the street in that case not being merely temporary.

The mere fact that the defendant on a certain day stood with his cart and mule near the angle made by two streets, one of which was 90 and the other 66 feet wide, for the space of an hour and a half, during which time there was the usual passing of vehicles and foot passengers every way up and down the streets, does not constitute the act a nuisance *per se*, within the meaning or provisions of a city ordinance. *State v. Edens*, 85 N. C. 623, 526.

The overloading of a wagon, thus damaging the highway, is a public nuisance. *Egerly's Case*, 3 Salk, 183.

And the storing of a wagon in the highway is a nuisance which the authorities must abate at their peril. *Cohen v. New York*, 118 N. Y. 582, 536, 4 L. R. A. 406, Reversing 43 Hun, 345.

In *Rex v. Cross*, 3 Campb. 226, stage coaches standing and soliciting passengers in the public streets, thereby obstructing the free use thereof by the public, were said to be a nuisance, as the highway cannot be used as a stable yard.

In *Chillicothe v. Brown*, 88 Mo. App. 609, 616, wherein it was sought to declare a city ordinance regulating omnibuses and other vehicles and porters and runners at railroad depots within the city, which the defendant was charged with violating, unreasonable and invalid, it is stated that railroads are public carriers deriving their power from the state, and their depots are constructed and maintained, not only to facilitate the receipt and discharge of freight and passengers, but for the comfort and convenience of arriving and departing passengers, and of the public generally having business with their station agents, and therefore any exercise of the police power by the state or any political subdivision thereof which imposes upon them and those having business at their depots such regulations as tend to prevent nuisances, and other 89 L. R. A.

Torrance, J., delivered the opinion of the court:

The defendant was prosecuted in the city court of Middletown for the violation of an ordinance of that city, and was convicted. He appealed to the superior court, and there, upon a trial to the jury, was convicted, and judgment

annoyances thereat, to the public, are not to be judicially condemned as unreasonable and invalid.

So, an ordinance prohibiting persons from running for or soliciting passengers for steamboats, or other public or private conveyances, or for taverns or boarding houses, or other places of resort, passed pursuant to a charter, was upheld, although the case did not specifically show such acts to be nuisances. *Niagara Falls v. Salt*, 45 Hun, 41.

In order to transgress an ordinance relating to the stoppage and occupation of a street by wagons and vehicles so as to amount to an obstruction in violation of a city ordinance, it must be shown that the act is done voluntarily before the defendant can be held for violating the ordinance. *Com. v. Brooks*, 99 Mass. 434.

Upon the question of the power of a municipality to regulate the speed of vehicles on the street, see *State v. Sheppard*, 64 Minn. 287, 26 L. R. A. 306.

The power of a municipality to license the use of the streets by vehicles will be found discussed in *note to Tomlinson v. Indianapolis* (Ind.) 36 L. R. A. 418.

d. *Selling on streets.*

A city ordinance which prohibits the sale, or offering or exposing for sale, at public auction, upon the streets of a city, of goods under a certain penalty, is reasonable, and not in restraint of trade, under the statutes of a state relating to the organization of cities and incorporated villages, giving the city council control of the streets and imposing upon them the duty of keeping the same free from nuisances. *White v. Kent*, 11 Ohio St. 550, 552, 553.

In *Com. v. Ellis*, 158 Mass. 555, the court upheld the ordinance of the city of Boston (Rev. Ord. 1892, chap. 43, § 35), relating to selling in the public streets, such ordinance being for the public benefit, as relieving a nuisance in the obstruction to travel and general inconvenience caused by stationary objects in crowded and narrow streets, the mere fact that the defendant had a license as a peddler in the commonwealth not authorizing him to violate the ordinance of the city.

So, in *Com. v. Passmore*, 1 Serg. & R. 219, the defendant, an auctioneer, sought to justify his obstruction of the public road under the ordinance of the city which imposed a penalty upon persons obstructing the streets with their goods, upon the ground that such ordinance exempted the sale of goods at public auction; but the court stated that although such might be the provisions of the ordinance, yet it could not authorize him to permit the nuisance at common law, and therefore affirmed the decision of the court below which found the defendant guilty of maintaining a nuisance.

The principles settled by the case of *Com. v. Passmore*, 1 Serg. & R. 219, were followed by the court in *Com. v. Milliman*, 13 Serg. & R. 403, wherein the court found a constable, who conducted an execution sale in the public street, to be a nuisance in obstructing the same.

The use of the streets for a market place by hucksters selling vegetables and other country produce, attended with loud noises and offensive smells, is a public nuisance, and an unwarranted use of the highway, and is not legalized by a grant from the city officer. *McDonald v. Newark*, 42 N. J. Eq. 136, 138.

A market in a street is an additional easement to, and in a measure inconsistent with, the ordinary

was rendered against him, from which judgment the present appeal is taken.

The complaint charges that the defendant, on the 11th day of March, 1897, within the limits of the city, "did, and for a long time previous thereto has unlawfully erected and maintained an awning over the sidewalk in front of the premises . . . occupied by him, which

awning is not upon a suitable frame, and attached entirely to the building so occupied by him as aforesaid, . . . against the peace and contrary to the form of the provisions of the ordinance of said city in such case made and provided." That part of the ordinance upon which this complaint is based reads as follows: "The following acts are declared to

use of the highway, and, if unauthorized, is a nuisance. *State v. Laverack*, 84 N. J. L. 201, 204, 208. In this case the defendant created a nuisance in placing a wagon close to the curb and selling produce therefrom.

An ordinance preventing the keeping of oysters elsewhere than in certain streets in a market is valid, being for the purpose of cleanliness and salubrity, as heaps of oysters have a great tendency to putrefaction. *Morano v. New Orleans*, 2 La. 217.

c. Sliding in the streets.

Sliding in the street accompanied with boisterous conduct is not necessarily unlawful, nor is it necessarily a public nuisance. *Jackson v. Castle*, 82 Me. 579, 581, 80 Me. 119.

And the mere averment that sliding on a side street is accompanied with boisterous conduct, contrary to the provisions of the city ordinance and to the common nuisance of the citizens, does not render the act itself a nuisance. *Jackson v. Castle*, 82 Me. 579, 581, 80 Me. 119.

Where, by an act amending the city charter, a city is empowered to pass ordinances to remove all nuisances and obstructions from the streets, lanes, and alleys within the city limits, and for the preservation of peace and good order, securing persons and property from violence, danger, and destruction, and the city ordinance prohibited any sport, play, or exercise that might produce bodily injury or endanger property on any street, square, or alley within the city limits, the city has power to prohibit by ordinance the practice of coasting upon a street, which ordinance it must enforce by ordinary and reasonable care and diligence. *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759.

f. Sidewalks.

Streets include sidewalks as well as the roadway, and all obstructions of a sidewalk are public nuisances. *Ex parte Taylor*, 87 Cal. 91, 94; *Bonnet v. San Francisco*, 65 Cal. 230; *Marini v. Graham*, 67 Cal. 180.

The obstruction of a sidewalk in a public street is a nuisance, and a common nuisance, and an ordinance of the city, to abate such a nuisance, or to inflict upon the person making it a pecuniary penalty for its existence or continuance, is reasonable and proper and ought to be enforced by the courts. *Memphis v. Lenore*, 6 Coldw. 412, 415.

A sidewalk opening is not a nuisance *per se*, and therefore, although municipal authorities may proceed to institute proceedings for the abatement thereof as a common nuisance, yet they cannot declare it to be such, nor make themselves the judges thereof. *Everett v. Marquette*, 53 Mich. 450, 451.

Yet an area 3 feet wide and 8 feet deep, so near to an alley as to endanger persons passing along the alley, is a public nuisance and abatable as such. *Bond v. Smith*, 44 Hun. 219, 222.

So, an area opening into a public footway, or so near thereto that a person lawfully using the way with ordinary caution may by accident fall into it, is *per se* a nuisance, and only ceases to be such when proper means are adopted, thereby inclosing it or maintaining a light to warn persons of danger and guard against the occurrence of such accidents. *Temperance Hall Asso. v. Giles*, 33 N. J. L. 260, 264; *Durant v. Palmer*, 29 N. J. L. 544; *Barnes v. Ward*, 9 C. B. 362, 2 Car. & K. 661, 19 L. J. C. P. N. S. 89 L. R. A.

196, 14 Jur. 384; *Hounsell v. Smyth*, 7 C. B. N. S. 781, 20 L. J. C. P. N. S. 303, 6 Jur. N. S. 897, 8 Week. Rep. 277; *Hardcastle v. South Yorkshire R. & River Dun Co.* 4 Hurlst. & N. 67, 28 L. J. Exch. N. S. 136, 5 Jur. N. S. 150, 32 L. T. 297, 7 Week. Rep. 326; *Binks v. South Yorkshire R. & River Dun Co.* 3 Best & S. 244, 32 L. J. Q. B. N. S. 26, 7 L. T. N. S. 850, 11 Week. Rep. 66; *Hadley v. Taylor*, L. R. 1 C. P. 63, 11 Jur. N. S. 979, 18 L. T. N. S. 368, 14 Week. Rep. 59.

And an areaway or passage opening into a much-frequented street is properly a public nuisance, when especially dangerous. *Beatty v. Gilmore*, 16 Pa. 463, 469, 55 Am. Dec. 514.

If an area is left open and unguarded it is dangerous and a public nuisance, and may be abated as such. *Chicago v. Robbins*, 47 U. S. 2 Black, 418, 424, 17 L. ed. 266, 302; *Storrs v. Utica*, 17 N. Y. 108, 72 Am. Dec. 487.

In *McNerney v. Reading City*, 156 Pa. 611-614, an areaway, 4 feet and 9 inches in width, extending from the building line into the street 5 feet and 6 inches, into which persons passing along the sidewalk or to and from the building in the night-time might accidentally fall, without any fault on their part, which way was insufficiently guarded and a dangerous obstruction, was held to be a public nuisance.

The court distinguished the above case of *McNerney v. Reading City*, 156 Pa. 611, 614, from that of *King v. Thompson*, 87 Pa. 365, 30 Am. Rep. 364, in which case the opening in front of a cellar window such as was usual and customary in the city for lighting and ventilating the cellar and reasonably necessary for that purpose, was held not to be a nuisance *per se*, although the opening was about 15 inches in width, 3 feet in length, and projected from the wall of the house about 16 inches, an opening of that description being wholly unlike the opening exhibited by the evidence in the *McNerney* Case, the court in the case of *King v. Thompson*, stating that it was "really difficult to see how the plaintiff succeeded in getting into the hole."

In *Memphis v. Lenore*, 6 Coldw. 412, 415, permission had been granted the defendant to make an entrance to the basement or cellar of his house by a descending stairway extending out from the wall of the house, 5 feet in width, upon the public sidewalk. It was held that, notwithstanding such permission, the city authorities had power by ordinance to cause the removal of such entrance or stairway as an obstruction and a public nuisance to the streets, and that the use and possession thereof being by permission was not adverse, and therefore gave the defendant no right by prescription or lapse of time.

Where the obstruction of the sidewalk was in the first instance erected under the permission of the city authorities, it was held that such an obstruction did not become a public common nuisance until after the permission was revoked and notice given to the defendant of the revocation and his failure to remove it, after which notice and failure the city was entitled to abate and remove it by the police power. *Memphis v. Lenore*, 6 Coldw. 412, 415.

So, in *Reading v. Reiner*, 167 Pa. 41, the city was allowed to recover the damages it had been compelled to pay by reason of the defendant's negligence in maintaining an unguarded areaway in the side-

be acts of nuisance of the first class: . . . The erection or maintaining any awning, except the same be upon a suitable frame, and attached entirely to the building, which awning shall not, when extended, be less than 6 feet from the sidewalk." The facts in the case,—and they were really undisputed on the trial,—are these: On the date alleged in the complaint,

and for a long time prior thereto, the defendant maintained an awning over the sidewalk in front of his store, "which awning rolled up and down upon a wooden frame, which was attached to the building and extended across the sidewalk, to wooden posts set near the curbstone, which posts furnished the support for the outer side of the frame." The awning was not

walk in such a way as to become an obstruction to the street and a public nuisance, the areaway in question being the same as that set forth in *McNerney v. Reading City*, 150 Pa. 611.

An excavation made in a sidewalk, and stairs erected without the permission of the public authorities, make the persons occasioning such excavation, whereby an injury is sustained for which the public authorities have been compelled to make compensation, the author of a nuisance in the street, and liable to the public authorities for the damages occasioned. *McNaughton v. Elkhart*, 85 Ind. 864, 887.

In *Com. v. Summerrott*, 5 Pa. Co. Ct. 1, it was sought to restrain the defendant in his encroachment upon the street by means of a bay window built from the ground to the top of the house which projected 4 feet, and which was alleged to be a public nuisance. The court held that as there were many such windows it was a serious matter to decide that in every instance the simple fact of a second-story window extending over the building line may be a public nuisance, liable to removal without regard to circumstances, and that every such case ought to depend upon its own peculiar circumstances, but the court granted an injunction restraining the defendant from continuing the maintenance of the first-story of the said bay window, and directed the removal of the same.

A legalized obstruction of a sidewalk is not a nuisance. *Ex parte Taylor*, 87 Cal. 91, 94; *Marini v. Graham*, 87 Cal. 180.

Although a city may give permission to do lawful and necessary work in the excavation of a sidewalk for building purposes and any other matters relating thereto, yet such permission will not authorize the creation of a nuisance. *Fort Wayne v. DeWitt*, 47 Ind. 391, 397. *Chicago v. Robbins*, 87 U. S. 2 Black, 418, 17 L. ed. 298, to the same effect.

As to excavations in general, see *supra*, I.

And although an act may legalize erections or obstructions upon a sidewalk which are nuisances, yet it is no more than a mere license for their continuance, and may be revoked at the pleasure of the legislature or public authorities. *Reading v. Com.* 11 Pa. 193, 201, 51 Am. Dec. 584.

The authority given by a municipal corporation to partially obstruct a sidewalk, and so create what would otherwise be a public nuisance, may be revoked by a change in the ordinance, and such obstruction would then become a public nuisance rendering the party continuing its use after such revocation amenable to the law. *Ex parte Taylor*, 87 Cal. 91, 94.

The above case was followed by the court in the latter case of *Ex parte Rinaldo* (Cal.) 25 Pac. 260, which was precisely similar in its nature.

In *Palmyra v. Morton*, 25 Mo. 598, 599, it is said that the rights of municipal corporations to require the owner to pave the sidewalk in front of his property may be derived from its duty to protect the public health and to prevent nuisances, and is a mere police regulation.

Where a landowner put in curb stones, and laid a pavement which projected into the highway of an unincorporated town in front of his house and lot, and planted trees and put in hitching posts along the outside edge of the pavement, it was held that he did not create a public nuisance in so 39 L. R. A.

doing, the same not being an unreasonable obstruction of the highway, the right to construct sidewalks in an unincorporated village being distinctly recognized by the Pennsylvania act of April 6, 1868. *Com. v. Hauck*, 108 Pa. 536, 537.

Whatever interferes unreasonably and unnecessarily with the use of the public streets by the public themselves is a nuisance which a city council may well prohibit by ordinance, and individuals have no right to appropriate the sidewalks to the use of their own trade or business in such a manner as to interfere with their public use, although there may be cases of necessity, as in the erection of buildings, when partial or temporary obstructions of sidewalks may be justified. *White v. Kent*, 11 Ohio St. 550, 552. *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, to the same effect.

In *State v. Summerfield*, 107 N. C. 895, 899, an ordinance which prohibited produce, merchandise, cooked provisions, poultry, fruits, vegetables, or other commodity from being kept exposed for sale in or upon any sidewalk, the space in front of buildings used as sidewalks, alley, gutter, or ereet of the town, and the placing of any stand thereon for any such purpose, and also the exposure of any such articles thereon, or in the space in front of any building in such manner as to be in the way of persons traveling the same, was upheld as valid, for the reason that such articles might, in the opinion of the commissioners based upon reasonable grounds, endanger the health of the citizens of the town or incommode them in passing by a way left open for them by the owner, or might frighten horses attached to vehicles driven along the street, which circumstances would be sufficient to warrant the enactment under the general authorities to prohibit nuisances, protect health, and prevent individuals from so using their own property as to subject others to serious or unnecessary inconvenience or danger.

As to stands, show-cases, and other such erections on sidewalks, etc., see *supra*, III. b; and as to things overhanging streets and sidewalks, see *supra*, III. e.

g. Gas pipes.

In *Butler v. Butler Gas Co. (Pa.)* 5 Cent. Rep. 609, it is held that a municipality cannot sustain a bill for perpetual injunction against a natural gas fuel company reincorporated under the Pennsylvania act of May 29, 1885, on the ground that the corporation has laid its pipes in the borough without permission, and that such pipes are defective, and cause injury to the property and persons of citizens,—especially where the averments of the bill are denied, and the court, upon examination, finds that the matter complained of is not a public nuisance.

An ordinance prohibiting a gas company from laying its gas mains in the public streets in the winter months was held reasonable and not in restraint of trade as being passed for the purpose of preventing obstruction in the streets and nuisances. *Northern Liberties Comrs. v. Northern Liberties Gas Co.* 12 Pa. 318.

h. Convict labor on the streets.

A city ordinance which declared the working of convicts upon the streets of the city to be a nuisance as calculated to produce riots, endanger the lives of the inhabitants, and to disturb the peace

permanently attached to this frame, but "was at one end attached to a 2 x 4 scantling, which was nailed to the building, and at the other end was attached to a wooden roller, which rolled out upon the frame above described when the awning was extended, and which was drawn up to the building by means of ropes, thus rolling up the awning upon it when

the awning was not needed as a shade. . . . No part of the frame, unless the posts aforesaid be considered a part of it, was within 6 feet of the sidewalk." These posts, "in addition to supporting the frame, were used as hitching posts for horses," and the frame and posts "had existed in the same condition for many years. . . . No evidence was offered by the state to show that

and good order of the city, is invalid, in so far as it declared such act to be a nuisance, and therefore equity will not enjoin such working. Ward v. Little Rock, 41 Ark. 528, 48 Am. Rep. 46, 47.

1. Betting on streets.

The power conferred upon municipalities by the English corporation act of 1862, to make by-laws for the good rule and government of the borough, and for the prevention and suppression of nuisances not already punishable by any act in force, empowers such municipalities to prohibit, by a by-law, any person using or frequenting the street for the purpose of bookmaking or betting. Burnett v. Berry [1896] 1 Q. B. 641.

V. Water, watercourses, etc.

Public streams are governed by the same general rules of law as are highways upon land. Gerrish v. Brown, 51 Me. 236, 262, 268, 81 Am. Dec. 569.

Great water highways belong to the same class of public rights, and are governed by the same general rules, applicable to highways upon land, and any contracting or narrowing of a public highway on land is a nuisance, and all unauthorized intrusions upon a water highway for purposes unconnected with the right of navigation or passage are nuisances. People v. Gold Run Ditch & Min. Co. 66 Cal. 138-147, 56 Am. Rep. 80. To the same effect, Republica v. Caldwell, 1 U. S. 1 Dall. 150, 1 L. ed. 77; Com. v. King, 18 Met. 115.

Highways, whether on land or water, are designated for the accommodation of the public for travel or transportation. They cannot be made the receptacles of waste materials, filth, or trash, nor the depositories of even valuable property, so as to obstruct their use as public highways, and therefore, if any person obstructs a stream which is by law a public highway by casting therein waste materials, or filth, or trash, or by depositing materials of any description except as connected with the reasonable use of such stream as a highway, or by direct authority of the law, he does it at his peril as it is a public nuisance. People v. Gold Run Ditch & Min. Co. 66 Cal. 138, 147, 56 Am. Rep. 80; Veazie v. Dwinel, 50 Me. 479; Gerrish v. Brown, 51 Me. 236, 262, 81 Am. Dec. 569.

In Com. v. Wright, Thacher, Crim. Cas. 217, it is said that as the common highways on the land are for the common land passage, so rivers, whether fresh or salt, are for common passage, and ports and harbors are highways by water, and if a person intrudes upon the property of the public it is a purpresture, and the people or the proper officer of the government may enter upon the same and repossess themselves of it, the remedy being civil in its nature; but that any intrusion into, or an occupation of, the public highway which straitens or incommodates the public in the enjoyment of a public right, as that of passing, is a common nuisance.

In this case, however, the defendants were prosecuted at the instance of the commonwealth, the object of the indictment being to preserve the safety of the harbor and to protect the public in the enjoyment of what they were entitled to, namely, a free and unobstructed navigation of the river.

It has been said that any illegal encroachment upon a public stream is a purpresture, that is, the making of that private which ought to be common to many, and an obstruction in a public river is a 39 L. R. A.

nuisance which may be dealt with as such. People v. Vanderbilt, 38 Barb. 232, 238, 294.

Obstructions to navigation are public nuisances. Allen v. Monmouth County Freeholders, 13 N. J. Eq. 68, 73.

An unlawful obstruction that impedes the free use of a navigable river for the purposes of navigation is a public nuisance. New York v. Baumberger, 7 Robt. 219, 220.

It is a public nuisance to obstruct the navigation of a public navigable river without authority of law. Renwick v. Morris, 7 Hill, 575.

A bridge constructed over a river with proper draws, in a manner calculated to injure navigation as little as possible, is not a nuisance, and therefore any slight unavoidable obstruction which such a bridge occasions must be borne as a necessary evil for the public good. Thompson v. Paterson & H. R. R. Co. 9 Eq. N. J. 628.

In Newark Pl. Road & Ferry Co. v. Elmer, Van Wagenen, 9 N. J. Eq. 754, 788, it is said that every wharf, pier, or bridge is not necessarily a nuisance for the reason that instead of injuring it might in some cases benefit the navigation of a navigable river, but every erection in a navigable river which obstructs or hinders the navigation is a nuisance, for the fact that it does obstruct or hinder the free navigation to which the public is entitled is precisely what makes it a nuisance *ad commune nocumtum*.

Without a grant of authority every obstruction in a navigable river will be a nuisance, and no evidence need be given of the extent to which the public right is impaired, or the public use of the river impeded; it is sufficient that the public domain which is devoted to a public use is invaded in a way to deprive the public of any part of it. People v. Vanderbilt, 38 Barb. 232, 238.

If a pier be erected in a navigable river without lawful authority, it is a nuisance *per se*, and no evidence is admissible to show that, though illegal, it will do no harm, and such an obstruction needs no evidence to prove it a nuisance *per se* as a matter of fact after the erection has been shown to be in violation of law. People v. Vanderbilt, 38 Barb. 232, 238.

✦ An unauthorized invasion of the rights of the public to navigate the water of navigable streams flowing over the soil is a public nuisance. People v. Gold Run Ditch & Min. Co. 66 Cal. 138, 147, 56 Am. Rep. 80.

Although the inhabitants of a town may be empowered to make a bridge according to the location of county commissioners, yet any excess or irregularity in the exercise of such a power by which navigation becomes obstructed becomes *pro tanto* a public nuisance. State v. Freeport, 43 Me. 198, 201.

Where the act gave the defendant company the right to erect its road beyond the banks of the river in a manner which would not prevent the free and uninterrupted navigation of the same, and the plan selected by such company showed that the work would obstruct navigation in a manner beyond what was reasonably necessary for the purpose of carrying out the provisions of the act, it was held that the works so constructed amounted to a public nuisance and were restrainable as such. Newark Pl. Road & Ferry Co. v. Elmer, Van Wagenen, 9 N. J. Eq. 754, 788.

the said awning or frame had ever in any way interfered with the health, safety, comfort, or convenience of the public at large, or that the awning or said frame was on the day in question a nuisance in fact, or had ever been so."

Upon this state of facts, the defendant requested the court, among other things, to instruct the jury in substance as follows: (1) That the ordinance in question was invalid and void

for uncertainty and ambiguity. (2) That it was invalid and void for uncertainty, "because the word 'suitable' has no definite and determined meaning in the connection in which it is placed, and the defendant could not know that he had done any act which was prohibited by the ordinance." (3) That the charter gave the city no power to pass this ordinance, and that the ordinance itself was unreasonable, un-

In *Cox v. State*, 3 Blackf. 193, 199, in reference to the government's interest of jurisdiction over navigable streams and waters, it is said that the government's jurisdiction over those streams in reference to nuisances is to reform and punish nuisances in all navigable rivers, whether fresh or salt, and reform all obstructions to the common passage of ships, vessels, barges, or boats therein; for as common highways on the land are of the common land passage, so these rivers, whether fresh or salt, that bear boats, are highways by water.

So, in *Gunter v. Geary*, 1 Cal. 462, 469, the court stated that it is the duty of municipal authorities as the guardians of the interests of commerce and navigation in a harbor to abate all nuisances, having authority to permit such structures as tend to the benefit thereof. In this case the authorities had appropriated a portion of the harbor for a public slip, and it was held that the mayor and his assistants violated no private rights in removing all structures of any kind which they found obstructing the free use of such slip.

By the law as it stood before the passing of Mass. Stat. 1837, chap. 229, and 1840, chap. 35, any building beyond the line of low-water mark upon navigable tide waters was an encroachment upon the public rights, and if it obstructed navigation it was a public nuisance. *Garey v. Ellis*, 1 Cush. 306. In that case, however, the action was of a private nature.

Under § 5, Mass. Stat. 1838, chap. 149, all erections and works made without authority from the legislature, or in any manner not sanctioned by the commissioners of harbors, when their direction is required as provided in the statute, within tide waters, flowing into or through any harbor, are to be considered public nuisances, and the prohibition extends to ordinary high-water mark. *Atty. Gen. v. Woods*, 108 Mass. 438, 440, 11 Am. Rep. 380.

In this case it was sought to restrain the building and rebuilding of a dam across a river to the obstruction of the waters of the river and the enjoyment thereof, to the great injury and common and public nuisance of the citizens at a place alleged to be within the tide waters flowing into the harbor of Boston, which was rightfully used by the citizens for the purpose of navigation. The cases of *Com. v. Roxbury*, 9 Gray, 451, and *Com. v. Charlestown*, 1 Pick. 180, 11 Am. Dec. 161, recognize the same principle.

The owner of land at the side of a public navigable river has no right to erect, on the bed of the river for the benefit of his own trade, any structure whether any actual obstruction or nuisance to the navigation of the river will or will not be thereby occasioned, and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection. *Atty. Gen. v. Terry*, L. R. 9 Ch. 423, 30 L. T. N. S. 215, 22 Week. Rep. 305.

In *Bristol v. Morgan*, cited in 2 Anstr. 607, and in Lord Hale's treatise, *De Portibus Maris* (Hargrave, Law Tracts, 81), the bill sought to have obstructions, nuisances, and purprestures in a navigable river abated, and it was proved that the defendants had erected houses on the bank so as to straiten the river and to incommode the passage to and from the shipping to the shore, the houses intercepting the commerce to the town and tending to defraud the 39 L. R. A.

revenue, and the encroachments were ordered to be abated on the ground of damage to the city, but it did not seem that they were ever destroyed, as some composition was probably entered into. A similar case is also cited by Lord Hale in the same treatise between the town of Newcastle and Johnson, relating to the right of towage on the river Tyne.

To make use of the banks of a river for dumping places, from which to cast into the river annually 600,000 cubic yards of mining debris, consisting of boulders, sand, earth, and waste materials, to be carried by the velocity of the stream down its course and into and along a navigable river, is an encroachment upon the soil of the latter and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair the navigation of the river but at the same time affect the rights of an entire community or neighborhood, or any considerable number of persons to the free use and enjoyment of their property, they constitute, however long-continued, a public nuisance. *People v. Gold Run Ditch & Min. Co.* 66 Cal. 133, 147, 56 Am. Rep. 30.

In *Ogdensburg v. Lovejoy*, 2 Thomp. & C. 83, affirming 58 N. Y. 662, it was held that the filling up of channels and harbors of a river with sawdust so as to obstruct the water was a public nuisance and a violation of a city ordinance relating thereto.

Blood and offal from slaughter houses running into a stream constitute a nuisance. *Woodyear v. Schaefer*, 57 Md. 1, 10, 40 Am. Rep. 419.

Permitting the blood of slaughtered animals and other refuse therefrom and offal or parts of any animal to run or to be deposited upon the shores or in the waters of a bay, or to remain on the premises, is a nuisance injurious to health. *Babcock v. New Jersey Stock Yard Co.* 30 N. J. Eq. 296.

The owner of land who cuts a raceway through the same and across a highway is primarily liable to maintain and keep in good repair a bridge across such raceway so long as he continues to use such way, and upon his neglect and refusal to so repair and maintain the same after being duly notified the public authorities have a right to restore such bridge to a safe condition so as to remove an obstruction to the highway and a nuisance thereon. *West Bend v. Mann*, 59 Wis. 69, 74.

A mill race in use over twenty years, and occupying a part of a public street in an angular form, and uncovered so that the public cannot use the street, is a nuisance abatable by the public authorities either by removing it altogether or causing it to be covered over so as not to interfere with the public use of the streets. *Waterloo v. Union Mill Co.* 72 Iowa, 437.

Section 2 of the Ohio nuisance act, S. & C. 880, provides that the obstructing and encumbering by fences, buildings, structures, or otherwise in the public roads, shall be deemed a nuisance, and therefore it is the duty of the landowner constructing a race or maintaining a private watercourse cutting across a public road or highway to bridge such watercourse at the point where it cuts the highway; otherwise he would be deemed guilty of a nuisance. *Burton Twp. v. Tuttle*, 30 Ohio St. 62, 68.

Where the evidence showed that by reason of the increase in travel and traffic upon the street crossings, a certain ditch consequent upon the growth

just, and oppressive. (4) That the ordinance is invalid "because it attempts to declare that to be a nuisance which is not a nuisance." The court refused to comply with any of these requests.

We are of opinion that the court erred in not instructing the jury, as requested, that the ordinance was void for uncertainty. If it be assumed, as claimed by the state, that the city,

under its charter, is empowered to pass an ordinance regulating the erection and use of awnings, it may still, perhaps, admit of doubt whether it could, by an ordinance, declare that to be a nuisance which was not in fact a nuisance; but, for the purposes of the argument merely, it will be assumed that the city had power to pass the ordinance now in question in its present form. In Webster's International

of the city was an obstruction to the use of the streets so as to be properly deemed a highway nuisance, although its character as a nuisance was not shown to exist in any other respect than as such obstruction to certain streets, its character as a nuisance consisting solely in the absence of bridges at the crossings, and being wholly contingent upon that circumstance, it was held that the removal of the nuisance without the destruction of the property or interference with its use could be properly effected by bridging the ditch properly at the street crossings, and that therefore any summary proceedings by the city authorities would be enjoined. *Denver v. Mullen*, 7 Colo. 345, 354.

In *Hart v. Albany*, 3 Paige, 213, it is said that the waters of the Albany basin, as well as the waters of the river, are a public highway, and a single canal boat may become a public nuisance by being permanently located in any particular part of the basin for a great and unreasonable length of time, to the exclusion of others finding it necessary or convenient to pass that way or to occupy the same temporarily.

The obstruction of a waterway so that the water accumulates on the street, or so as to prevent the flow of water through or from the street, may be slight, occasional, and temporary, and as such will not interfere with the use of the street or occasion perceptible harm, and will not therefore constitute a nuisance unless it interferes with the use of the street. *State v. Wilson*, 106 N. C. 718, 720.

So, the mere obstruction of a waterway, so that water accumulates on the street, or so as to prevent the flow of water through or from the streets, does not, *per se* and necessarily, constitute a public nuisance. *State v. Wilson*, 106 N. C. 718, 720.

A stream may become a public nuisance in obstructing the highway, and when it does it is the right and duty of the public officers to abate it, and they therefore have the right to restore it to its original channel,—especially where it is found that the plaintiff had filled up an artificial channel on his own land; and if the original channel has also been filled up and the stream thereby turned into the highway without legal authority or right, the party filling up such channel and thus turning the stream into the highway cannot complain or object to the restoration of such stream. *Kellogg v. Thompson*, 66 N. Y. 88, 92.

And a city ordinance which prohibits the obstruction of a waterway, thereby preventing travel from being hindered, delayed, or impeded, and which prevents such water from being accumulated so as to become stagnant and giving rise to noxious vapors, is valid, and the mere fact that the offense which creates the nuisance is also regulated by the general law of the state will not render it invalid. *State v. Wilson*, 106 N. C. 718, 720.

A bridge over a navigable stream is not of itself a nuisance, it may or may not be such according to the circumstances. *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Dec. 522, 526.

The unauthorized erection of a bridge over a public navigable river, which obstructs the navigation, is an offense at common law, on the same principle upon which the erection of gates across a public road has been held to be a nuisance. *State v. Freeport*, 43 Me. 193, 201; *James v. Hayward*, Cro. Car. 184; *Rex v. Cross*, 3 Campb. 224.

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Where the board of chosen freeholders had power vested in them by statute to erect a bridge over a certain river at a certain place, it was held that, having exercised such power, they had exhausted the authority given to them under the statute, and that therefore they could not change the location of such bridge, and that such change was unlawful as being an unauthorized obstruction in the channel of the river which was a navigable one, and therefore a public nuisance. *Allen v. Monmouth County Chosen Freeholders*, 13 N. J. Eq. 68, 73.

Any unauthorized obstruction in a navigable river by means of a bridge or a dam of any kind is a public nuisance which any person may abate, and if it be put there under the authority of the sovereign it will be protected only so far and so long as it is confined within the limits of the authority, and in so far as it goes beyond such authority it is *pro tanto* a public nuisance. *State v. Dibble*, 49 N. C. (4 Jones, L.) 107, 115; *Renwick v. Morris*, 3 Hill, 621; *Meares v. Wilmington Comrs.* 31 N. C. (9 Ired. L.) 81, 49 Am. Dec. 412; *State v. Freeport*, 43 Me. 193, 201.

In *Com. v. Chapin*, 5 Pick. 190, 16 Am. Dec. 386, it was held that it was not a nuisance at common law to dam up the waters of a river so as to prevent the passage of fish, but the remedy for such nuisance or obstruction lies under the Massachusetts statutes.

And an ordinance abating a dam as a nuisance cannot be upheld when, as a matter of fact, it is not shown that such dam is a nuisance *per se*. *Walker v. Board of Public Works*, 16 Ohio, 540.

A mill dam is not a nuisance *per se*, yet it may become so at some places and under special circumstances, and when it does become a nuisance at one place it is no defense to say that a greater nuisance is tolerated elsewhere. *Douglass v. State*, 4 Wis. 387.

And the maintenance of a dam in such a manner as to cause water to overflow a highway and wash gullies therein constitutes a public nuisance, and if the town which is bound to maintain such highway suffers special damages from such nuisance it may recover the same against the party maintaining it. *Charlotte v. Pembroke Iron Works*, 82 Me. 391, 8 L. R. A. 828.

Where a dam across a river caused water to be turned back upon a bridge across it in a public highway, thereby destroying the bridge, it was held that the town had a right to recover damages, and that the company's charter was no defense. *Hooksett v. Amoskeag Mfg. Co.* 44 N. H. 105.

A raft in a stream rendering the same inconvenient may be declared a nuisance by a city ordinance. *Tourne v. Lee*, 8 Mart. N. S. 548, 20 Am. Dec. 261.

The obstruction of the public right of fishing in a navigable stream is a public nuisance, and abatable as such. *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513.

In *Cooley v. Albany*, 57 Hun, 327, in which it was sought to hold the city liable for damages occasioned by its nonremoval of a sunken canal boat from the waters of the river, upon the ground that the same was a nuisance, being an obstruction to navigation, it was held that, although under the New York Laws of 1826, chap. 185, the common council were declared commissioners of highways with power to pass ordinances to abate and remove

Dictionary the word "awning" is defined as follows: "A roof-like cover, usually of canvas, extended over or before any place as a shelter from the sun, rain, or wind;" and in the Century Dictionary as follows: "A movable roof-like covering of canvas or other cloth spread over any place, or in front of a window, door, etc., as a protection from the sun's rays." As thus defined, "awning" means the covering which shelters or protects, as distinct from its frame or support; and this covering may extend over, or hang in front of, the protected place. It is in the sense of the covering, as distinct from its frame, that the word "awning" is used in this ordinance, for he speaks of the one as distinct from the other. The ordinance does not prohibit all awnings, but only those which do not conform to its requirements. It permits awnings under certain conditions, and in effect, it punishes as a crime the erection or use of awnings which fail in any way to comply with those conditions. This being so, the conditions ought to be stated with such reasonable certainty that the man of ordinary intelligence may with reasonable efforts understand them, and be able to guide his conduct by

them. They should be stated so clearly and unambiguously that the average man may with due care know whether in erecting and using his awning, he has or has not committed an act which subjects him to fine and imprisonment in a criminal prosecution. An ordinance of this kind, which limits to a certain extent the use of property, and visits the offender against its provisions with such consequences, ought to be strictly construed; and, when thus construed and tested by the rule above stated, we think this ordinance should be held to be invalid. The ordinance in effect prohibits the use and erection of any awning "except the same be upon a suitable frame, and attached entirely to the building, and which awning shall not, when extended, be less than 6 feet from the sidewalk." Here are three conditions to be complied with, namely: (1) The awning must "be upon a suitable frame." (2) Taking the ordinance just as it reads, the "awning" is to be "attached entirely to the building." (3) The awning "shall not, when extended, be less than 6 feet from the sidewalk." Taking these conditions in reverse order, what does the third mean? Does it mean that the awn-

nuesances in any street or wharf and to prevent obstructions in the river near or opposite to any wharves, docks, or slips, and although such sunken boat might be a nuisance, and although there was no other practicable way of abating it except by its destruction, yet the power to do so was not conferred under the statute.

And the same point was practically held in the case of *Seaman v. New York*, 80 N. Y. 239, 36 Am. Rep. 612, although the question of nuisance did not there arise.

In *Dzik v. Bigelow*, 27 Pittsb. L. J. N. S. 360, the plaintiff claimed damages against the city authorities for entering and taking possession of a house or boat in a navigable river and ruining and destroying it, the boat in question being a shanty or jobat situated below high-water mark and used as a private residence. The court held the action of the public authorities as justifiable, the same being a public nuisance, the defendant having been notified by the public authorities to remove the same.

So, a floating store so permanently moored in the Albany basin, secured in its place by means of spikes or posts driven into the earth in the bottom of the basin, is *prima facie* a nuisance, and equity will leave the owner thereof to his legal remedy against those who removed it as such. *Hart v. Albany*, 3 Paige, 213.

The legislature has power to establish lines in Boston harbor beyond which no wharf shall be extended or maintained, and to declare any wharf extending or maintained beyond such lines to be a public nuisance. *Com. v. Alger*, 7 Cush. 53.

The right to maintain an action for damages for obstructing a highway at the landing of a river was upheld in *Pittsburgh v. Scott*, 1 Pa. 308, 320.

It is not an obstruction or a nuisance to build a wharf in a navigable stream if a sufficient passageway is left for the public, but *aliter* if no sufficient passageway is left. *Com. v. Crowninshield*, 2 Dane, Abr. 697. *Com. v. Pierce*, 2 Dane, Abr. 696 followed.

The law conferring upon individuals the right of building wharves in front of their lands in navigable rivers does not confer an unlimited privilege; it annexes these qualifications, that such wharves do not improperly impede the public navigation. When this is done they become public nuisances. *Frink v. Lawrence*, 20 Conn. 117, 121, 50 Am. Dec. 274. 39 L. R. A.

So, a municipality cannot, by its special act, declare a private wharf an obstruction and a nuisance when it is not so in fact, although under its charter it may have power to prevent obstructions and nuisances in waters. *Yates v. Milwaukee*, 77 U. S. 10 Wall. 505, 19 L. ed. 966.

The mere fact that the dock department and the municipality itself have permitted ferry companies using other slips to encumber them by structures of similar description both before and after the passage of an act of the state legislature relating to the changing of the bulk-head lines will not legalize this structure, as the authority conferred upon the board is not discretionary, but absolute and positive, forbidding the waters of the slips to be obstructed or encumbered by such a structure beyond the bulk-head line. *New York v. Cunard S. S. Co.* 61 Hun, 346.

In *Frink v. Lawrence*, 20 Conn. 117, 121, 50 Am. Dec. 274, the committee found that a valuable wharf existed, and that the dock on its north side was a very safe and convenient one much frequented by vessels, and that the business done at the wharf was principally with vessels lying upon the north side of it, and that the defendant was about creating an obstruction which would exclude the access of all vessels to that dock and to that side of the wharf. It was held that such act would work a serious and irreparable injury and would manifestly be a public nuisance.

In *Atty. Gen. v. Terry*, L. R. 9 Ch. 423, 30 L. T. N. S. 215, 22 Week. Rep. 395, an information was filed at the relation of the mayor, etc., of the town against the defendant and wharf owner who threw tiles into the bed of a river extending the wharf so as to occupy 3 feet out of a breadth of about 60 feet valuable for navigation. It was held that such act was an obstruction and a nuisance and restrainable at the suit of the municipal corporation, which was empowered by act of Parliament to remove obstructions.

In *Franklin Wharf Co. v. Portland*, 67 Me. 46, 59, 24 Am. Rep. 1, where it was sought to recover damages for the obstruction of the plaintiff's wharf by reason of deposits of sewage from a sewer constructed by the defendant with an outlet at the head of the dock of the plaintiff's wharf, the court held that the defendants under the Statutes of 1857, chap. 16, §§ 2 and 3, and the Laws of 1860, chap. 153, had the right to construct such sewers and to use

ing, or the frame, or both, must be at least 6 feet above the sidewalk, or 6 feet laterally from the sidewalk, or both? What is the precise meaning of the second condition? What is it that is to be "attached entirely to the building,"—the awning, or the frame, or both? What is meant by the phrase "entirely attached?" Does it mean that every part of the awning or the frame or both, are to be attached to the building? To the person who desires to exercise his property rights, and to have the benefit of an awning, and yet to obey the ordinance, these questions must be quite perplexing, and the ordinance does not clearly and certainly answer them, so as to be a guide to the average man using due care in the premises. If, however, it can be fairly said, with reference to the first two conditions, that these doubts and uncertainties are the ordinary ones that arise as to the construction of every law, that they may be obviated by a reasonable construction of it, and that they are not of such a nature as to warrant this court in holding the ordinance to be void on account of them,—with reference to these two conditions this claim may be true, but it is not true as to the first con-

dition. That requires the awning to be "upon a suitable frame," and the ordinance furnishes no criterion by which the question of suitability can possibly be determined. It does not define the word "suitable," as here used, and the law does not define it. Indeed, when it is thus used, it is incapable of any general or legal definition. *Batters v. Dunning*, 49 Conn. 479; *Smith's Appeal*, 65 Conn. 185. Its use, of necessity, implies the judgment of some tribunal or person who is to determine the question of suitability, and yet neither the charter nor the ordinances of the city empowers any person or tribunal to exercise such judgment. This term "suitable," as here used, seems altogether too vague and indefinite to serve as the basis of an ordinance so highly penal in its consequences as this one is. On the whole, we are of opinion that the ordinance in question is void for uncertainty, and that the court below erred in not instructing the jury to that effect.

There is error in the judgment complained of, and it is reversed.

The other Judges concur.

them in a reasonable manner for conducting and depositing therein refuse matters and impurities, but that it was their duty to cause such docks to be cleared thereof whenever an obstruction to navigation or injury to public health occurred, and that any neglect in so doing would constitute a public nuisance.

But under a city charter empowering a corporation to abate or remove any nuisances in any street or wharf, or to prevent all obstructions in the river near or opposite to such wharves, the public authorities have no power to remove a bulk head at the end of a basin in the river at the termination of a canal, erected under the authority of a special act of the legislature by a corporation, although such bulk head may be or is a public nuisance, as endangering the health of the subject, corporations having no powers but those which are derived from their charter, or special act of the legislature. *People v. Albany*, 11 Wend. 539, 27 Am. Dec. 95.

So, in *Evansville v. Martin*, 41 Ind. 145, the city was not incorporated or acting under the general law for the incorporation of cities but under a special charter provision which gave it power "to regulate all wharves on the shore of the Ohio river adjoining such city whether the same be public or private, and the amount of wharfage to be charged at or for the use of the same." It was sought to abate buildings erected by the defendant below the high-water line as a nuisance, and to impose a fine provided for by the ordinance. The court held the city had no such power, the ordinance giving no authority to define the line of high-water mark.

In *Moore v. Board of Comrs. of Pilots*, 32 How. Pr. 184, the court upheld the action of the defendants in removing a platform or structure erected in the slip adjoining a pier, the same being an obstruction and a public nuisance.

And the filling up of a canal by the public authorities, which has been in constant use during the season of navigation and, while kept at its proper

depth and before obstructed by rubbish, is a valuable highway to the public and the owners of property, is not a proper exercise of the power to abate nuisances under its charter, where the obstructions could have been removed, and the alleged nuisance, caused by the failure of the corporation itself to exercise the powers conferred upon it by charter to preserve canals and slips in the city by preventing the casting into them of obstructions and filth, could have been abated by the plaintiff himself, at a less expense and without injurious consequences to the public health. *Babcock v. Buffalo*, 56 N. Y. 268, Affirming 1 Sheldon, 817.

So, whatever power a city has to remove the obstruction complained of as a public nuisance, it cannot be held that under an act authorizing the city to dredge and clear obstructions from a certain creek, and to maintain the same in a navigable condition and assess not less than half of the expense upon the property benefited, the city has the power to remove such obstructions and to make the assessment, the act not saying that the common council may remove the obstruction, unless they have the power to abate it as a public nuisance, or unless it is created by the carelessness or negligence of the defendant, but conferring an absolute power to remove obstructions, etc. *Buffalo Union Iron Works v. Buffalo*, 13 Abb. Pr. N. S. 141, 146.

And an ordinance declaring a certain branch of a river a public nuisance, and making provision for the abatement of the same by means of a new channel, is within the power of the city authorities to enact. *Hamilton v. Fond du Lac*, 40 Wis. 47, 51.

As to how far a stream may be polluted for mining purposes, see note to *Drake v. Lady Ensey Coal, I. & R. Co. (Ala.)*, 24 L. R. A. 64.

Upon the question of nuisances as injurious to health, arising from water and watercourses, see note to *Harrington v. Providence (R. I.)* 38 L. R. A. 305.

E. W.

CALIFORNIA SUPREME COURT (Department 2).

Margaret Sutton AINSWORTH, Exrx., etc.,
of George J. Ainsworth, Deceased, Resp.,
v.

BANK OF CALIFORNIA, Appt.

(.....Cal.....)

1. A definition of what a counterclaim is, and not a mere rule for pleading counterclaims, is stated by Code Civ. Proc. § 438.
2. The immaturity of a debt at the time of the debtor's death does not prevent it from being set off against a claim due to the estate if it is mature at the commencement of the action, as prescribed by Code Civ. Proc. § 438.

(December 30, 1897.)

APPEAL by defendant from a judgment of the Superior Court for Alameda County in favor of plaintiff in an action brought to recover a deposit which had been made by plaintiff's testator with the defendant bank. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. James M. Allen, for appellant:

The answer of the defendant shall contain a statement of any new matter constituting a defense or counterclaim.

Code Civ. Proc. § 437.

The counterclaim must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: In an action arising upon contract; any other cause of action also arising upon contract and existing at the commencement of the action.

Code Civ. Proc. § 438.

The defendant may set up any other cause of action arising upon contract and existing at the commencement of the action."

St. Louis Nat. Bank v. Gay, 101 Cal. 290.

The credit of \$5,974.53 given on the note of respondent was compulsory.

All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to decedent's legal representative.

Code Civ. Proc. § 1498.

Every claim which is due must be supported by the affidavit of the claimant, or someone in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, etc.

Code Civ. Proc. § 1494; *Knecht v. United States Sav. Inst.* 2 Mo. App. 563.

In order to entitle a defendant to a set-off against an executor or administrator, it is not necessary that the defendant's debt should have been actually due, or really liquidated, at the death of the testator or intestate.

Waterman, Set-Off, § 97; *Ravson v. Copland*, 3 Barb. Ch. 166; *Mathewson v. Strafford Bank*, 45 N. H. 104; *Skiles v. Houston*, 110 Pa. 255.

NOTE.—As to set-off of claims against decedent's estate, see also *Koons v. Mellett* (Ind.) 7 L. R. A. 231; *Fiscus v. Moore* (Ind.) 7 L. R. A. 235; *Blood v. Kane* (N. Y.) 15 L. R. A. 490; *Gonnell v. Flack* (Md.) 18 L. 39 L. R. A.

Set-off is in all cases useful to prevent circuity of action. But where one of the parties is dead, insolvent, bankrupt, or removed beyond the jurisdiction of the court, it is absolutely necessary to prevent gross injustice.

Byles, Bills, 349; *Waterman, Set-Off*, §§ 16, 24; *Temple v. Scott*, 3 Minn. 419.

The demands of appellant and respondent are cross demands, and should be deemed compensated, so far as they equal each other.

Code Civ. Proc. § 440; *Hart v. Cooper*, 47 Cal. 77; *Lyon v. Petty*, 65 Cal. 322; *Concery v. Langdon*, 66 Ind. 311.

Appellant had a banker's lien on said sum of \$5,974.53.

1 Morse, Banks & Banking, § 324.

Such a lien arises upon the maturity of the note.

Colebrooke, Collateral Securities, § 61; *Civil Code*, § 3054; *Overton, Liens*, § 80.

Appellant had the right to apply said \$5,974.53 on its note when it became due.

The relation between banker and depositor is that of debtor and creditor.

Boone, Banking, § 40; *Civil Code*, §§ 1878, 1818.

The character of the banking business is such that it necessarily follows that if a customer, being a depositor, owes the bank, and he then makes a deposit of money with it, such money will be passed on the books of the bank to his credit, and will stand *pro tanto* as a payment of his indebtedness.

Overton, Liens, § 80; *Central Nat. Bank v. Connecticut Mut. Ins. Co.* 104 U. S. 54, 26 L. ed. 692; *State Bank v. Armstrong*, 15 N. C. (4 Dev. L.) 519; *Ford v. Thornton*, 3 Leigh. 695.

Messrs. Davis & Hill and Rodgers & Patterson, for respondent:

Had the executrix received letters testamentary and presented her check for this balance, on, say, December 1, it would hardly be contended now that the bank could have refused payment of the check because it held Mr. Ainsworth's unmatured note for a greater amount. In that case the money would have passed into the hands of the executrix and become a part of the assets to which all creditors might resort for payment of their demands against the estate, and the holder of the note would have occupied the same position with respect thereto as any other creditor.

Babcock v. Booth, 2 Hill, 181, 38 Am. Dec. 578.

A rule which would allow this counterclaim would in many cases take assets out of administration, through proceedings in which creditors and others interested in the result could not be heard; would pay the debt of one creditor out of the assets of the estate, notwithstanding other creditors, even those preferred by the statute, got nothing; would render inoperative the provisions for temporary support of the family of the deceased—to which, under probate proceedings, all debts are postponed; would, in brief, make the statutory

R. A. 158; *Powers v. Morrison* (Tex.) 28 L. R. A. 521; *Webb v. Fuller* (Me.) 22 L. R. A. 177; *Re Bailey* (Pa.) 22 L. R. A. 444.

system of closing up estates inoperative in every case where the rule might be invoked. The counterclaim must be rejected on this ground.

Fitzpatrick v. Brady, 6 Hill, 581; *Leiper v. Lewis*, 15 Serg. & R. 108; *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467, 30 Am. Rep. 819.

This counterclaim should be rejected for want of mutuality.

Patterson v. Patterson, 59 N. Y. 574, 17 Am. Rep. 384.

Chipman, C., filed the following opinion:

The facts are admitted, and found to be as follows: September 27, 1895, George J. Ainsworth, plaintiff's testator, executed his note to the Bank of California for \$10,000, payable December 26, 1895. He was a customer of the bank, and at his death, October 20, 1895, had on deposit there to his credit the sum of \$5,974.25. On December 26, 1895 (the day the note matured), the bank, without the consent of respondent, applied this sum on the note. On December 30, 1895, letters testamentary were issued to respondent by the superior court of Alameda county. February 17, 1896, respondent presented her check for said deposit to the bank, and demanded payment, which was refused. February 21, 1896, the bank presented its claim on said note therein, crediting it with said sum of \$5,974.53, which claim was rejected on March 3. On March 9, 1896, plaintiff commenced her action to recover the sum so deposited. In its answer the bank set up its presented claim, and claimed the right to use it as a counterclaim, under §§ 487, 438, Code Civ. Proc., and also the right to apply said deposit on said note by virtue of its banker's lien, and also that the two debts—the note and said deposit of \$5,974.53—should be deemed compensated, so far as they equal each other, under § 440, Id. There is no finding or evidence as to the solvency or insolvency of the estate. The court denied the right of defendant to use the note as a counterclaim, or to apply the said sum of \$5,974.53, on the note, and denied the right to such "compensation." Judgment was given for plaintiff for \$5,974.53, and for defendant for \$10,000 and interest, payable in due course of administration. The appeal is from the judgment, and comes here on bill of exceptions.

Under § 487 a defendant may answer by "(2) a statement of any new matter constituting a defense or counterclaim . . ." A counterclaim is, by § 438, defined to be "one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: . . .

(2) In an action arising upon contract; any other cause of action also arising upon contract and existing at the commencement of the action." Counsel for plaintiff (respondent) make an ingenious argument to the effect that these sections simply prescribe a rule for pleading counterclaims, how to plead them and what qualities they must possess in order that they may be pleaded, but leaves the question entirely open "as to what counterclaims are, and what are not, claims upon which a several

judgment might be had in the action." It is true that § 438 says that the counterclaim mentioned in § 487 must possess certain elements; but it goes further, we think, and defines what a counterclaim is, as well as when it may be pleaded. The section practically says that a counterclaim is defined to be what the section says may be pleaded as such. It is suggested by respondent that a rule which would allow his counterclaim would in many cases take assets out of administration, through proceedings in which other creditors could not be heard, would pay one creditor to the exclusion of others, would render inoperative provisions for the temporary support of the family of the deceased, to which all debts are postponed; and therefore the rule cannot be sound; citing *Fitzpatrick v. Brady*, 6 Hill, 581; *Leiper v. Lewis*, 15 Serg. & R. 108; *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467, 30 Am. Rep. 819.

Respondent makes the point, also, that the counterclaim should be rejected for want of mutuality, grounding the objection upon the fact that the note of deceased was not due when he died, and that nothing ever did become due from him; that plaintiff sued as executrix, in her representative capacity, for a debt due the deceased at his death, and her title and right of action are to be considered as of that date, as is also the right of defendant to set up the counterclaim, at which time nothing was due defendant,—citing *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384. The contention is that if A owes B \$1,000 upon a promissory note, and B owes A a like sum on a promissory note, both due on the same day in the future, and A meanwhile dies, A's administrator may sue and recover when B's note to A matures, but B cannot plead A's note by way of counterclaim, because B now owes the estate, and not A, and there is no mutuality, because a right of action on A's note did not accrue in A's lifetime. Such is the apparent reasoning of *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, and also of *Jordan v. National Shoe and Leather Bank*, 74 N. Y. 474, 30 Am. Rep. 819, cited by respondent. In the case cited from 6 Hill, the *pro rata* distribution of an estate was not a question. The case is not in point. The case in 15 Serg. & R. 108, was decided upon the construction given to the act of 1794, then in force in the state of Pennsylvania; and the question was as to the right of a judgment creditor of an insolvent estate gaining a priority over other judgment creditors by taking out and levying a *fiere facias* which related to a day prior to the intestate's death. The case does not seem to throw any light on this case. In *Patterson v. Patterson* plaintiff, as executrix, brought suit to foreclose a mortgage executed by defendant to plaintiff's testator given to secure a promise in the nature of an annuity, which by its terms was made to depend upon the testator's death, and was payable to his executrix or administratrix after his death. Defendant set up as counterclaim a claim for rent due him from the testator at the time of his decease. It was said there was no mutuality, and the set-off was disallowed. The case follows the construction given by the English courts to the statute of 2 Geo. II. chap. 22, to

which the New York statute was similar. The decision is well considered, and was followed in *Jordan v. National Shoe & Leather Bank*. The statute of New York (2 Rev. Stat. p. 855, § 23) reads: "In suits brought by executors, etc., demands existing against their testators, etc., and belonging to the defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased." The case of *Patterson v. Patterson* does not necessarily support respondent, although, as interpreted in *Jordan v. National Shoe & Leather Bank*, it may be so applied. In this latter case the relation of the claims of the parties was the reverse of *Patterson v. Patterson*. Jordan sued as administratrix on a demand owned by the intestate in his lifetime, and due and payable to him then, while the promissory note which defendant sought to set off, though owned by it in the lifetime of the intestate, was not due and payable until after his death. It was held that, for a demand to be set off against an executor or administrator in an action brought by him, it must have been due and payable from the decedent in his lifetime. We think that the provisions of our § 438, Code Civ. Proc., read with § 440, are different from the New York statute. The clause, "any other cause of action also arising upon contract, and existing at the commencement of the action (§ 438, subd. 2), is not in the New York statute. Section 440 provides that "when cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other." Our statute of set-off, we think, relates to the situation of the parties "at the commencement of the action," and the death of one of the parties to the demand, though such death occur before the maturity of the demand, will not change the relative rights of the parties in pleading a counterclaim, or in compensating the claims so far as they equal each other, provided the set-off be due when the action is commenced.

In New Hampshire and Massachusetts the statutes were said to be substantially the same as the statute of Geo. II. In both these states the rule contended for by appellant was sustained. In *Mathewson v. Stratford Bank*, 45 N. H. 104, where the question was examined, and the rule as in *M'Donald v. Webster*, 2 Mass. 498, and *Bigelow v. Folger*, 2 Met. 255, was followed, a clear distinction is drawn between debts or demands to and from executors in their own right, "and those where the transactions were wholly between the deceased and the adverse party, in the lifetime of the former, but the contingent claims have become absolute, and the claims not due have become payable after the decease. . . ." Said the court: "We are unable to see any good reason why such demands should not be set off against an administrator, when they become absolute and payable." We cannot assent to the doctrine that our statute does not apply because the cross demand of the bank was not due when plaintiff's testate died. It

was due when action was brought. *St. Louis Nat. Bank v. Gay*, 101 Cal. 288. The debt existed at his death. Section 61 of the Indiana Code (2 Rev. Stat. 1876, p. 64) reads almost as our § 440, *supra*. There is no substantial difference. In *Convery v. Langdon*, 66 Ind. 811, the New York cases and the New York statute *supra* were considered, and it was said: The "cross demand must have been an existing demand against the testator or intestate at the time of his death. It is not necessary that the cross demand thus existing . . . should have become due at the time of the testator's . . . death. It is sufficient if it become due and payable in time to be pleaded as a set-off in the same manner as if the testator or intestate had lived to bring the action." See also *Waterman, Set-off*, §§ 24, 97; *Ransom v. Copland*, 8 Barb. Ch. 166 (limited and distinguished in *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 884; *Mathewson v. Stratford Bank*, 45 N. H. 104; *Skiles v. Houston*, 110 Pa. 255; *Byles, Bills*, 531, and note 8; *Temple v. Scott*, 3 Minn. 419 (Gil. 806). It is laid down as the rule in 2 Woerner, American Law of Administration, 398, supported by cases there cited, that, where the defendant and deceased had mutual dealings the judgment can be only for the difference between the claims of the creditor and the decedent; and this is there said to be true, whether the debts are payable simultaneously, or the one *in presenti* and the other *in futuro*.

The claim of respondent that by the death of plaintiff's testator the demand passed *eo instante* to his representatives, and took date by relation to the date of the testator's death, is correct only to this extent: that it passed subject to any right of set-off or counterclaim in appellant. The demand was not an asset of the estate, in the sense claimed, and to the exclusion of appellant's right of set-off. As was said in *Richardson v. Parker*, 2 Swan, 529: "The notes and accounts of the deceased are not assets, if they have been discharged by payment, the creation of adverse accounts, or otherwise. It is only what remains after all just settlements with the debtors of the estate which goes into the fund for distribution." See *Finnell v. Nesbit*, 16 B. Mon. 351, and *Ely, v. Com.*, *Horine*, 5 Dana, 398, therein referred to. See also *Ford v. Thornton*, 3 Leigh, 695. That the title of the administrator to the assets of the estate takes effect by relation, from the intestate's death, respondent cites *Babcock v. Booth*, 2 Hill, 181, 33 Am. Dec. 578. In that case the general rule was stated to be that the administrator can only maintain such claims as the testator or intestate might have successfully asserted if living. An exception to the rule was found in the case cited, however, where the deceased was a fraudulent vendor, who remained in possession until his death; and as to his creditors the sale was held void against the fraudulent vendee, who took the property from the possession of the widow after her husband died. We do not think the case before us would be an exception to the general rule as above stated, or that the creditors of the estate would stand in any better position than the testator would himself have stood in, had he lived, and had drawn his check after his note was due, and had been re-

fused payment. Under our Code provisions as to claims against estates of deceased persons, it is compulsory upon the claimant to present his claim under oath stating all offsets and credits. Without doing this he cannot maintain an action, or be paid his claim. The purpose of the law, we think, is to ascertain the balance existing and to give to both the claimant and the estate the benefit of all just offsets, whether the estate be solvent or insolvent. As was said in *Aldrich v. Campbell*, 4 Gray, 284: "The settlements with such estates [insolvent] are final, and all mutual demands are to be balanced. Claims not liquidated, and debts absolutely due, though payable in the future, are to be included. The balance found upon such adjustment is the only debt remaining. In the case of an insolvent estate of one deceased, all claims existing at the time of the death are to be set off." If this is sound law in the case of insolvent estates,—and we think it is,—it certainly must be so if the estate be solvent, for no harm can come to anyone by applying the rule in the latter case. We find nothing in the sections of the Code of Civil Procedure cited by respondent in conflict with this view of the matter. The inventory required to be made by the administrator or executor by §§ 1443-1446, and the duty imposed by § 1581 to take into his possession all the estate, etc., and to collect all debts due to decedent, etc., cannot affect the rights of creditors of the deceased, or change their relations in respect of mutual obligations.

The view we have taken of the case makes it unnecessary to decide whether the appellant had a right to apply the deposit by virtue of the banker's lien claimed by it. We think the court below erred in its conclusions, and advise that its judgment be reversed, and that judgment be ordered for defendant, payable in due course of administration, for the amount of its note and interest, less the amount of said deposit credited as of the date of December 26, 1895, the date when indorsed on said note.

We concur: **Haynes, C.; Searls, C.**

Per Curiam:

For the reasons given in the foregoing opinion the judgment is reversed, and the judgment ordered for defendant, payable in due course of administration, for the amount of its note and interest, less the amount of said deposit credited as of the date of December 26, 1895, the date when indorsed on said note.

Re ESTATE OF Ann CALLAGHAN,
Deceased.

(.....Cal.....)

A devise of specified land in a specified county to designated grandchildren is such a provision for such grandchildren as will prevent their taking the same share in the estate

NOTE.—As to the effect of an omission in a will to provide for children, see also *Smith v. Olmstead* (Cal.) 12 L. R. A. 44.

89 L. R. A.

of testatrix as if she had died intestate, although testatrix had no land in such county at the time of making the will, under a statute providing that when any testator "omits to provide" in his will for any children or the issue of any deceased child, unless it appears that such omission was intentional such child must have the same share in the estate of the testator as if he had died intestate.

(January 11, 1898.)

APPEAL by Bertha Callaghan *et al.* from a decree of the Superior Court for the City and County of San Francisco granting a partial distribution of the estate of Ann Callaghan, deceased, in opposition to their claims for a share in the estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Myrick & Deering for appellants.

Messrs. Bishop & Wheeler, J. H. Creeley, Knight & Heggerty, and W. S. Wood for respondents.

McFarland, J., delivered the opinion of the court:

The estate of Ann Callaghan, under administration in the probate court, being in a condition to warrant a partial distribution, petitions for such partial distribution were filed by Daniel T. Callaghan, son of the decedent, and Mary A. Bailey, daughter of the decedent, and certain of said Mary's children. Said Daniel and Mary were the only surviving children; and the petitions for distribution excluded any interest of Bertha Callaghan and Josephine Callaghan, who were grandchildren of the decedent, and minor children of Sherwood Callaghan, who was the son of the decedent, and died during her lifetime. These two grandchildren, Bertha and Josephine, filed oppositions to said petitions for distribution; and they also filed a petition for distribution, in which they claimed that a certain interest in the estate should be distributed to them. The probate court granted the petition of Daniel T. Callaghan and Mary A. Bailey and others, and denied the petition of said grandchildren, who appealed from the order granting the former petition and also from the order denying their petition. The appeals are brought here in two separate transcripts, numbered 881 and 882; but, as the same question arises in each case, the two appeals may be considered together.

The decedent, Ann Callaghan, left a will, and the question here involved arises out of such will. The appellants contend that she omitted to provide for them in her will, and that, therefore, they are entitled to the same share in her estate which they would have had if she had died intestate, under § 1807 of the Civil Code. That section is as follows: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." By the will nearly all the property of the deceased, with the exception of a few legacies, is given to her said son, Daniel T., and her daughter, Mary A. Bailey,

and her children; and the fifth subdivision of the will is as follows: "Fifth. I own six acres of land more or less, in Alameda, Alameda county, state of California. Said land I give, devise, and bequeath to Bertha and Josephine, the two children of Sherwood Callaghan, to be held and enjoyed by them during their lives and the life of the survivor of them; and, in case of their death leaving issue, then to such issue, share and share alike according to representation. But, in case the said Bertha and Josephine die without issue, then said property shall revert to my son, Daniel Callaghan, and my daughter, Mary Bailey, share and share alike." This is the only mention made in the will of the grandchildren Bertha and Josephine. Upon the trial of the petitions in the court below the appellants offered to prove that the testatrix did not own any land in Alameda county at the time the will was made, or thereafter up to the time of her death, and that the estate did not own or claim to own any land in said county; that the testatrix once owned a track of 25 acres in Alameda county, but had sold and conveyed the same to one Hawley before the making of the will, and had never owned or claimed to own any land in said county, other than that so sold to Hawley; and that said grandchildren had never received any portion of the estate of testatrix in her lifetime by way of advancements. This offered evidence was objected to by respondents upon the ground that it was irrelevant, immaterial, etc.; and the objection was sustained, and exceptions reserved. These offers, rulings, and exceptions present the question here involved, *viz.*, whether the will omitted to provide for appellants, within the meaning of said section 1807.

We think that the rulings of the court below were correct. The words "omits to provide," as used in said section, mean simply an omission to make a provision in the will, and have no reference to the pecuniary value of such provision. It is apparent that the Code provision in question expresses no intent to in any way limit the disposing power of a testator, or compel him to provide for any child; for it clearly provides how the testator may decline to give anything to any such relative. This being so, what is the object of the provision? Nearly all the states have provisions substantially the same as that here under consideration; and, as such a provision is not intended as a limitation of the power of a person to dispose of his property by will, it has been uniformly held that the provision applies only to a case where a child or descendant is unknown or forgotten, or for some reason unintentionally overlooked. "The object of the statute was to guard the testator against the effect of a mistake in providing for some of his children, to the exclusion of others, through forgetfulness of their existence, or in otherwise disposing of his property in such forgetfulness, and the failure to allude to them is made evidence that they were so forgotten." *McCourtney v. Mathes*, 47 Mo. 533. In the case of *Payne v. Payne*, 18 Cal. 291, the exact provision, as it now stands in the Code, was under review, and Field, Ch. J., speaking for the court, said: "The children are mentioned three times in the codicil, showing that they were in the mind of

the testator at the time, and not overlooked in the disposition of his property. And the only object of the statute is to protect the children against omission or oversight, which not infrequently arises from sickness, old age, or other infirmity, or peculiar circumstances under which the will is executed. When, however, the children are present to the mind of the testator, and the fact that they are mentioned by him is conclusive evidence of this, the statute affords no protection, if provision is not made for them." We do not see any controlling force in the suggestion made by appellants, that in § 1807 the word "mentioned" is not used, while it is used in certain preceding sections. The omission of that word does not change the purpose and intent of the section as above declared. An argument similar in character to this is fully answered by the court, through Crockett, J., in the case *Re Garraud*, 35 Cal. 342. In the case at bar the appellants were not only mentioned, but an express specific provision was made for them in the body of the will; and there can therefore be no pretense that they were unknown, forgotten, or unintentionally overlooked.

The only purpose of the evidence offered by appellants and rejected by the court was to show, not that the appellants had been forgotten or overlooked, or not expressly provided for, but that the provision made for them was a mistake of the testator. It is not by any means clear that such evidence, if admitted, would have established such a mistake. The testatrix may have known that she had no land in Alameda county, and may have intended thus to dispose of the hopes of her grandchildren, and it is admitted that her declarations could not have been introduced to show a different intent. But the most that appellants can claim is that the evidence would have shown a mistake; and it is established law that after the death of a testator a mistake in his will cannot be corrected, nor can the will be reformed or remodeled. "No bill in equity lies to reform a will, because its author is dead, and his intent can only be known from the language he has used." *Patch v. White*, 117 U. S. 219, 29 L. ed. 865. "It is not here attempted to reform the instrument so as to make it speak really the intentions of the testator. No court can do this." 3 Redf. Wills, p. 48. The evidence offered by appellants was therefore properly excluded. Of course, where, in a will, there is an imperfect description of either person or property, the description may be made more certain, when it can be done either from the context of the will, or from extrinsic evidence, and such is the meaning of § 1840 of the Civil Code, relied on to some extent by appellants. But in the case at bar there was no imperfect description of either the persons or the property mentioned in the will. The appellants were expressly named in the will, and there is no doubt that they were intended, and there is no question made as to what tract of land in Alameda county was intended. It is not contended that, either by extrinsic evidence or otherwise, the description of the property mentioned in the will could be made to apply to any other track of land, and appellants do not claim any other particular piece of land. The case is therefore materially

different from *Patch v. White*, 117 U. S. 219, 29 L. ed. 865, cited by appellants. That case was an action of ejectment, in which the plaintiff claimed title to the lot of land in contest under a devise in a certain will. The question was whether or not the lot was the one devised to plaintiff's grantor, and the court, by a bare majority (four justices dissenting), held that there was a latent ambiguity, and that parol evidence was admissible to show that an imperfect description in the will should be applied to the lot in contest. No such question arises in the case at bar. The above views make it unnecessary to consider the contention of respondents that these appeals are improperly taken in the name of the guardian of the grandchildren.

The orders appealed from are affirmed.

I concur: **Henshaw, J.**

Temple, J., concurring:

I concur in the opinion, but I think the appeal should be dismissed. The guardian may appear and prosecute or defend actions for his ward, but, under our Code, must do so in the name of his ward. Section 869 of the Code of Civil Procedure expressly authorizes administrators and executors to sue as though trustees of an express trust. In some states this same privilege is awarded to guardians, but our Code provides (§ 878) that a ward shall himself be a party to a suit which shall bind his estate. It has been held in some jurisdictions where there is no special statutory provision upon the subject that a guardian can maintain an action in his own name upon an obligation made by himself as guardian, and also that as to such contracts he may be sued. Such cases also hold that he is the owner of, and personally liable on, such contracts, and only liable to account in reference to them as trustee of his ward. In case of his death such choses in action go to his representatives. *Chitwood v. Cromwell*, 12 Heisk. 658. Whether, in the probate court, the guardian should appear to object to proposed distribution in his own name as guardian or in the name of his ward, was immaterial; but no one can appeal from a judgment, except the parties to it, or those in privity with the parties. And even as to parties the record must show that their interests are, or may be, affected by the judgment. The subject will be found fully considered in 9 Enc. Pl. & Pr. 929; also, Schouler, Dom. Rel. § 343, note. See also *Fox v. Miner*, 32 Cal. 112, 91 Am. Dec. 566; *Wilson v. Wilson*, 36 Cal. 451, 95 Am. Dec. 194; *Justice v. Ott*, 87 Cal. 581; *O'Shea v. Wilkinson*, 95 Cal. 454; *Dixon v. Gries*, 106 Cal. 506.

In *Re Rose*, 66 Cal. 241, this question was not raised. The question there was whether the general guardian, or the attorney appointed by the probate judge to represent the minor, should appear for the minor in the probate court. Nothing is there said as to the propriety of the appeal taken in the name of the guardian, and the record does not show that any objection was made on that ground. Under such circumstances, we cannot presume that it was intended to overrule other decisions upon this question without noticing them. The guardian was not in privity with

his ward nor is he a person interested. The judgment was not for or against him, but, if he can appeal in his own name, he is thereby made a party, and the judgment here would be for or against him. This is in violation of the Code, which provides that in such cases the ward shall be the party, although he must appear by guardian. I also concur in the judgment.

Charles K. McCLATCHY, *Petitioner*,
v.

SUPERIOR COURT OF SACRAMENTO
COUNTY, *Respt.*

(..... Cal.)

1. **Refusal to permit a man charged with contempt by publications respecting evidence** in a judicial trial to show in defense that the publications were true, and for this purpose to disprove the accuracy of the reporter's notes which have been offered against him, is such a deprivation of his constitutional right to make a defense as to be a denial of due process of law.
2. **An examination of the evidence** may be made on certiorari for the purpose of determining the claim that the court exceeded its power.

(*Harrison, Temple, and Henshaw, JJ., dissent.*)

(December 27, 1897.)

CERTIORARI to the Superior Court for the City and County of San Francisco to review an order adjudging the petitioner guilty of contempt of court. *Order annulled.*

The facts are stated in the opinion.

Messrs. Delmas & Shortridge, John E. Richards, and Garrett McEnerney, with Mr. P. Reddy, for petitioner:

The court had no jurisdiction, power, or authority to punish the petitioner for the publication of the articles complained of.

No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session, and in such a manner as to actually interfere with its proceedings.

Code Civ. Proc. § 1209, subd. 12 (Stat. 1891, p. 7); *Re Shortridge*, 99 Cal. 532, 21 L. R. A. 755; *Re Buckley*, 69 Cal. 1.

All the decisions in this court upon the question of contempt have recognized all the provisions of the Code of Civil Procedure and the Penal Code concerning contempt as consistent with the Constitution, and in force.

Batchelder v. Moore, 42 Cal. 412; *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167; *Johnson v. San Francisco City & County Super. Ct.* 63 Cal. 578; *Lezinsky v. Contra Costa County Super. Ct.* 72 Cal. 510; *State v. Kaiser*, 20 Or. 50, 8 L. R. A. 584; *Ex parte Abbott*, 94 Cal. 383.

The specification of acts constituting the offense of contempt would exclude all others, under well-established rules of construction.

NOTE.—As to denial of right to make defense, see cases in note to *Hovey v. Elliott* (N. Y.) ante, p. 449.

State v. Morrill, 16 Ark. 384.

The legislature had the absolute and inherent power to make such changes as it might deem proper.

Wickersham v. Brittan, 98 Cal. 40, 15 L. R. A. 106; *State v. Morrill*, 16 Ark. 384.

Where the defendant is denied a hearing, any judgment pronounced against him is absolutely void.

Rapalje, Contempts, § 111; *State, De Buys, v. Orleans Civil Dist. Ct. Judges*, 83 La. Ann. 1256; *Re Holt*, 55 N. J. L. 884; 4 Enc. Pl. & Pr. p. 788, note 2; *Schwarz v. San Francisco Super. Ct.* 111 Cal. 106.

Mr. A. P. Catlin, with **Mr. S. S. Holl**, for respondent:

The statute providing: "But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court, while in session, and in such a manner as to actually interfere with its proceedings,"—does not prevent this proceeding.

Re Shortridge, 99 Cal. 532, 21 L. R. A. 755; *Dailey v. San Francisco Super. Ct.* 112 Cal. 94, 32 L. R. A. 273; *State v. Morrill*, 16 Ark. 384; *Re Frew & Hart*, 19 Cent. L. J. 71; *Myers v. State*, 46 Ohio St. 473.

The Constitution places no limitation upon the power of superior courts to punish for contempts.

No one will claim that the legislature of California has not the power to punish its own members or other persons for insolvent or contemptuous behavior in its presence during its sessions.

Ex parte Adams, 25 Miss. 883, 59 Am. Dec. 234; *Ex parte Jones*, 13 Ves. Jr. 237.

The power to punish for contempt is inherent in all courts of record.

Burke v. Territory, 2 Okla. 499; *Percival v. State*, 45 Neb. 741.

Mr. Freeman, in his notes on *Percival v. State* (Neb.) 50 Am. St. Rep. 578, says: "While there is still controversy upon the subject, we think reason and the great weight of authority concur in affirming that, though it may be competent for the legislature to regulate proceedings in cases where contempts are alleged to have been committed, it cannot thereby, nor otherwise, take from courts of general jurisdiction their inherent power to command the respect due to them and their decisions; and therefore the authority to punish for contempt need not be founded on any statute, nor is it subject to statutory destruction," citing—

State v. Morrill, 16 Ark. 384; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Re Shortridge*, 99 Cal. 526, 21 L. R. A. 755; *Cheadle v. State*, 110 Ind. 301, 59 Am. Rep. 199; *Cooper v. People, Wyatt*, 13 Colo. 356, 6 L. R. A. 480; *State, Phelps, v. Orleans Civil Dist. Ct. Judge*, 45 La. Ann. 1250; *Re Cheeseman*, 49 N. J. L. 137, 60 Am. Rep. 596; *Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *Watson v. Williams*, 36 Miss. 831; *Re Stuvro*, 48 N. H. 428, 97 Am. Dec. 626; *State v. Galoway*, 5 Coldw. 326, 98 Am. Dec. 404.

Writ of review will not lie to correct errors where there is no excess of jurisdiction.

Holbrook M. & S. v. Sacramento County Super. Ct. 106 Cal. 589; *Buckley v. Fresno* 39 L. R. A.

County Super. Ct. 96 Cal. 119; *Muir v. Contra Costa County Super. Ct.* 58 Cal. 361; *People, Lamby, v. Dwinelle*, 29 Cal. 635; *Reynolds v. San Joaquin County Ct.* 47 Cal. 606; *Sayers v. San Francisco City & County Super. Ct.* 84 Cal. 642; *Farmers & M. Bank v. Los Angeles Bd. of Equalization*, 97 Cal. 328; *Golden Gate Consol. Hydraulic Min. Co. v. Yuba County Super. Ct.* 65 Cal. 188; *Ex parte Smith*, 53 Cal. 204; *White v. San Francisco City & County Super. Ct.* 110 Cal. 60.

Van Fleet, J., delivered the opinion of the court:

Certiorari to review an order of respondent adjudging petitioner guilty of contempt. While the cause of Talmadge against Talmadge was on trial in the superior court of Sacramento county an article appeared in the Sacramento Bee, a newspaper published in the city of Sacramento, purporting to be an account of certain testimony given by one of the witnesses; and when, at the opening of court next day, its attention was called to the article by one of the attorneys in the cause, the judge stated from the bench that he had no hesitation in saying that the statement referred to was a grossly false statement, a gross fabrication, and that there was not the slightest ground in the testimony of the witness upon which such a statement could be based. In the afternoon of that day the Bee published in its editorial columns the following article: "The Bee will not keep in its employ a reporter who garbles or who misstates, but when a newsgatherer does his duty and tells the truth it will not stand silently by while an aggregation of attorneys tries to make him out a liar, and while a prejudiced and vindictive czar upon the bench aids and abets them in such a purpose. The Bee reasserts that in all material details the statement of Talmadge, as given in the Bee of yesterday, was the statement that he made upon the stand at Monday afternoon session. The Bee will go further than that. It will declare that both the attorneys before the bar and the judge on the bench knew that the statement made in the Bee was an essentially correct epitome of the testimony given by Mr. Talmadge at the very moment when they unhesitatingly, shamelessly, and brazenly declared it to be a gross fabrication. There is no paper anywhere that has a higher regard for fair and impartial courts than has the Bee, but there is no paper anywhere that has a supremacy of contempt than has the Bee for a judge who will approve the unmitigated falsehood of an attorney, as Judge Catlin to-day approved the brazen misstatement of Judge J. B. Devine." Similar language was repeated in the columns of the newspaper on the two succeeding days. The petitioner herein is the editor and one of the proprietors of the Bee, and on June 2, 1896, upon an affidavit of Mr. C. T. Jones, setting forth these publications, and that the same was an interference with the proceedings of the court in the trial of the cause, and constituted a contempt of said court, a citation was issued directing him to show cause why he should not be punished for said contempt. In obedience to the citation the petitioner appeared in court, and filed an answer acknowledging that the article was pub-

lished by his authority, and justifying its publication upon the ground, among others, that it was in fact a correct report of the proceedings at the trial, and that it was published in order to defend himself from the charge made by the judge of the court, and in his answer repeated the charges made in the article published. Upon the hearing of the charge the court found the facts in accordance with the affidavit of Mr. Jones, and that the publications were an unlawful interference with the proceedings of the court in the trial of the cause, and adjudged the petitioner guilty of the contempt alleged, and that he pay a fine of \$500. The petitioner seeks by this proceeding a judgment annulling this order of the superior court.

There is but one point which need be considered. It is contended, and we think correctly, that the order under review is void for the reason, clearly disclosed by the record, that the petitioner was denied his constitutional right to be heard in his defense. The charge against him was in making certain publications in his newspaper relating to the evidence in the case on trial, alleged in the affidavit upon which he was cited to be "false, scandalous, and defamatory," and which "were intended to degrade the said court, and excite public prejudice and odium against it, and were unlawful interferences with the proceedings of said court." The gravamen of this charge was the alleged false character of the publications, and the wrongful intent of petitioner in making them to bring the court into contempt, and thus interfere with the orderly administration of justice in the cause on trial. That this was the understanding and theory of the prosecution if shown by the course of proceeding in the court below. To prove the false character of the matter published by petitioner, the prosecution introduced the court reporter, who testified that the matter published, purporting to be a statement of the evidence as given in the action on trial at the time, did not accord with his notes of such evidence; and to show that petitioner acted with malicious intent, it was proved by the reporter that before the second publication appeared he had furnished to petitioner what purported to be a correct transcript of his notes of that portion of said evidence to which the publication referred. This was substantially the case of the people, the publications being admitted. The substantive defense was that the publications were in fact true, and not made with any wrongful intent; that the personal references therein to the judge were merely in response to the aspersion of the latter cast upon petitioner in characterizing the statements in his newspaper as false and fabricated, when in fact they were not; and that such personal references were not made for the purpose of interfering with the administration of justice. That this was a complete defense, if sustained by evidence, there can, we think, be no doubt. The publication of the truth as to legal proceedings is not a contempt of court (*Re Shortridge*, 99 Cal. 528, 21 L. R. A. 755), and the criticism of the action of the judge, if made only in proper response to an unjust charge against petitioner's veracity, and without intent to improperly influence the proceedings of

the court, would not be contemptuous. It is said that the language of the judge was not directed at petitioner, but to the reporter on his paper; but we do not think the language will justly bear this limitation. A judge on the bench no more than any other can cast aspersions upon the character of a person not a party or participant in a case on trial, without a right in the latter to defend himself. Petitioner might not have been able to establish this defense, but he was not permitted to make the effort. When the case of the people rested this occurred: "Mr. Reddy: We want to call witnesses to show that the publication in the Bee was in point of fact true. The Judge: I will not hear testimony further than what has already appeared on that subject, as stated by the reporter. I will not allow this matter to degenerate into a controversy as to the correctness of the reporter's notes. Mr. Reddy: Then we will not be allowed to introduce any evidence at all,—is that the proposition?—if these notes are to be taken as correct? The Judge: I shall act only on the official notes, as given you by the reporter. I will hear no other testimony. Mr. Reddy: We wish to show that the notes are not correct, in so far as they differ from the report in the Bee, and that the testimony as reported in the Bee was actually given on that occasion. The Judge: I will not hear any outside testimony other than the notes of the official reporter. . . . Mr. Reddy: Your honor will allow no testimony except the reporter's notes? The Judge: No. Mr. Reddy: Then your honor will not permit us to put in evidence the subject-matter,—the allegation of the answer? The Judge: I have made my ruling that I will hear no testimony in regard to the evidence that was taken there except what is contained in the notes of the official reporter, and they have been fully given, and I will add to that the cross-examination of Mr. Duden [the reporter] with respect to those questions that the court asked him in regard to the time when he delivered the transcribed notes to the Bee." Thereupon the defendant offered and requested to be allowed to introduce evidence in support of the various subdivisions of his answer, involving as a whole the same general issues as suggested above, but was denied such right except to the extent that he was told he would be allowed to show that the publications were "without malice." This privilege was declined as of no avail, unless petitioner was allowed to put in his entire defense.

That the result of this action of the court in thus requiring petitioner, in effect, to submit his defense upon the evidence for the people, was in substance and effect to deprive petitioner of the right to be heard in his defense, is, we think, obvious. It is contended by respondent that, even if the action of the court was wrong, it was error merely, which cannot be reviewed on certiorari; that, the court having jurisdiction of the person and subject-matter, the mere method in which it exercised such jurisdiction cannot be inquired into in this proceeding, which looks only to the question of jurisdiction. If the premise were correct, the conclusion would undoubtedly follow. But with the view that the action involved no more than mere error we cannot coincide. It

was error, certainly, but it was more than that. It was a transgression of a fundamental right guaranteed to every citizen charged with an offense, or whose property is sought to be taken, of being heard before he is condemned to suffer injury. Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where there exists an inceptive lack of power. "The substance and not the shadow determines the validity of the exercise of the power." *Postal Tele. Cable Co. v. Adams*, 155 U. S. 689, 698, 39 L. ed. 812, 816.

While the writ of certiorari is not a writ of error, "it is nevertheless," as suggested in *Schwarz v. San Francisco City & County Super. Ct.* 111 Cal. 112, "a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, where necessary to determine the jurisdictional fact." If, then, by looking at the evidence, we can see that the court exceeded its power, we have a right to examine the evidence for that purpose. The evidence and proceedings in this case disclose clearly to our minds such an excess. Contempt of court is a specific criminal offense (*Ex parte Hollis*, 59 Cal. 408; *Ex parte Gould*, 99 Cal. 380, 21 L. R. A. 751), and a party charged therewith, although the proceeding is more or less summary in character, has the same inalienable right to be heard in his defense, especially in instances like the present, of mere constructive contempt, as he would against a charge of murder or any other crime. On this subject it is said in *Rapalje on Contempts* (§ 111): "Contempt of court is of two kinds,—that which is committed in open court, and that which is committed out of the view and hearing of the court. For the punishment of the first, by commitment and fine, no proceeding need be taken contradictorily with the offender, but for the punishment of the latter, by the same means, the offender must be allowed to offer evidence and argument in his defense, otherwise any judgment which the court may pronounce will be absolutely void." In *State, De Buys, v. Orleans Civil Dist. Ct. Judges*, 32 La. Ann. 1256, 1262, considering a case of constructive contempt, it is said: "The charge of contempt should not, in any case, be followed by sentence and imprisonment, unless after a rule to show cause has been granted and the party defendant therein heard and permitted to offer evidence and argument." And it is held that anything less than that would constitute a want of "due process of law," or a proceeding not in accord with "law of the land," rendering the judgment void. And the court there quote with approval this justly celebrated definition of the phrase "law of the land" formulated by Mr. Webster in the *Dartmouth College Case* [17 U. S. 4 Wheat. 581, 4 L. ed. 645]: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds from inquiry, and renders judgment only after trial. The meaning is, that every

citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. And in the very recent case of *Hovey v. Elliott* (decided by the Supreme Court of the United States) 167 U. S. 409, 42 L. ed. 215, where, in a civil action, the court had stricken out the answer of a party because of his contempt of an order requiring him to pay money into court, and rendered judgment against him *pro confesso*, it was held that the act was beyond the power of the court, for the reason that it deprived the party of the right to be heard in his defense and that the judgment so entered against him was void, even as against collateral attack. Among other things it is there said: "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial power of the government, sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent." And, as showing that it is not sufficient that the court shall go through the mere form of citing a party to appear upon the pretense of giving him a hearing while in fact denying him the right in its substance, it is there said: "Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, 'Appear and you shall be heard;' and, when he has appeared, saying, 'Your appearance shall not be recognized, and you shall not be heard.'" And, quoting from *Galpin v. Page*, 85 U. S. 18 Wall. 350, 21 L. ed. 959, it is said: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

These considerations make it manifest that

petitioner at his trial in the court below was denied that "due process of law" requisite to a valid conviction, and for that reason the order convicting him of contempt must be annulled. It is so ordered.

I concur: **Garoutte, J.**

McFarland, J., concurring:

I concur in the judgment annulling the order under review. The case is a very close one; but I think that the alleged contempt rested ultimately upon the asserted fabrication and publication by petitioner of false testimony, and his persistency in restating this version of the same as true. This being so, he should have been allowed to introduce such evidence as he had to the point that his publication of the testimony was a fair and correct statement of it. The court declined to hear any evidence from him on that subject; and the weight of authority is to the point that this ruling, being a denial of appellant's right to make a defense, goes to the jurisdiction, and is reviewable on certiorari. If petitioner had been allowed to introduce the offered evidence, the case would have presented no difficulties.

Beatty, Ch. J., concurring:

A cause being on trial in the superior court, a newspaper publishes what purports to be a portion of the testimony of one of the parties to the action. The attention of the judge being called to the publication, he pronounces it grossly false from his seat on the bench. The publisher in the next issue of his paper, and while the cause is still on trial, reasserts the correctness of his report, and in coarsely vituperative terms retorts upon the judge the accusation of falsehood. Is this a contempt of court? The answer to this question depends, it seems to me, upon the further question whether or not the judge in denouncing the original report was acting in a judicial capacity. A true report of the proceedings of a court is not a contempt. A false report may or may not be a contempt, according to circumstances. If a false report is published under such circumstances as to constitute a contempt, there is but one way to deal with the matter judicially, and that is by a regular citation or attachment and a hearing. If the court or judge undertakes to act upon the matter in any other way, his action is extrajudicial, and not in his official character. Such, it seems to me, was very clearly the case here. The attention of the judge being drawn to this publication, it was natural, and no doubt commendable, that he, believing it to be gross perversion of the facts, should so characterize it, but in so doing he was not acting as a court or judge. What he said was in no sense a part of any judicial proceeding, and the fact that he was seated on the bench at the time makes the case no different in point of law from what it would have been if his remarks had been delivered on the street or communicated in writing to the same or another newspaper. The report of the newspaper was, therefore, not an attack upon the court or an interference with the proceedings of the court, but was an attack upon the man, for which, if it was malicious

and unfounded, he had the same, and no other, means of redress that the law gives to every citizen who is the victim of a libel. The facts alleged and found in the proceeding against the petitioner do clearly establish a malicious libel, but they do not, in my opinion, constitute a contempt of court, and for that reason I concur in the judgment annulling the order.

Harrison, J., dissenting:

Section 1209, Code Civ. Proc., declares that any unlawful interference with the proceedings of a court is a contempt of the authority of the court; and when facts are presented to the court which could, under any circumstances, have interfered with its proceedings in the trial of a cause, it has jurisdiction to investigate the charge of contempt. No question as to the general power of the court is presented in the present case. Its jurisdiction to investigate a charge of contempt is not denied. Whether it had jurisdiction to investigate the charge against the petitioner does not depend upon any review of evidence, but is to be determined by the sufficiency of the affidavit upon which the citation to him was issued. If the facts set forth in that affidavit are sustained, its power to punish for the contempt therein charged follows as a legal conclusion. That the affidavit of Mr. Jones sets forth facts sufficient to give to the court jurisdiction to inquire into the alleged contempt, and to determine whether the acts charged against the petitioner had been committed by him, cannot be questioned, and the regularity of the procedure by which he was brought before the court is not challenged. The court, therefore, had jurisdiction to investigate the charge, and, after its jurisdiction had been thus acquired, any error by it in the course of the inquiry, either in admitting or excluding evidence, is not the subject of review in this proceeding, and its finding of the facts upon which it based its judgment that the petitioner was guilty of contempt is also final.

It is claimed, however, by the petitioner, that the court had no jurisdiction to punish him for the contempt charged without giving him an opportunity to be heard in his defense, and that inasmuch as it refused to receive evidence which he offered at the hearing in support of certain matters which he had set up in his answer as a defense to the charge, and refused to consider these matters, it exceeded its jurisdiction in determining that he was guilty of the contempt charged in the affidavit. The right of one charged with contempt to be heard in answer to the charge is fully conceded; but upon this as upon any other charge his right to be heard is limited to matters that are pertinent to the issue before the court. If he is allowed a hearing upon these matters, he cannot say that he is deprived of his rights without due process of law. The provision in § 1217, Code Civ. Proc., that the court or judge must "investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him," does not require the court to hear an answer whose allegations have no tendency to exonerate the person from the charge, or to permit an examination of witnesses upon matters that are not relevant to

the alleged contempt. The court is to conduct the investigation under the sanction of its judicial authority, but its determination therein will not be set aside upon the ground that it committed error in the course of the investigation. If the court had refused to allow the petitioner to file any answer to the charge, or if, after permitting his answer to be filed, it had ordered it to be stricken from the files, and had refused to receive any evidence on his behalf in defense of his charge, its judgment against him would have been unauthorized. Instead of doing so, however, the court permitted the petitioner to file such answer as he desired, and also heard all the evidence which he chose to offer in support of the matters therein which were material or relevant to his defense.

In his answer the petitioner had alleged that the original publication of the proceedings was a correct statement of the testimony given before the court, and the refusal of the court to allow evidence in support of this averment is claimed by him to have been a denial of the right to be heard in his defense; but the truth or falsity of this publication was not involved in the charge of contempt before the court. The contempt with which the petitioner was charged did not consist in this publication, but in the subsequent effort on his part to compel the court to accept it as the truth in opposition to its own statement that it was not correct. A false publication of the proceedings of a trial does not of itself constitute a contempt, or render its author liable to punishment. The charge of contempt against the petitioner was the fact that after the court had stated that the testimony contained in that publication had not been given, and while the cause was still in process of trial before it and undetermined, the petitioner had published in his newspaper, in a manner calculated to destroy the freedom of the court in determining the rights of the parties to the controversy then before it for determination, that this judicial declaration was false. The court therefore very properly refused to permit the truth or falsity of the publication to be made an issue of fact in the proceedings upon the charge of contempt; and it also properly denied the offer of the defendant to introduce the evidence given at the trial of the cause of Talmadge against Talmadge, relating to other matters than those involved in the publication. Such evidence could have no bearing or relevance to the matter then under investigation. The case of Talmadge against Talmadge was on trial before the court without a jury. The court was required to make its findings of fact upon the testimony given before it, and to render its judgment in accordance with that testimony. When its attention was drawn to this publication, with a request by one of the attorneys in the case to be informed whether that was the testimony as understood by the court, and it stated from the bench in reply that such testimony had not been given, and that the publication was incorrect, this was a declaration by it that its decision was not in any way to be affected by what was stated in the publication to have been given as testimony in the case. If either of the parties had felt that the court was in error, it would have been proper

to point out to it in any competent mode—either by the notes of the stenographer or by the statement of one who had heard it—that such testimony had in fact been given. The court, however, would not have been bound to accept such statement as correct but would still be compelled to decide the cause upon its own view of what was the testimony therein, leaving it to the defeated party to show in any proper mode that it had decided contrary to the evidence. It is manifest, from a mere reading of the article published in the Bee, that it would naturally tend to interfere with the proceedings of the court in the trial of the cause to which it referred, and that the court was authorized to find that it was an unlawful interference with its proceedings. The evident purpose, as well as the natural tendency, of the article in question was to compel the court to accept the facts given in the previous statement in the Bee as the correct version of that portion of the testimony in the case, and was an attempt on the part of the petitioner to coerce the court into deciding the cause upon testimony which in its opinion had not been given; and to the extent that this publication might tend to bring about that result, whether it did in fact effect the purpose or not it was an unlawful interference with the proceedings of the court. If the cause had been on trial before a jury, and the petitioner had approached one of the jurors and made the statements contained in the article, it would not be questioned that he would have been guilty of contempt. It is none the less a contempt that the testimony was to be considered by the court instead of by a jury, nor is the act constituting the contempt diminished by the fact that it was published in a newspaper rather than stated orally. It was published with the evident purpose that it should be read, and it was in fact read by the judge while the cause was still pending before him and undetermined.

The defendant also alleged in his answer that the publication set forth in the affidavit of Mr. Jones was published without malice, and for the purpose of defending himself against the false charges made against him by the judge, and that he then believed that the original publication contained a correct statement of the evidence in the case. At the hearing, after the court had declined to allow any evidence upon the correctness of the original publication, the defendant proposed to offer proof in support of the several matters contained in his answer. The court gave him permission to show that the publication was made without malice, and that he believed it to be true, and also that he believed that he had a right to publish it, and to state his motive therefor. The court also stated that, if he could do so, he might show that the original publication was made from a report compiled by a reporter of the Bee from the testimony which he had heard in court. The defendant declined to accept these offers, or to introduce any evidence upon these matters, his counsel saying: "We desire to put in our entire defense so that it may all go together." As the defendant was given an opportunity to present any evidence in his power relevant to the issue or material to his defense, it cannot be said

that his trial was had contrary to the law of the land, or that he was convicted without a hearing.

The defendant's offer to prove by testimony that the publication did not interfere with the proceedings of the court was properly rejected. Whether the publication had such an effect or tendency was a question of law depending upon the nature of the publication and the circumstances under which it was made, and was a question of law to be determined by the court, and not upon the testimony of witnesses.

The claim of the petitioner that by the article published he sought to justify himself against the implied charge of wilful misrepresentation made by the court when its attention was first drawn to the statement of the testimony falls to the ground, in view of the fact that the court had made no reference to the petitioner, but assumed throughout its remarks that the publication had been made by reason of false and incorrect reports made by some one other than the petitioner. Whatever right the defendant might have to defend himself against what he deemed an unjust aspersion in these remarks of the judge, he had no right to do it in such a way as to interfere with the proceedings of the court. Unless courts are permitted to administer justice freely, and without being subjected to intimidation or coercion in their deliberations and decisions they will be powerless to protect those who are injured, or to enforce the rights of those who invoke their aid.

It is contended by the petitioner that by reason of the following provision in § 1209, Code Civ. Proc., as amended in 1891: "But no speech or publication reflecting upon or concerning any court, or any officer thereof, shall be treated or punished as a contempt of such court, unless made in the immediate presence of such court while in session, and in such a manner as to actually interfere with its proceedings,"—the court had no authority to adjudge him guilty of contempt. The effect of this provision was considered in *Re Shortridge* 99 Cal. 526, 21 L. R. A. 755, and it was said in that case: "No authority has been found which denies the inherent right of a court, in the absence of a limitation placed upon it by the power which created it, to punish as a contempt an act—whether committed in or out of its presence,—which tends to impede, embarrass, or obstruct the court in the discharge of its duties. It is a doctrine which is admitted in all its rigor by American courts everywhere, and does not need the support of foreign authorities based upon the fiction that the majesty of the King, represented in the persons of the judges, is always present in the court. It is founded upon the principle,—which is coeval with the existence of the courts, and as necessary as the right of self-protection,—that it is a necessary incident to the execution of the powers conferred upon the court, and is necessary to maintain its dignity, if not its very existence. It exists independent of statute. The legislative department may regulate the procedure and enlarge the power, but it cannot without trenching upon the constitutional powers of the court and destroying the autonomy of that system of checks and balances

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which is one of the chief features of our triple-department form of government, fetter the power itself." See also *Myers v. State*, 46 Ohio St. 478; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Ex parte Barry*, 85 Cal. 803; *People v. Durrant*, 116 Cal. 179.

It is, however, contended by the petitioner that the Constitution has conferred upon the legislature the right to thus limit the power of courts to punish for contempt of their authority. This proposition is maintained by the following argument: Section 1 of article 23 of the Constitution provides "that all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the legislature." The chapter of the Code of Civil Procedure relative to contempts was a law in force at the adoption of the Constitution, and, not being inconsistent therewith, was, by virtue of this section, when the people voted for and adopted the Constitution, adopted by them as a part and parcel of that instrument, and so continued until changed by legislation; that the amendment of 1891, having been enacted under the power implied in the clause, "until altered or repealed by the legislature," is to be regarded as if the Constitution had conferred express power upon the legislature to thus limit the power of the courts to punish for contempt. No such effect can be given, however, to the language of this section of the Constitution. The legislature derives no greater power of legislation therefrom than is conferred upon it in article 4 of the Constitution, nor is the judicial department of the state deprived of any of its power by virtue of this section. The purpose and effect of the section was not to change the character of the laws therein referred to, or to give to them any different effect from that which they previously had, but the section was placed in the Constitution for the purpose of avoiding any question of implied repeal of any existing laws that were not inconsistent with the Constitution; or, as is expressed in the preamble to the section, "that no inconvenience may arise from the alterations and amendments in the Constitution of this state." The order of the superior court should be affirmed, and the writ discharged.

We concur: **Temple, J.; Henshaw, J.**

Rehearing denied.

(Department 1.)

Margaret E. WALSH, *Respt.*,

v.

Emma E. HUNT, *Appt.*

(.....Cal.....)

1. The unauthorized alteration of an instrument by an agent with whom it is left to be delivered does not bind the principal.

NOTE.—For the effect of an alteration of a negotiable note as affecting bona fide holders, see note to *Citizens' Nat. Bank v. Williams* (Pa.) 85 L. R. A. 464.

2. Signing an instrument in which the amount to be paid is written in pencil, and leaving it with an agent to be delivered for a loan, do not constitute negligence or render the maker liable to an innocent holder for the forgery of the agent in raising the same.

3. The forgery is the proximate cause of the injury to an innocent holder where an obligation is unlawfully raised by an agent of the maker, although the latter may have been negligent in signing the instrument in such condition as to facilitate the successful perpetration of its fraudulent alteration.

4. An alteration of an obligation, amounting to forgery, by an agent of the maker, does not avoid the contract in its entirety, or prevent a recovery by an innocent holder upon it in accordance with its original terms, if they can be ascertained.

(February 5, 1898.)

A PPEAL by defendant from a judgment of the Superior Court for Santa Clara County in favor of plaintiff in an action brought to foreclose a mortgage. - *Reversed.*

The facts are stated in the opinion.

Mr. William P. Veure for appellant.

Mr. John H. Yoell, for respondent:

The court did not err in admitting the promissory note in evidence.

Corcoran v. Doll, 32 Cal. 83; *Sedgwick v. Sedgwick*, 56 Cal. 213.

The court did not err in admitting the mortgage in evidence.

People v. Torres, 38 Cal. 141; *Caldwell v. Parks*, 50 Cal. 502; *Valleau v. San Francisco City & County Super. Ct.* 62 Cal. 290.

The court justly and properly finds Hughes to have been the agent of Mrs. Hunt, the defendant.

As such, she was bound by his fraud.

Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; *Hollingsworth v. Holbrook*, 80 Iowa, 151.

Mrs. Walsh was ignorant of and innocent of any fraud equally with the defendant, and in such a case the sufferer must be the person through whose fault and negligence the injury was occasioned. For, to sign notes and mortgages with material parts therein written in pencil is gross negligence.

Harvey v. Smith, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 257; *Young v. Grotz*, 4 Bing. 258; Civil Code, § 3548; *Blaisdell v. Leach*, 101 Cal. 405.

To avail herself of any alteration in the instruments, defendant should have pleaded it specially, and set up and proved the knowledge or consent of the plaintiff thereto.

Humphreys v. Crane, 5 Cal. 173.

The figures were no part of the note at all.

Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 662; *Payne v. Clark*, 19 Mo. 152, 59 Am. Dec. 338; 1 Wait, Act. & Def. p. 557; *Mears v. Graham*, 8 Blackf. 144.

No obligation takes effect until it is issued, and a note is issued when and only when it comes into the hands of a party capable of enforcing it.

2 Parsons, Notes & Bills, p. 573.

Of two persons equally innocent he by whose fault the injury was caused should suffer the loss.

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Civil Code, § 3548; *Blaisdell v. Leach*, 101 Cal. 405.

Van Fleet, J., delivered the opinion of the court:

Action to foreclose a mortgage. The findings show that defendant, who resided in San Francisco, but owned certain premises in San José upon which there was a mortgage for \$500, some time prior to October 3, 1893, authorized one Hughes, a real-estate agent and notary public in San José, to negotiate a loan of \$500 on said premises, at a rate of interest not to exceed 8 per cent per annum, with the proceeds of which to pay off said mortgage; that, being notified by Hughes that he had found a person willing to make the loan, defendant on October 3, 1893, went to his office in San José to execute the necessary note and mortgage. She was informed by Hughes that the loan could not be had for less than 9 per cent, which rate she consented to pay, and thereupon Hughes presented for her signature a note and mortgage prepared by him, which defendant, after reading, signed and executed, the mortgage being acknowledged before Hughes as notary. The note was in these words:

\$500. San José, Cal., October 3, 1893.

Two years after date, for value received, I promise to pay to Mrs. Margaret Walsh, or order, at the office of G. C. Hughes, the sum of five hundred (\$500) dollars, with interest thereon from date until payment at the rate of nine (9) per centum per annum, payable quarterly, and, if not so paid, then to be added to and become a part of the principal, and bear a like interest; said principal and interest to be paid in United States gold coin only. If any interest on this note be not paid within two months after it becomes due, then the whole principal and interest shall, at the option of the payee, become and be immediately due and payable. Privilege to pay at any time by paying three months' interest extra. This note secured by mortgage.

Mrs. Emma E. Hunt.

The mortgage was in the usual form, setting out at length a copy of the note, etc. It is found "that, after signing the said note and mortgage as aforesaid, the said defendant left the same with the said Hughes for delivery to the said plaintiff, and returned to her home in San Francisco; that the principal sum of said note, wherever expressed in said note and mortgage, and the rate of interest, wherever specified therein, had been written in pencil by said Hughes at the time he prepared said note and mortgage, and prior to the said visit of said defendant to the office of said Hughes on said 3d day of October, 1893; that after said defendant had left said office of said Hughes as aforesaid, the said Hughes erased said pencil words and figures expressing the principal sum of said promissory note and mortgage and the rate of interest thereon, and wrote in lieu thereof, with pen and ink, the necessary words and figures to make the principal sum of said note and mortgage \$1,200 instead of \$500, and the rate of interest 10 per cent instead of 9 per cent." In all other respects than as thus

changed the note and mortgage remained as when executed by defendant. Thereafter, on the same day, Hughes delivered both instruments as thus altered by him, to the plaintiff, and in return received from her the sum of \$1,200 in gold coin, \$500 of which he paid in satisfaction of said prior mortgage, and the balance of \$700 he retained, and fraudulently converted to his own use. Both plaintiff and defendant were ignorant of the alteration of said instruments until about one year after their execution, when Hughes absconded, and they subsequently met for the first time. Upon these facts the court below gave judgment for plaintiff foreclosing her mortgage for the full amount of said note, principal and interest, as expressed therein after such alteration, and from this judgment and an order denying her a new trial defendant appeals.

It appears from the briefs and arguments of counsel that the considerations actuating the court below in reaching its conclusion were: First, that Hughes being the agent of defendant in the transaction, the latter is bound by his acts, whether expressly authorized or not; second, that defendant was guilty of such negligence in the execution of the note and mortgage as that Hughes was enabled to perpetrate the fraud which deceived the plaintiff, and that defendant is therefore estopped from setting up such fraud as a defense; and these are the two substantive propositions upon which respondent now relies to sustain the judgment. Neither proposition, as it seems to us, receives any adequate support from the findings. Hughes was defendant's agent, it is true, and for his acts as such she is bound; but what was the extent of that agency? He was authorized to find a party willing to make the loan, which he did, and thereupon, as found by the court, the note and mortgage, complete in all their parts, were executed by defendant, and left by her with Hughes "for delivery to the said plaintiff." This, then, was the extent of his express authority as to those instruments,—that of a mere bailee for delivery. There is certainly no express finding of any authority to alter or tamper with the instruments in any respect, and as certainly there is nothing in the facts from which such authority could be implied. Where there is no express authority in the person to whom a note or other instrument is intrusted or delivered to make alterations therein, it is only where such writing is patently incomplete in some respect, such as an omitted date, or a blank space required to be filled to make the contract express the intent of the parties, that there is any implied authority to insert new matter, or make any material addition thereto. Even in such a case the implication must very plainly arise from the circumstances, or the maker will not be bound. This is upon the very obvious principle that any unauthorized change in a material respect destroys the integrity of the instrument as the contract which the maker has executed. It ceases to be his contract, and is avoided, even in the hands of an innocent holder for value. These principles are thoroughly well settled, not only as to deeds and other sealed instruments, but as to commercial paper as well. *Angle v. Northwestern L. Ins. Co.* 92 U. S. 830, 23 L. ed. 556; *McGrath v. Clark*, 56 N. Y. 84, 89 L. R. A.

15 Am. Rep. 872; *Bruce v. Westcott*, 3 Barb. 874; *Wood v. Steele*, 78 U. S. 6 Wall. 80, 18 L. ed. 725; *Greenfield Sav. Bank v. Stowell*, 128 Mass. 196, 25 Am. Rep. 67. Nor can it make any difference that the alteration is made before delivery of the instrument. *Wood v. Steele*, 78 U. S. 6 Wall. 80, 18 L. ed. 725. Manifestly, whether made before or after that fact, if the alteration be effected by other than the party to be bound, and without his knowledge or consent, it involves the same question of ostensible agency as when made after delivery. In either case the question is whether, under the circumstances, the person making the alteration is to be deemed the agent of the one whose contract is affected. Here, while Hughes was admittedly the agent of defendant for certain purposes, as found by the court, it would be absurd to hold that there was, upon the facts, any implied or ostensible authority conferred upon him to commit a forgery,—the plain legal effect of his act,—and bind the defendant thereby.

The assumed negligence of defendant is based upon that part of the finding above quoted "that the principal sum of said note, wherever expressed in said note and mortgage, and the rate of interest, wherever specified therein, had been written in pencil by said Hughes at the time he prepared said note and mortgage, and prior to the said visit of said defendant to the office of said Hughes;" and the implication, not expressly found as a fact, that defendant signed and executed the instruments in that condition. The respondent's argument is that by her act in executing the papers in that condition, and leaving them with Hughes, she enabled or facilitated the successful perpetration of the fraudulent alteration by which plaintiff was deceived into accepting the note and mortgage, and therein was guilty of such negligence as precludes her pleading such alteration to plaintiff's prejudice,—upon the principle that where one of two innocent persons must suffer, the loss must fall upon the one through whose negligence the injury was occasioned.

The appellant contends that the evidence is wholly insufficient to sustain this feature of the finding; and, if the point were essential to the determination of the case, we should be constrained to adopt this view. But, assuming that mere negligence could ever in such a case be a bar to the defense here made, the fact found does not establish such negligence. In the first place it is not expressly found that the execution of the instrument in the manner indicated was an act of negligence, and no inference to that effect can be deduced from the facts. The court finds that the words which were erased and altered were written in pencil, but it is not found that Hughes's criminal act of spoliation was thereby in any manner facilitated or rendered easier, or that it could not have been as readily accomplished had the words been written in any other manner; and we cannot say, either as an inference of fact or as one of law, that, for the purposes accomplished by Hughes, pencil writing is more readily effaced than ink or other substance. That would depend in any given case upon circumstances not here found, and which the court could not know,—such,

for example, as the character of the pencil and paper used, and whether the impression was heavy or light, etc. The mere writing of an instrument in pencil, either in whole or in part, cannot, of itself, be said to be negligence, since the law recognizes the validity of such instruments equally with those written with ink or printed. And in fact there is nothing in the findings that necessarily negatives the fact that the instruments in question were written entirely in pencil. But, if it were conceded that the finding established carelessness or negligence by defendant, which might in some degree have contributed to the successful execution of the fraud by which plaintiff was deceived into parting with her money, it would not then constitute an estoppel. This is upon the principle that a party is not bound in transactions of this character either to anticipate or take precaution against the commission of a crime by which another may be deceived; that where it is through the instrumentality of a criminal act that the wrong is accomplished, it is the crime, and not the negligent act, which is the proximate cause of injury; and in such a case, the maxim that where one of two innocent persons must suffer from the wrongful act of another, the loss must fall upon the one making the act possible, has no application. While there was some diversity in the earlier cases upon the subject in England, commencing with *Young v. Grote*, 4 Bing. 253, in which the doctrine contended for by respondent was to a certain extent sustained, the trend of the latter cases, even in England, is against the rule announced in *Young v. Grote*; and, if the case may not be said to have been expressly overruled, its application has at least been so limited to the peculiar circumstances of that case, and the particular relations there existing between the parties, as to render it no longer valuable as authority in any general sense. The more recent cases all support the principles applicable to this class of cases as we have stated them above. Thus, in the case of *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 83 Am. Rep. 129, where the court speaks of the negligence of a drawer of a bill in leaving a blank partly filled so as to admit of a ready raising of the amount payable, these principles are aptly stated: "Can it be fairly said that the negligence of the drawer of the check or maker of the note was the proximate cause of loss to the holder? It seems to us the proximate cause of the loss is the forgery, and this the maker had no reason to anticipate. In some of the cases following *Young v. Grote* the rule has been invoked that, when one of two innocent persons must suffer by the wrongful act of another, he must suffer who placed it in the power of such third person to do the wrong. It seems to us such rule can have no application to this class of cases. It has never, we think, been carried to the extent of making

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one person civilly liable for the crime of another, and, on principle, we think it cannot be." And the following cases support these views: *Scholfield v. Earl of Londesborough* [1896] A. C. 514; *Burrows v. Klunk*, 70 Md. 451, 8 L. R. A. 576; *Worrall v. Gheen*, 39 Pa. 388; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Bruce v. Westcott*, 8 Barb. 874, and *Wood v. Steele*, 73 U. S. 6 Wall. 80, 18 L. ed. 725.

These considerations make it apparent that the findings did not warrant the judgment entered thereon, and this brings us to the question as to whether the plaintiff, under the facts found, was entitled to recover to any extent. The general rule undoubtedly is, as contended for by appellant, that any material alteration in the contract avoids it, even in the hands of innocent holders, and prevents recovery upon it to any extent. But this rule has application to cases where such alteration has been made by the payee or party seeking to enforce it. By the later authorities the rule does not apply in cases where the alteration is by a stranger to the contract, and it is now the settled doctrine, in this country at least, that such an act by a stranger, without the privity of the grantee or obligee, does not avoid the contract in its entirety, even though it be without the knowledge or consent of the party to be bound, but amounts to a spoliation merely, which will not prevent a recovery upon the contract in accordance with its original terms, where those terms can be ascertained. And this is obviously upon the principle that the act of a mere interloper without the privity of the parties should not be permitted to defeat a contract to the extent that it would otherwise be valid and binding. See Am. & Eng. Enc. Law, 2d ed. p. 214, where the authorities are fully collated. And an agent without authority is, in this sense, held to be a stranger to the transaction. *Id.* p. 217, and cases cited in note. In this case the terms of the contract, as it existed prior to its alteration, have been explicitly ascertained by the court; and, as it also appears that defendant has had the benefit of the contract actually made by her, the case is squarely within the rule which entitles the plaintiff to recover to that extent. As the facts found are sufficient to sustain a judgment such as plaintiff is entitled to recover under this rule, no new trial is necessary.

For these reasons, the order denying a new trial is affirmed; the judgment is reversed, with directions to the court below to enter judgment on the findings in favor of plaintiff for the foreclosure of the mortgage for the amount of principal and interest stipulated in the note as it was executed by defendant, less the amount of interest already paid; defendant to have her costs of appeal.

We concur: **Harrison, J.; Garoutte, J.**

W. H. SPURGEON, Appt.,

v.

SANTA ANA VALLEY IRRIGATION
COMPANY, Resp't.

(.....Cal.....)

1. By-laws providing that a transfer of the stock of an irrigation company shall be made only with the land for which it was issued do not apply to a sale of delinquent stock for assessments, as the purchaser is not a transferee of the former owner of the stock.
2. The rights of a purchaser of delinquent stock sold for assessments must be determined by the general law, if no provision therefor is made by the charter or by-laws, and general provisions of a by-law as to transfer of shares of stock do not apply.

(McFarland, J., dissents.)

(February 11, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for Orange County in favor of defendant in an action brought to enforce rights as holder of stock in the defendant corporation. *Reversed.*

The facts are stated in the opinion.

Mr. James G. Scarborough, for appellant:

The by-laws of a private corporation bind the members only by virtue of their assent, and do not affect third persons.

2 Am. & Eng. Enc. Law, p. 709 and cases cited; 1 Morawetz, Priv. Corp. § 500.

A corporation, by its conduct and otherwise, can waive its by-laws.

1 Morawetz, Priv. Corp. § 207; 2 Am. & Eng. Enc. Law, p. 711, and notes; *Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co.* 118 Mo. 447.

Shares of stock are, under the law, personal property, and can be transferred by their owner by indorsement and surrender of the certificate, and a corporation has no power to change this law by its by-laws, articles of incorporation, or rules.

Anglo-California Bank v. Granger's Bank, 63 Cal. 359; *People's Home Sav. Bank v. San Francisco City & County Super. Ct.* 104 Cal. 649, 29 L. R. A. 844; 1 Morawetz, Priv. Corp. § 494; 1 Lawson, Rights, Rem. & Pr. § 484; 2 Am. & Eng. Enc. Law, pp. 706, 707, and notes.

The power to regulate the transfer of stock does not include the power to restrict such transfer.

Boisot, By-Laws of Corporations, §§ 44, 50.

Such by-law of defendant is void and of no effect for the reason that it is in restraint of trade, unreasonable and contrary to public policy.

NOTE.—As to restrictions by by-laws on the transfer of shares of stock, see *New England Trust Company v. Abbott* (Mass.) 27 L. R. A. 271, and note; *Ireland v. Globe Milling & Reduction Co.* (R. I.) 29 L. R. A. 426; *Victor G. Bloede Co. v. Bloede* (Md.) 88 L. R. A. 107; and *Carter v. Producers' Oil Co.* (Pa.) 39 L. R. A. 100.

39 L. R. A.

Re Klaus, 67 Wis. 401; *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306; *Driscoll v. West Bradley & C. Mfg. Co.* 59 N. Y. 102; *Fleckheimer v. National Exch. Bank*, 79 Va. 80.

Such by-law of defendant is void for the reason that it in effect deprives the corporation of the power of levying and enforcing assessments conferred upon it by the statute.

Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; *Reclamation Dist. No. 103 v. Hager*, 66 Cal. 54; 1 Morawetz, Priv. Corp. § 494, and authorities there cited.

This by-law being in itself invalid and void, the provisions of its articles of incorporation relating to the same matter do not give it any additional force or vitality.

Spring Valley Waterworks v. Schottler, 62 Cal. 110; 1 Morawetz, Priv. Corp. § 32; 1 Lawson, Rights, Rem. & Pr. §§ 353, 354.

If an unauthorized provision be inserted in articles of incorporation, all acts done in pursuance of such provision shall be void, and such provision considered as surplusage.

Eastern Pl. Road Co. v. Vaughan, 14 N. Y. 551.

The respondent by its sale of the stock to the appellant, and by receiving his money therefor, has contracted with him to deliver the shares of stock without any restrictions or limitations, and it has been frequently held that in an action involving contracts made with corporations, the latter cannot interpose as a defense that in making such contract it had exceeded the power conferred by its charter or its by-laws, or the law under which it was formed, and that in such a proceeding it is estopped from contending that it had no power to enter into the obligation.

Main v. Casserly, 67 Cal. 127, and cases cited; 2 Herman, Estoppel, §§ 1169, 1170, 1179 et seq.

Formalities prescribed in the execution of transfer may be waived by the corporation, either expressly or by implication.

23 Am. & Eng. Enc. Law, p. 647, and notes.

Mr. E. E. Keech, for respondent:

In some cases the corporation owns the land and water and distributing system, and sells the land to individuals in small tracts, together with the right to a certain amount of water per acre. Frequently the corporation owns the water and delivery system, and supplies landowners at rates agreed upon or fixed in accordance with law.

In both these systems the interest of the water company is adverse to the landowner, and it has become too often an odious monopoly, in spite of the provisions of the Constitution for fixing the rates by law.

Attempts have been made to remedy this difficulty by identifying the stockholder with the landholder and rendering inseparable in law what are so in nature in this state, the land, the water, and the delivery system.

McFadden v. Los Angeles County Supers, 74 Cal. 571; *Rocky Ford Canal, Reservoir Land, L. & T. Co. v. Simpson*, 5 Colo. App. 30.

The water is appurtenant to the land and the corporation delivers the water to the landowner who has purchased one share of its stock for each acre of land.

The respondent was organized solely by and

on behalf of the land and water owners, and not a single share of its stock has ever been sold to or owned by any other than land and water owners for whom in its articles it proposes to act as a delivery agency under the conditions named.

In *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 283, the right to limit the transferability of stock by contract was sustained.

Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 874; *Babcock v. Goodrich*, 47 Cal. 488; *Pratt v. Whittier*, 58 Cal. 132.

The by-laws adopted in their scope and extent do not go beyond the power in the corporation to adopt them.

McFadden v. Los Angeles County Supers. 74 Cal. 572; *Knowles v. Clear Creek, P. River Mill & Ditch Co.* 18 Colo. 209.

The transferee takes no rights under a sale except the statutory rights to participate in elections and receive dividends.

Anglo-California Bank v. Granger's Bank, 63 Cal. 359; 1 Thomp. Corp. § 1031; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 518, 100 Am. Dec. 388; *People v. Crockett*, 9 Cal. 112.

The demand made for the delivery of water was not sufficient.

Price v. Riverside Land & Irrig. Co. 56 Cal. 481.

A judgment, order, or ruling correct in itself will not be reversed because rendered for a wrong reason.

May v. Hanson, 6 Cal. 643, 68 Am. Dec. 135; *Nevada County & S. Canal Co. v. Kidd*, 37 Cal. 320.

Beatty, Ch. J., delivered the opinion of the court:

The question in this case relates to the rights of the plaintiff under a purchase of stock in the corporation defendant. A demurrer was interposed to his complaint, which was sustained by the court, and, declining to amend, final judgment was entered in favor of defendant. Plaintiff appeals, and the judgment roll constitutes the record.

The complaint seems to have been drawn, and, as we think, wisely, with the object of presenting squarely the legal questions involved in the case, and which, whether so presented or not, must necessarily be met and decided sooner or later in its progress. It appears from such complaint that defendant is a corporation organized and existing under and by virtue of the laws of the state of California. Among the purposes of the corporation, as expressed in its articles of incorporation, are the following: "To deliver water for the purpose of irrigation to the owners of land in the Rancho Santiago de Santa Ana, susceptible of irrigation from the waters of the Santa Ana river; said water so delivered to be taken from the south side of the Santa Ana river, at and near what is known as 'Bed Rock Canyon,' and to be delivered under the following conditions: (1) The company will act only as an agency for delivering said water to said owners, whose right to use the same is appurtenant to their said lands. (2) It will deliver water to no one who has not purchased one share of the stock of the company for each acre or fractional part thereof of irrigable land owned by him

along the canal of the company, and agreed with the company that said stock shall be transferable only with the land for which it is issued, and that the water delivered shall be used only on the land for which it is issued: provided, that the company may, under such rules as the board of directors shall establish, deliver the water appurtenant to one parcel of stocked land upon other stocked land on the written consent of the owner of the first parcel, filed with the company, which consent shall not be valid for a longer term than one year; and further provided, that in case any land for which the owner has purchased stock as above specified shall become nonirrigable for any reason, and the owner thereof shall file with the company, and record in the office of the county recorder of the county in which the land lies, a written disclaimer to all future rights or use of said water from said Santa Ana river, and make due proof to the satisfaction of the company that his lands are non-irrigable, the company may allow said stock to be transferred to other unstocked lands lying along the ditches of the company."

The following of the by-laws and rules of defendant are set out:

By-Law 16.

Shares of stock in this company shall not be transferable except with the land for which it is issued, and a conveyance of the land shall legalize a transfer of the stock to the purchaser. Each subscriber of the stock of this company shall be required to purchase one share of the stock for each acre of land owned by him and located under the canals of the company, and the stock shall not be issued either in a greater or less quantity than one share per acre, or fractional part thereof, of irrigable land.

By-Law 21.

Water shall be distributed for irrigating purposes from the main canals of the corporation in such manner as shall be most equitable and just to all parties interested therein, and, other things being equal, in regular rotation to all gates on said canal; always providing that no water be distributed except to stockholders, and that no water shall be sold by the company or furnished to any stockholder to be run on land not covered by stock.

Rules.

No stockholder shall be allowed to receive water or make use of his or her water stock until a certificate of stock has been issued, and the stock books of the company signed. Passed December 27, 1891.

The water appurtenant to one parcel of stocked land may be delivered upon another parcel of stocked land, unless otherwise ordered by the board, upon the filing of a written order from the owner of the first parcel of land, and the owner of the stock located thereon, with the secretary of the company, at least forty-eight (48) hours prior to the time of the delivery of the water. Passed May 2, 1892.

Each of the certificates of stock issued by

defendant, after setting forth date, number, name of stockholder, number of shares, etc., contained the following words: "Transferable on the books of the company by indorsement hereon and surrender of this certificate, and on purchase by the transferee of the land covered by this certificate. The land covered by this certificate is described as follows, to wit." Here follows in each certificate description of land owned by the party named in the certificate, or by his grantee.

In 1891, and again in 1892, defendant levied in due form certain assessments upon its capital stock, which assessments becoming delinquent the stock was sold and the plaintiff became the purchaser thereof, *viz.*, the purchaser of the shares of sundry of the stockholders, aggregating, say, forty shares of the capital stock of defendant. These sales are shown by apt averment to have been regular in form, and sufficient in law to pass the title to such shares, so far as under the provisions of the articles of incorporation and by-laws of defendant and the laws of California might be done by such sale. Thereupon plaintiff applied to defendant, and demanded that certificates of stock issue to him for the shares by him so purchased, but without the clause, "Transferable on the books of the company by indorsement hereon and surrender of this certificate, and on purchase by the transferee of the land covered by this certificate," followed by a description of the land so covered. The defendant refused to deliver to plaintiff the certificates, without the above clause and description of the land being incorporated therein, but was ready and willing to issue to him such certificates with said clause inserted. Neither plaintiff nor defendant owned any of the lands described in the certificates representing the shares by him purchased. Plaintiff also demanded that defendant furnish to him water from its ditch, to irrigate land by him owned in the Rancho Santiago de Santa Ana, along or near the water ditches of defendant, and susceptible of irrigation therefrom, and from the waters of the Santa Ana river. The water so demanded was that to which the plaintiff claimed to be entitled by virtue of his purchase of forty shares of stock in the defendant company aforesaid, and, if procured, was not to be used upon any of the land described in the certificates representing said stock so purchased. Plaintiff offered to pay all costs and expenses of delivering the water as fixed by defendant. Defendant refused to deliver the water to plaintiff.

Defendant's demurrer was both general, for want of facts, and special upon various grounds. As to all the special grounds set forth it was overruled, and it was sustained upon the sole ground that the facts alleged did not constitute a cause of action. This ruling was erroneous. Upon the facts alleged the plaintiff was entitled to certificates of stock in the form in which he demanded them; that is to say, without an indorsement which would render them valueless to him, and incapable of transfer. If the defendant could sell the stock of delinquent shareholders,—as it assumed to do,—certainly the purchaser was entitled to receive certificates for his shares in such form as would enable him to enjoy the ordinary rights

of a stockholder, unless there was something in the charter or by-laws of the company inconsistent with such rights. The validity of a by-law which would abridge the ordinary rights of a purchaser of stock at a delinquent sale would certainly be open to serious question, and much of the argument of counsel has been devoted to this feature of the case. But we find it wholly unnecessary to decide whether, in any particular, the charter or by-laws of the defendant are in conflict with the laws of the state; for, as we construe them, they are entirely consistent with plaintiff's demand. The charter does not say that certificates of stock will not be issued until the subscriber or purchaser has agreed that it shall be transferable only with the land for which it is issued, etc. What it does say is that the company will deliver no water except upon the conditions named. No doubt it was contemplated in the organization of the company that stock would be issued only to such subscribers as had land of the requisite character to enable them to receive water, and that the certificates should show to what particular tracts the right to irrigate was attached. But for the case of delinquent stock sold for assessments no provision was made, either expressly or by implication, in the charter or in the by-laws, and therefore the rights of a purchaser at such sale must be determined by the general law. Under that law he has a right to receive certificates for the shares he has purchased, and to come into the corporation as a shareholder on the same footing with the other shareholders. If shares are issued to him without the special indorsement insisted upon in this case by the defendant, he is put upon the same footing with other shareholders, and that without any injury to the company or infringement of its by-laws. He is not, by virtue of the mere issuance of the shares, entitled to receive any water, and the company is not compelled to deliver any water at any time or place or in any manner inconsistent with its charter or rules. Like an original subscriber, he must become the owner of land within the district designated in the charter and in other respects conforming to its conditions. When he has acquired such land he may then, with the consent of the company,—which it would have no right unreasonably to withhold,—have his shares ascribed to such land by indorsement on the certificate, or in any other convenient method.

The company, by its act in selling the delinquent stock, and the original holder, by violation of the condition upon which he held it, have effectually severed the connection between the stock in question here and the land to which it was originally ascribed, and there is nothing in the charter or by-laws to prevent its assignment to other lands of like character within the proper district, as may be done in the analogous case expressly provided for in the charter. Until this is done, it is no disadvantage to the corporation or its other stockholders that these shares should be held in a form that will enable the plaintiff to use them or transfer them. As they do not now, and never can, oblige the company to deliver water to the plaintiff or any assignee until they are ascribed to land of the requisite character,

there is no reason why they should not be issued in a form admitting of their free assignment. Until so ascribed, they do not come within either the letter or the spirit of by-law No. 16, which, like the other by-laws, relates only to voluntary transfers by shareholders, and has no application to a transfer effected by the corporation itself through the medium of a delinquent sale. The purchaser at a delinquent sale is the transferee, not of the former owner of the stock, but of the corporation itself. He comes in on the footing of an original subscriber; at least he can claim from the corporation all the privileges of a subscriber, so far as necessary to enable him to enjoy the fruits of his purchase. In this case the plaintiff shows that he is the owner of land of the requisite quantity, location, and character upon which to locate this stock, and we can perceive no reason why he should not have the stock, and, if he demands it, have it located. It is certainly a strange position for the defendant to take to claim that its vendee has no title to the stock it has sold him, or to claim that he has only such a title as will make him liable for assessments without any right to the only dividends that the company makes, *i. e.*, water furnished for irrigation.

The judgment is reversed, and cause remanded, with directions to the superior court to overrule the demurrer.

I concur: **Van Fleet, J.**

Temple, J., concurring:

I concur in the judgment, but I am not willing, even by silence, to seem to assent to the proposition that the stock of a corporation can be made exempt from execution, and practically unassessable, by any possible by-laws. If the position of respondent be sustained, that has been accomplished. By this scheme the water rate is not made appurtenant to the several tracts of land, but the corporation stock is thus converted into an appurtenance. Make one of the tracts a homestead, and the stock becomes at once exempt from execution, and the corporation can no longer collect assessments in the statutory mode. I do not dispute the proposition that one who purchases stock is bound by the articles and also by the by-laws of the corporation, but in this state, where corporations are formed under general laws, such laws are themselves part and parcel of the charter of the corporation, and as such are beyond the control of the corporations. They can make no by-laws which conflict with or displace these. These laws expressly make stock subject to execution for the debts of the stockholder, and authorize the directors to levy assessments. The law also provides the mode in which the assessment may be enforced by sale, and expressly declares the effect of the sale. Creditors of

the corporation have an interest in this power, and may sometimes compel the corporation to exercise it. It cannot be waived or destroyed by anything in the by-laws, or by any contract between the stockholders. Corporations may be formed for any purpose for which men may lawfully associate themselves, but men cannot, by any association or contract between themselves, make their property exempt from execution. If people will conduct their business by means of corporations, they must hold their corporate property and conduct such business under the corporation laws of the state. In spite of all they can do, such laws will constitute their corporate charters. It is not necessary to say what rights the purchaser will acquire under the sale, but I think it plain that he cannot be held to be a stockholder, and liable to assessment, and still be deprived of all profits as a stockholder, nor can he be compelled to purchase any particular piece of land to get such benefit. Under the claim of respondent, if the former owner of the stock has put a homestead on his land, the corporation could not sell the land to collect the assessment, and he need not concern himself as to the ownership of the stock if the right to the use of the water has become an appurtenance to the land. And, if it has not become an appurtenance, and the result is simply that the water can be used nowhere else, he is not much worse off, for the stock is worthless to anyone else, and, if not in law inalienable, has become unsalable. Such a scheme, in my opinion, is against public policy as declared in the statutes concerning corporations.

I concur: **Henshaw, J.**

McFarland, J., dissenting:

I dissent, and think that the judgment should be affirmed. There is nothing in the articles of incorporation or the by-laws that is unconstitutional, in conflict with general laws, or for any reason invalid; and, in my opinion, the charter and by-laws clearly provide that there shall be no ownership of shares of stock in gross; that is, an independent ownership attached to the person, and not by virtue of ownership of specific land. By-laws bind the company—the body corporate—as well as the stockholders; and the corporation cannot sever the shares of stock from the land described in them by the device of a sale for assessments any more effectively than it could do so in any other way. It could collect assessments by suit, but, if it undertakes to dispose of the shares assessed at forced sale, the purchaser takes them impressed with the character given them by the charter and by laws; and if, with that character, they are not valuable to him, he has simply made a bad bargain with his eyes open.

FLORIDA SUPREME COURT.

R. C. STEARNS, *Appt.*,

v.

Louis A. FRALEIGH *et al.*

(..... Fla.)

(December 21, 1897.)

*1. Where the instrument creating a trust empowers a trustee to resign after acceptance, a resignation in the manner pointed out by such instrument will be valid.

2. An instrument of writing, by which one named as trustee in a trust deed, after reciting that he was holding in trust certain lands, etc., for certain named beneficiaries, more fully set forth and described in the deed creating the trust, did thereby resign and relinquish said trusteeship, as by the provisions of said trust deed he claimed the right and authority to do, is a resignation of a trust already accepted, and not a refusal to accept the trust.

3. Under a power given to a wife to appoint and choose by her writing under her seal, another trustee instead of the one named in a trust deed executed by her husband conveying real and personal property in trust for the wife and her children, whenever the named trustee should wish to resign his trust, or should die leaving the same unfulfilled, the wife has authority to appoint her husband to be such trustee upon the resignation of the one named. The husband's acceptance of such appointment binds him to execute the trust according to its terms, and he thereby becomes invested with the same powers, and is subject to the same responsibilities, as other trustees; and the wife is entitled to the same protection against him in equity as any other *cestui que trust*.

4. By the common law a married woman may, without the concurrence of her husband, execute a power, whether given to her while sole or married; and she can execute such power in favor of her husband.

5. The power to appoint a trustee upon certain contingencies, invested in a married woman by a deed conveying property to a trustee for the benefit of the married woman and her children, may be executed by the married woman without her husband's concurrence, and without the formalities required by our statutes regulating married women's conveyances, as such statutes have no reference to the execution of powers, but only to conveyances of the married woman's property. The execution of such power in the manner prescribed by the trust deed will be sufficient.

6. Where real property is conveyed in trust, with power to the trustee to sell same, and with authority to the named trustee to resign, and power to a beneficiary to "appoint . . . another trustee instead of the" one originally named, the trustee so appointed taking the trusteeship subject to the trusts limited in the trust deed, and the substituted trustee sells and conveys the real property in accordance with the power contained in the trust deed, the purchaser will thereby acquire the legal title, although the resigning trustee failed to convey the trust property to his successor.

*Headnotes by CARTER, J.

NOTE.—For husband as trustee of wife, see also *Riley v. Martinelli* (Cal.) 21 L. R. A. 38; *Brown v. Wright* (Ark.) 21 L. R. A. 467; *Meacham v. Bunting* (Ill.) 28 L. R. A. 618.

39 L. R. A.

APPEAL by defendant from a decree of the Circuit Court of Gadsden County in favor of plaintiffs in a suit to set aside a conveyance alleged to be in violation of the terms of a deed of trust and to appoint a new trustee for the property. *Modified.*

Statement by CARTER, J.:

On June 4, 1890, appellees filed their bill in equity in the circuit court of Gadsden county, making appellant and one Mary A. Fraleigh defendants thereto. An amended bill was filed by appellees April 16, 1891, whereby it was alleged that on January 18, 1864, Emanuel M. Fraleigh, husband of defendant Mary A. Fraleigh, executed a trust deed of conveyance to one Samuel B. Love, a certified copy of which was made a part of the bill. The deed referred to purported to be made for and in consideration of the great love and affection which the grantor bore towards his wife Mary A. Fraleigh and his children, Lillie C., Cornelia M., and Clara W. Fraleigh, as well as in consideration of the sum of \$10 to the grantor paid; and it conveyed to Samuel B. Love, his heirs and assigns, certain real and personal property in Gadsden county, therein described. The deed contained the following provisions: "To have and to hold the afore-granted property to the said S. B. Love, his heirs and assigns, in trust, nevertheless, for the sole use of the said Mary A. Fraleigh, wife of the said E. M. Fraleigh, for and during her natural life, and after death to such children as she may have living at the time of her death, share and share alike, with power to the said Samuel B. Love to sell any portion of said trust estate, and to reinvest the proceeds in such other property, subject to the above-described trust, as he shall deem most for the interest of said trust estate, with power to the said Mary A. Fraleigh to appoint and choose, by her writing under her seal, another trustee instead of the said Samuel B. Love, whenever the said Samuel B. Love shall wish to resign said trust, or shall die leaving the same unfulfilled; said trustee so appointed taking said trusteeship subject to the trust herein limited."

It was further shown by the amended bill that on May 23, 1866, Samuel B. Love executed under seal, and in the presence of two subscribing witnesses, an instrument in writing, whereby, after reciting that said Love was holding in trust certain lands, etc., for Mary A. Fraleigh and her children, more fully set forth and described in the trust deed above described, he did thereby resign and relinquish said trusteeship, as by the provisions of said trust deed he claimed the right and authority to do; and on the same day Mary A. Fraleigh executed under seal, and in the presence of two subscribing witnesses, an instrument in writing, whereby, after reciting the trust deed before referred to, and its provision empowering her to appoint or choose another trustee whenever the said Love wished to resign, and that said Love had resigned the trusteeship, leaving same unfulfilled, she did, by virtue of

the authority vested in her by said trust deed, constitute and appoint E. M. Fraleigh trustee in lieu of said Love. Each of these instruments was proved by a subscribing witness, and recorded in the clerk's office of Gadsden county on August 28, 1866.

It was further alleged by said amended bill that appellant was in possession of certain lands described in the trust deed, claiming title to same by virtue of a deed from one Samuel Hamblin, who received deeds to said lands from Mary A. and E. M. Fraleigh (the latter pretending to execute said deeds as trustee), dated January 20, 1874; that the property embraced in said deed had "run down" and was "going to waste," and that appellees had received no benefits, rents, or profits therefrom since the date of said deed to Hamblin; that appellant and Samuel Hamblin combined and confederated with E. M. Fraleigh and other persons to destroy the force and effect of the trust deed, and to deprive appellees of all benefits that might arise from the proper control and management of the property, in order that appellant might obtain title thereto and possession thereof and that the title passed to the said Samuel Hamblin for little or no consideration; that the proceeds of the sale were not reinvested as required by the trust deed, and that appellant knew that fact; that the appointment of Emanuel M. Fraleigh as trustee was unauthorized, null and void, the said Mary A. Fraleigh being under coverture, the wife of said E. M. Fraleigh, at the time of making such appointment; that the deeds made by virtue of said appointment, by E. M. Fraleigh, pretended trustee, and the said Mary A. Fraleigh, to Samuel Hamblin, and the one from Hamblin to appellant, passed no title, and were null and void.

It was further alleged that Samuel B. Love and E. M. Fraleigh were dead; that appellees Louis A., Albert E., Lillie F., Alliene, and Emily were the only surviving children of Mary A. Fraleigh, and were all over twenty-one years of age, except Alliene and Emily, who were about twenty years of age. The consideration expressed in the deeds from Fraleigh and wife to Hamblin was \$700.

The bill prayed that the appointment of E. M. Fraleigh to be trustee, the deeds to Samuel Hamblin, and the deed to appellant be declared illegal, null, and void; that appellant be required to produce the deeds in court for cancellation; that a trustee be appointed, vice Samuel B. Love, deceased,—and for general relief.

The separate answer of appellant to the amended bill of complaint filed May 19, 1891, admitted the execution of the trust deed by E. M. Fraleigh; the appointment of E. M. Fraleigh to be trustee by Mary A. Fraleigh; the resignation of S. B. Love as trustee; that appellant was in possession of certain land described in the trust deed, and claimed same under a deed from Samuel Hamblin, who acquired title to same by deeds from Mary A. Fraleigh and Emanuel M. Fraleigh, as trustee,—and denied that the property had run down or was going to waste, that the lands passed to Hamblin for little or no consideration, that the proceeds of sale were not rein-

vested as required by the trust deed, and that appellant knew that fact.

Appellant by his answer also denied all charges of combination and confederacy made against him in the bill, and alleged that he purchased the lands mentioned in the bill from Samuel Hamblin in March, 1878, in good faith, and without notice of any equities claimed by appellees, paying therefor the sum of \$1,500.

The case was set down for hearing on amended bill and answer of appellant, and on November 4, 1893, a decree was rendered whereby it was decreed that the appointment of E. M. Fraleigh to be trustee, by Mary A. Fraleigh, his wife, was illegal, null, and utterly void; that the deeds from E. M. Fraleigh, as trustee, and his wife, Mary A. Fraleigh, to Samuel Hamblin, passed whatever right, title or interest Mary A. Fraleigh might have had in the property attempted to be thereby conveyed, but did not pass any right, title, or interest of the children of Mary A. Fraleigh, and as to such children the deeds were absolutely null, void, and of no effect whatever; that the deed from Hamblin to appellant passed no title whatever to any lands embraced in the original trust deed, except the interest or estate which Mary A. Fraleigh had therein, and which she might have conveyed to Samuel Hamblin in the deeds to him before mentioned, and that for any other purpose, or to any other extent, the said deed from Hamblin to appellant was utterly null, void, and of no effect; that D. McMillan be, and he was thereby, appointed trustee, to take charge of, recover, and manage the lands described in the trust deed from Fraleigh to Love, so far as the interest and estate of the children of Mary A. Fraleigh extended, subject to the same trust and powers as mentioned in the original trust deed in respect to said children. From this decree Stearns entered his appeal on March 24, 1894, to our June term, 1894, claiming in his petition of appeal that the court erred in decreeing (1) that the appointment of E. M. Fraleigh as trustee, by his wife, was illegal and void; (2) that the deeds from Fraleigh, trustee, and his wife, to Samuel Hamblin, did not pass to Hamblin any right or interest of Mary A. Fraleigh's children, but that as to them the deeds were absolutely null and void; (3) that the deed from Hamblin to appellant passed only the interest of Mary A. Fraleigh in the lands conveyed, and to any further extent was null and void; (4) the appointment of D. McMillan to be trustee.

Mr. Fred. T. Myers, for appellant:

There is certainly no legal obstacle to a husband being appointed trustee of his wife's separate estate by a third person. In fact where there is a separate estate created for the benefit of the wife, and no trustee is named in the instrument creating it, the husband, by the common law, becomes the legal owner of the property, charged in equity with the trust to hold it for the separate use of the wife.

1 Bishop, Married Women, § 600; *Gerald v. McKenzie*, 27 Ala. 166; *Friend v. Oliver*, 27 Ala. 532; *Shirley v. Shirley*, 9 Paige, 363; *Croom v. Wright*, 89 N. C. (4 Fred. Eq.) 248.

When the husband is the trustee, the wife

has the same remedies against him for the protection of her estate that she would have against a stranger acting as trustee.

1 Bishop, Married Women, § 801; 2 Story, Eq. Jur. § 1380; *Walker v. Beat*, 76 U. S. 9 Wall. 753, 19 L. ed. 818.

Why cannot the wife exercise the unlimited power of appointment given her in the instrument, by selecting her husband as trustee in lieu of him who resigned?

Waterman v. Higgins, 28 Fla. 660.

There is no contractual quality in the act of appointment. The contractual relations were created and established at the execution of the trust deed, and the unrestricted power of appointment was there given. The act of appointment is simply the nomination of the person to execute the trusts created by the original instrument; and the conjugal relation does not forbid, as we have seen, the relationship of trustee and *cestui que trust* between husband and wife.

Tweedy v. Urquhart, 30 Ga. 446; 1 Perry, Tr. § 296.

If the appointment was valid then, under the power conferred on the trustee by the deed of trust, the trustee, Fraleigh, had full authority to sell to Hamblin.

2 Perry, Tr. § 764.

This is not a case where the purchaser would be held to see to a proper application of the proceeds of sale.

2 Perry, Tr. § 794; *Doran v. Wiltshire*, 3 Swanst. 699; *Balfour v. Welland*, 16 Ves. Jr. 157; *Lining v. Peyton*, 2 Desauss. Eq. 875; *Redheimer v. Pyron*, Speers, Eq. 135; *Sims v. Lively*, 14 B. Mon. 433; *Steele v. Lewisay*, 11 Gratt. 454; *Potter v. Gardner*, 25 U. S. 12 Wheat. 499, 6 L. ed. 706; *Hauser v. Shore*, 40 N. C. (5 Ired. Eq.) 357; *Garnett v. Macon*, 6 Call. (Va.) 808; *Tiffany & Bullard, Trusts & Trustees*, 764.

A bona fide purchaser for a valuable consideration without notice, expressed or implied, is entitled to full protection.

1 Perry, Tr. § 218; 2 Perry, Tr. § 828; *Gunnell v. Cockerill*, 79 Ill. 79.

Mr. W. H. Ellis for appellees.

Carter, J., delivered the opinion of the court:

The appellant having failed to argue the fourth error assigned in the petition of appeal, we treat it as abandoned. The principal question involved by the other assignments is whether the appointment of E. M. Fraleigh to be trustee, by his wife, under the power of appointment given her by the terms of the trust deed, was a valid act. If so, and the deeds to Hamblin passed title, the appellant, being a purchaser for value from him, without notice of any equities claimed by appellees, would obtain a good title. *Saunders v. Richard*, 35 Fla. 28. The hearing in the court below was upon bill and answer, and it will be observed that the answer denied that the sale to Hamblin was for little or no consideration, that the proceeds of the sale had not been reinvested, and all charges of fraud and conspiracy on the part of appellant to obtain title to the property. The deeds to Hamblin expressed a consideration of \$700, and, in the absence of actual

notice, the appellant could only be charged with constructive notice to the extent of that furnished by the record of the trust deed, and of those to Hamblin.

It is insisted by appellees that the appointment of E. M. Fraleigh to be trustee was void, because—First, the trustee, Love, could not, after having accepted the trust, resign or renounce it; second, a married woman cannot appoint her husband trustee of a trust created by him for the benefit of herself and children; third, the execution of the instrument of appointment was not joined in by Mrs. Fraleigh's husband, nor did she acknowledge its execution separate and apart from her husband.

1. The general rule, that a trustee cannot, after having accepted a trust, resign or renounce it at his pleasure, contended for by appellees, is unquestionably correct; but it is equally true that, where the instrument creating the trust empowers a trustee to resign after acceptance, a resignation in the manner pointed out by such instrument will be valid. 1 Perry, Tr. § 274; 2 Lewin, Tr. *646; *Tiffany & Bullard, Trusts & Trustees*, p. 536. It is not denied that the trust deed authorized Mr. Love to resign, nor that his resignation was in strict accordance with the authority; but the appellees ask us to construe the written resignation as a refusal to accept the trust, and it is insisted that Mrs. Fraleigh had no authority to appoint another trustee in case of Mr. Love's refusal to accept the trust, but only in the event of his resignation. The instrument expressly recites the fact that Mr. Love was holding property in trust, and it referred to the trust deed for a description of the property so held and to its provisions authorizing him to resign. If he was holding the property in trust, as declared by this instrument, he had accepted the trusteeship, and the instrument was what it purported to be,—a resignation of the trust, and not a refusal to accept it.

2. It is argued by appellees that the appointment of E. M. Fraleigh as trustee of a trust created by him for his wife and children would defeat the object of the trust, and his acceptance would amount to a revocation thereof; and we are referred to the case of *Robinson v. Dart*, Dud. Eq. 128, 31 Am. Dec. 569, and to the cases of *Richards v. Chambers*, 10 Ves. Jr. 580; *Magwood v. Johnston*, 1 Hill, Eq. 228, and *Ewing v. Smith*, 3 Desauss. Eq. 417, 5 Am. Dec. 557, cited therein, as sustaining this proposition. The last two cases have no reference to the question under consideration. The case of *Richards v. Chambers*, 10 Ves. Jr. 580, as quoted in the first-named case, would go far towards sustaining the contention of appellees, but a reference to the official report of the case shows that it sustains the contrary view. There the property, by a marriage settlement, was secured to the sole and separate use of the wife for life, and, if she survived her husband, to her absolutely; but, if she died before her husband, it was to go to such persons as she by will or deed might appoint, and, in default of appointment, to her executors or administrators. The husband and wife by petition applied to have a part of the trust property then in court transferred to them; the wife having executed an appoint-

ment in favor of the husband, and expressed a desire, upon an examination *de bene esse*, that the petition be granted. The court said: "The wife, having a separate estate for life, might, according to the doctrine of many cases, part with that life interest. She might also execute an appointment in favor of her husband, or of any person, which appointment in the event of her death in his life would be a valuable and effectual disposition of the property. But the question . . . is, whether the contingent interest which the wife, while *sui juris* has secured to herself in the event of her surviving her husband, can, through the interposition of this court, be given up by her while in a state of coverture." The question in that case was as to a contingent interest, over which the wife had no power of appointment by contract; and the proposition was distinctly recognized that she could exercise a power of appointment, even in favor of her husband. In *Robinson v. Dart*, Dud. Eq. 128, 81 Am. Dec. 569, application was made to a court of equity to appoint a husband trustee for his wife. The court declined to appoint him, or to direct that the wife's separate property be turned over to him; holding, not that he was incompetent or disqualified, but that he was an improper person to whom to commit the trusteeship. The reasons advanced by the court were that, if appointed, he would be constantly tempted to use the authority and influence of a husband to assume the disposal of the property to his own uses, and induce his wife's acquiescence, and that a court of equity should not place a wife in such a situation that she might be compelled to go into equity to call her husband to account for breaches of his duty as trustee. To the same effect, see *Boykin v. Cipiles*, 2 Hill, Eq. 200, 29 Am. Dec. 67; *Ex parte Hunter, Rice*, Eq. 293; *Dean v. Lanford*, 9 Rich. Eq. 423.

In none of the cases referred to by appellees was any question involved as to whether, under a power to appoint new trustees, a married woman could appoint her husband; nor was it held that a husband was incompetent or disqualified to be a trustee for his wife. There is a very clear and obvious distinction between the incompetency and the unfitness of a person for the position of trustee, and between the power of an individual to select a trustee, and the duty of a court in appointing one. *Forster v. Abraham*, L. R. 17 Eq. 851. The general rule is that any person may be appointed a trustee who is capable of confidence, of holding real and personal property, and of executing the trust. 3 Kerr, Real Prop. § 1728; 1 Perry, Tr. § 89; *Tiffany & Bullard, Trusts & Trustees*, 325. It is not denied that the husband in this case was capable of everything required by the general definition, and that he was in fact a competent trustee for his children under the same deed. Then why not for his wife? In equity he has been frequently held to be a trustee for his wife, and prior to any recent statutes regulating married women's property, in all cases where real estate was conveyed direct to the wife during coverture, for her sole and separate use, exclusive of her husband, he was in equity deemed a trustee for the wife, and as such held the legal title. 2 Story, Eq. Jur. § 1380; 1 Bishop, Married

Women, § 800; *Porter v. Bank of Rutland*, 19 Vt. 410; *Bennet v. Davis*, 2 P. Wms. 816; *Conway v. Hale*, 4 Hayw. (Tenn.) 1, 9 Am. Dec. 748; *Walker v. Beal*, 76 U. S. 9 Wall. 743, 19 L. ed. 814. And where an estate was given to, or engaged to be held by, a husband, for the use of his wife, the husband was thereby constituted a trustee for the separate use of the wife. *Darley v. Darley*, 3 Atk. 399; *M'Lean v. Longlands*, 5 Ves. Jr. 71; *Rich v. Cockell*, 9 Ves. Jr. 369; *Walter v. Hodge*, 2 Swanst. 92; 2 Story, Eq. Jur. § 1872. While a court of equity, perhaps, would never have appointed Mr. Fraleigh to be trustee of the trust created by him for his wife and children, and would probably have removed him from the position, upon proper application, after he was appointed, yet there is no absolute rule of law rendering him incompetent to act in that capacity, if appointed by authority of the instrument creating the trust, or in any other legal manner. 1 Perry, Tr. § 59; 1 Lewin, Tr. *41. Neither did the appointment of Mr. Fraleigh, and his acceptance thereof, revoke the trust deed. On the contrary, his acceptance bound him to execute the trust according to its terms; and he was invested with the same power, and subject to the same responsibilities, as other trustees, and the wife was entitled to the same protection in equity as any other *cestui que trust*. 1 Bishop, Married Women, § 801; *Walker v. Beal*, 76 U. S. 9 Wall. 743, 19 L. ed. 814; 2 Story, Eq. Jur. § 1380; *Tweedy v. Urquhart*, 30 Ga. 446. In this latter case, by an antenuptial settlement between Ephraim Tweedy and Isabella Hadley, made in contemplation of marriage, certain personal property was conveyed to a trustee for the sole use of Isabella, "separate from and wholly free from the control of her intended husband, or any future husband," with a provision authorizing Isabella to appoint any other person trustee in the place of the one named in the deed, should he die or resign. The trustee having resigned, Isabella, then the wife of Tweedy, appointed her husband trustee, in accordance with the power contained in the deed. The court held that there was nothing in the relation of husband and wife, nor in the clause of the settlement in quotation above, depriving the wife of the right to appoint her husband trustee, under the power reserved in the settlement, and that his appointment was valid.

8. At common law a married woman could, without the concurrence of her husband, execute a power, whether the power was given to her while sole or married. 4 Kent, Com. *324; *Gridley v. Wynant*, 64 U. S. 28 How. 500, 16 L. ed. 411; *Gridley v. Westbrook*, 64 U. S. 503, 16 L. ed. 412; *Armstrong v. Kerns*, 61 Md. 364; *Thompson v. Perry*, 2 Hill, Eq. 204, 29 Am. Dec. 68; *Burnes v. Irwin*, 2 U. S. 2 Dall. 199, 1 L. ed. 348. And she could, in such cases, execute the power in favor of her husband. *Wood v. Wood*, L. R. 10 Eq. 220; *Taylor v. Eastman*, 92 N. C. 601; 8 Kerr, Real Prop. §§ 1857, 1859; *Richards v. Chambers*, 10 Ves. Jr. 580. As the appointment of a trustee in this case was the exercise of a mere power, and at common law a married woman could exercise such power without the assent of her husband, it only remains to be seen whether this rule of the common law had been changed by

any statute of this state at the time of the execution of the power in question in this case. We are very clearly of the opinion that it had not. The statutes in force at that time requiring the joinder of the husband, and a separate acknowledgment of the wife, were applicable only to transfers and conveyances of the wife's property. Act Feb. 4, 1835, § 1; Act March 6, 1845, § 4.

The designation of a person to act as trustee, and hold the legal title to property of which she was a beneficiary, was not a transfer by her of the trust property, or any interest therein. Her appointment conferred no title upon her husband in the trust property. His title, powers, and duties were derived from, and determined by, the original trust deed, not from her appointment. Her power to appoint possessed none of the elements of an estate. *Norfleet v. Hawkins*, 98 N. C. 392; 4 Kent, Com. 337; *Patterson v. Lawrence*, 83 Ga. 708, 7 L. R. A. 148; *Schley v. McCeney*, 36 Md. 266; 3 Kerr, Real Prop. §§ 1850, 1851; *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106.

4. It is also insisted that the substituted trustee acquired no title to the property which he could convey without a deed from the retiring trustee. The trust deed authorized the named trustee to resign. He did resign, and thereupon ceased to be trustee. Mrs. Fraleigh was authorized to choose and appoint another. She did so, and thereupon E. M. Fraleigh, by

the express language of the trust deed, took the trusteeship, subject to the trust in the deed limited. Even if the trust property was not, by the language of the trust deed, effectually transferred to the new trustee upon his appointment, without a formal conveyance from Mr. Love, yet by his appointment Mr. Fraleigh became the rightful trustee, and as such could unquestionably have maintained actions against Mr. Love for conveyances and possession of the trust property. *Noble v. Meymott*, 14 Beav. 471; 2 Lewin, Tr. *650. If the language of the trust deed was insufficient to vest title to the trust property in Mr. Fraleigh, but was sufficient to constitute him a trustee upon Mrs. Fraleigh's appointment, then the legal title remained in Mr. Love, as a naked trust; and, upon the execution of the power of sale contained in the trust deed by the new trustee, the title passed to the purchaser (at least, so far as the *cestui que trustent* were concerned), by force of the terms of the trust deed granting power to sell, and by the deed of the new trustee executed under that power. *National Webster Bank v. Eldridge*, 115 Mass. 424.

The decree of the Circuit Court, except the paragraph appointing D. McMillan as trustee, is reversed, with directions to dismiss the bill and amended bill, as against the appellant. In other respects the decree is affirmed.

Rehearing denied January 25, 1898.

GEORGIA SUPREME COURT.

B. F. WILCOX, *Plff. in Err.*,

v.

STATE of Georgia.

(.....Ga.....)

"Inasmuch as there can be no doubt that the words 'domestic animals,' as used in that clause of the Constitution authorizing the general assembly to 'impose a tax upon such domestic animals as, from their nature and habits, are destructive of other property,' were intended to refer to dogs, it follows inevitably that the dog is classed by the fundamental law of the state as 'a domestic animal;' and therefore an act of cruelty to a dog is indictable under § 703 of the Penal Code.

(June 11, 1897.)

ERROR to the Superior Court for Wilcox County to review a judgment convicting defendant for cruelly treating a dog. *Affirmed.*

The facts are stated in the opinion.

*Headnote by FISH, J.

NOTE.—As to railroad liability for killing dogs, see *note* to *St. Louis S. W. R. Co. v. Stanfield* (Ark.) 37 L. R. A. 669.

For cruelty to animals, see *Com. v. Lewis* (Pa.) 11 L. R. A. 522, and some cases in *note*; also *Waters v. People* (Colo.) 33 L. R. A. 836.

39 L. R. A.

Messrs. Cutts & Lawson for plaintiff in error.

Messrs. Tom Eason, Solicitor General, and *M. E. Land* for the State.

Fish, J., delivered the opinion of the court:

An accusation in the county court of Wilcox county charged B. F. Wilcox with the offense of cruelty to a domestic animal, under § 703 of the Penal Code, which provides that "every person who shall instigate, engage in, or do anything in furtherance of an act of cruelty to a domestic animal, shall be punished as for a misdemeanor." The animal alleged to have been cruelly treated was a dog. The accused demurred to the accusation on the ground that a dog is not a domestic animal. The demurrer was overruled, and this ruling was sustained upon certiorari, whereupon the accused excepted. The sole question made, therefore, is whether a dog is a domestic animal. There is some conflict in the decisions of the courts of different states on the subject, but the decided weight of authority seems to be that a dog is a domestic animal. Some of the leading cases so holding are *State v. McDuffie*, 34 N. H. 526, 69 Am. Dec. 516; *Hurley v. State*, 30 Tex. App. 333; *State v. Giles*, 125 Ind. 124; *Dodson v. Mock*, 20 N. C. (4 Dev. & B. L.) 146; and *Shaw v. Croft*, 37 Fed. Rep. 317. The case of *Patton v. State*, 93 Ga. 111, is cited by counsel for plaintiff in error as au-

thority that a dog is not a domestic animal. The sole question decided in that case was that § 729 of the Penal Code, which is in these words: "All other acts of wilful and malicious mischief, in the injuring or destroying any other public or private property not herein enumerated, shall be misdemeanors"—does not apply to injuring or killing animals of any kind, and therefore the wilful and malicious killing of a dog was not an indictable offense under that section. The discussion by Justice Lumpkin in that case as to whether or not a dog was property, while quite interesting, was not necessary for the determination of the questions as ruled. This court, in *Graham v. Smith* (decided at the last term) 28 S. E. 325, held that "the owner of a dog has such a property in it as will enable him to maintain an action of trover for its recovery in case of its wrongful conversion." Whatever the status of the dog may be elsewhere, we think the fundamental law of this state classifies it as "a domestic animal" in that clause of the Constitution (Civ. Code, § 5883) authorizing the general assembly to "impose a tax upon such domestic animals as, from their nature and habits, are destructive of other property." There can be no doubt that the words "domestic animals," as there used, were intended to refer to dogs, and therefore an act of cruelty to a dog is indictable under § 703 of the Penal Code, and there was no error in overruling the certiorari.

Judgment affirmed.

All the Justices concur.

James ALLEN, *Plff. in Err.*,

T. J. PEARCE.

(.....Ga.....)

"While the term 'aged,' as applied to human beings, is not, for all purposes, susceptible of precise definition, and while it is not practicable to arbitrarily fix a period of life at which the condition of being aged may be said to have certainly begun, it is safe to hold that a man sixty-six years old is entitled to an exemption of his property from levy and sale, under that clause of the Constitution (Civ. Code, § 5912) allowing this right to 'every aged or infirm person.' This is true although the applicant may be a hale and hearty man.

(May 22, 1897.)

ERROR to the Superior Court for Talbot County to review a judgment refusing to set apart to plaintiff as an aged person a homestead free from execution. *Reversed.*

The facts are stated in the opinion.

Mr. J. J. Bull, for plaintiff in error:

Code, § 2002, provides that every aged person shall be entitled to a homestead.

The allotted life of a man is three score years and ten (seventy) years. 90 Psalm, 10th verse.

*Headnote by FISH, J.

NOTE.—The question who is "aged" seems to be a novel one.

On the question who is a "child," see *Collins v. State* (Ga.) 35 L. R. A. 501.

39 L. R. A.

This plaintiff only lacks four years of living his allotted time.

Webster's definition of "aged" is an old person "having lived almost to or beyond the usual time allotted to that species of beings."

Evidently the legislature intended to give a homestead to an aged person whether he is infirm or not, and the statutes make "aged" or "infirm" persons two separate and distinct grounds.

Messrs. J. H. Worrill, J. H. McGehee, and Brannon, Hatcher, & Martin for defendant in error.

Fish, J., delivered the opinion of the court:

On January 11, 1895, James Allen applied to the ordinary of Talbot county for the setting apart of a homestead and exemption to himself as an aged person, alleging in his petition that he was sixty-six years of age. T. J. Pearce, a creditor of the applicant, filed an objection on the ground that Allen was not an aged person in contemplation of law. The homestead was granted, and the objector appealed to the superior court. On the trial, there, it appeared that the applicant was sixty-six years old, and that he was hale and hearty. The judge directed a verdict in favor of the objector, on the ground that the petition and evidence did not show that the applicant was entitled to a homestead. This ruling is assigned as error. It will be observed that the sole question made by this record is whether a man sixty-six years of age, though hale and hearty, is entitled to an exemption of his property from levy and sale under that clause of the Constitution (Civ. Code, § 5912) allowing this right to "every aged or infirm person." The right is to every aged or infirm person. If he be aged, he is entitled to the exemption, whether he be infirm or not. So, if he be infirm, he has the right to it, without regard to his age. It would be difficult to designate an exact period of life when one might with certainty be said to have become aged; yet there are certain ages fixed by our statutes, which, when attained, relieve a man of some of the burdens of citizenship. After he reaches the age of fifty years, he is no longer subject to road duty; and after he is sixty years old he is relieved of poll tax, and, at his option, of jury services. It has been held in an English case that persons fifty years of age are aged. *Pomeroy v. Willway*, L. R. 42 Ch. Div. 510. There a testator directed that the interest of a fund should forever "be divided into annuities of ten pounds each, and to be paid half-yearly, to an equal number of men and women not under fifty years of age. Unitarians, and who attend Lewin's Mead Unitarian Chapel or chapels in Bristol." The question was whether or not the gift was charitable, and it was held that persons not under fifty years of age were aged persons, within the meaning of the statute of charitable uses (43 Eliz. chap. 4), providing for gifts "for the relief of aged and impotent and poor people," and that the bequest was good as a charitable gift.

While we are not to be understood as fixing with accuracy the time when human beings become aged, yet we deem it safe to hold that a man sixty-six years old, though hale and hearty, is entitled to homestead and exemption under the above-cited constitutional provision.

Judgment reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

Clara F. BASS, *Appt.*,

v.

METROPOLITAN WEST SIDE ELEVATED RAILROAD COMPANY *et al.*

(53 U. S. App. 542, 82 Fed. Rep. 367.)

1. **A tenant has no right to remove a building placed by him upon the leased property** under a stipulation requiring him to make the erection, keep it insured and in repair, and requiring the lessor to purchase it at the expiration of the term or to renew the lease for a specified time, at the expiration of which the title should pass to the lessor, and it is immaterial that a lien is reserved in favor of the lessor to enforce performance of the lessee's covenants.
2. **The lessor's agreement to the erection of a building** upon the leased premises which varies from that called for by the lease will prevent his subsequently enforcing the specifications of the contract.
3. **A tenant who has covenanted to erect and keep in repair a building** on the leased premises cannot by improving one part of it acquire the right to destroy another part.
4. **Injunction will not be refused** to prevent the destruction of a portion of a building because it is small and insignificant in comparison with the space that remains.
5. **The right to remove a portion of a leased building** for the occupation of its tracks is not acquired by a railroad company without condemnation proceedings by purchasing the leasehold with the assent of the lessor, although the building was erected by the tenant under a stipulation in the lease which required the lessor to make him certain compensation for it at the expiration of the lease.
6. **Injunction may issue to compel the restoration** by a railroad company of a portion of a building on a leasehold which has been acquired by it, and which, without making compensation therefor, it has removed to make space for the laying of its tracks.

(October 20, 1897.)

A PPEAL by plaintiff from a decree of the Circuit Court of the United States for the Northern District of Illinois dismissing a bill to enjoin defendants from occupying and using certain real estate belonging to her for railroad purposes. *Reversed.*

Before Woods and Jenkins, Circuit Judges, and Grosceup, District Judge.

Statement by Woods, Circuit Judge:

This appeal is from a decree dismissing a bill for an injunction against the occupation and use for railroad purposes of real estate in Chicago, between Van Buren and Jackson streets, fronting to the east on Market street, and extending to the Chicago river on the west, described as lot 10 in the subdivision of lots 2, 3, and 4 in block 84, school section addition to Chicago. The essential facts, as shown by the bill, answer, and proofs are these:

NOTE.—As to mandatory injunction, see *note to Moundville v. Ohio River R. Co.* (W. Va.) 20 L. R. A. 161; also *Central Trust Co. v. Moran* (Minn.) 29 L. R. A. 212.

39 L. R. A.

In 1888, the appellant, Clara F. Bass, leased the premises to John P. Altgeld for the term of ninety years, at an annual rental of \$2,500 for the first five years, and of \$2,750 for the next five years, and thereafter of 5 per centum of the "fair salable value of the leased premises, exclusive of the building or buildings," to be ascertained by appraisalment on July 1, 1898, and every succeeding tenth year, but at no time to be less than \$2,750 per annum; the tenant paying all taxes, rates, charges, and assessments, and maintaining in good repair buildings and improvements. Of the numerous provisions and covenants in the lease, binding upon or for the benefit of the respective parties, their heirs, representatives, or assigns, those especially pertinent to the present discussion are, in substance, the following: The tenant shall forthwith erect on the premises "a good and substantial building of brick, stone, and such other material as is commonly used on the outside and in the inside of first-class mercantile buildings, the foundations and walls to be sufficiently strong to support a building eight stories high, and the building to be at least seven full stories in height above the grade of the street, and to cost not less than the sum of \$50,000, according to designs, plans, and specifications, to be approved in writing by the lessor, . . . and in accordance with the building ordinances of the city of Chicago, covering the entire premises aforesaid." The tenant shall keep the building insured for three fourths of its value, and, in case of destruction or damage by fire, "shall rebuild or repair the same upon designs, plans, and specifications to be approved by the said party of the first part, . . . so that the building shall entirely cover said premises, and shall be at least seven full stories in height above the grade of the street, also of such materials and with such foundations and walls as shall be approved by said party of the first part, . . . to cost not less than \$35,000, exclusive of foundations, and have the same rebuilt and ready for occupancy within eighteen months from such loss and destruction;" and in case of failure to rebuild, all insurance money shall belong to the lessor. In the event of the determination of the lease before the expiration of the term for breach of any covenant herein, the building, fixtures, and improvements on the premises shall be forfeited to and become the property of the owner of the fee, "without any compensation therefor" to the tenant. At the end of the term of ninety years the owner of the fee shall either purchase the building, fixtures, and improvements on the premises, paying 60 per cent of their cash value, as determined by an appraisalment provided for, or make a new lease for forty years on the terms of the original lease, except that, in lieu of the clause for the purchase of building, it shall be provided that, if the lease expires by lapse of time or otherwise, the building or buildings with all improvements and fixtures then on the premises, shall become and be the property of the owner of the fee, without rendering any compensation therefor. The tenant shall at no time permit any part of the premises to be occupied adversely to the inter-

est or title of the lessor. No assignment of the lease shall be made without giving the owner of the fee the option to buy the leasehold interest at the price of the proposed assignment. "In order to secure the payment of all rent due, accruing, or to accrue under this lease, and also all sums advanced or paid for taxes, duties, rates, charges, assessments, or impositions as aforesaid, or due upon any other account whatever, and for which said lessor, her heirs, executors, administrators, or assigns, may be entitled to repayment hereunder, she, he, or they shall have at all times a first and valid lien upon all improvements and tenements, and the materials thereof, which may be at any time put upon the said leased premises, . . . meaning and intending hereby to give the party of the first part, her heirs, executors, administrators, and assigns, a valid and first lien upon any and all buildings, improvements, and other property on said premises belonging to the party of the second part, his heirs, executors, administrators, and assigns, as security for the payment of said rent in the manner aforesaid, anything hereinbefore contained to the contrary notwithstanding." A seven-story brick building was accordingly erected at a cost of more than \$50,000, and covering the entire lot except a strip 5 or 6 feet wide, next to the river.

In 1894, the appellee, the Metropolitan West Side Elevated Railroad Company—a corporation organized to operate an elevated railroad in Chicago, acquired the premises adjacent to the appellant's lot on the north extending from Market street to the river, and having removed existing buildings, constructed thereon an elevated railroad upon which its trains ran, and for some months prior to the filing of the bill had been running, in their passage to and from the western division of the city. In order to connect its road with the loop elevated railroad in process of construction in the city, the Metropolitan Company found it necessary to cut away the northeast corner of the appellant's building above the first story thereof, and, in order to accomplish that end without resort to proceedings for condemnation under the statute of the state, procured an assignment to itself of the leasehold estate; Altgeld having assigned in 1889 to John J. Mitchell, who on August 29, 1895, assigned to the Metropolitan Company. These assignments were made with the consent of the appellant. Upon coming into possession and before the filing of the bill, the Metropolitan Company proceeded to cut away the northeast corner of the building above the first story, the portion removed being in the form of a prism, with three plane faces extending from the top of the building, the lines of section of the walls being 13.4 feet on the north and 12.4 feet on the east from the northeast corner of the building. A freight elevator which had been in that corner was removed, and re-erected next to the north wall at a point half way from Market street to the river. According to the plans in evidence, no supporting columns have been or will be placed upon the land of the appellant, but the portion of the first story now cut down will be crossed by a girder upon which will rest the track connecting the road of the Metropolitan Company on the north side of the premises with

the road of the Union Consolidated Elevated Railroad Company in front of the premises on Market street. The Metropolitan Company is insolvent, and its road is in the hands of a receiver, the respondent and appellee Dickson and MacAllister.

The prayer of the bill is that the appellee MacAllister be enjoined from placing the proposed structure across the premises, and from running trains thereon within the lines of the lot; that the receiver be required to perform the covenants of the lease, to restore the building to the condition in which it was before the cutting off of the corner, and thereafter to maintain the same in accordance with the terms of the lease; and that, in default thereof, the lease be forfeited, and the premises surrendered to the appellant.

It is shown that the Metropolitan Company paid Mitchell for the leasehold \$84,000, and, in addition expended upon the property, for necessary improvements and repairs, more than \$10,000, and that in its present condition the building is a better security for the payment of rent and the performance of other covenants of the lease than it was before the Metropolitan Company took possession. The Constitution of Illinois of 1870 (art. 2, § 13) provides that "private property shall not be taken or damaged for public use without just compensation," which, "when not made by the state, shall be ascertained by a jury, as shall be prescribed by law;" and by article 11, § 14, it is provided: "The right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right." Section 2 of "an Act to Provide for the Exercise of the Right of Eminent Domain" (2 Starr & C. Anno. Stat. (Ill.) chap. 47) requires the party authorized to take or damage the property, or the railroad company which proposes to take property, to file in court "a petition, setting forth by reference his or their authority in the premises, the purpose for which said property is sought to be taken or damaged, a description of the property, the names of all persons interested therein as owners or otherwise as appearing of record, if known, or if not known stating that fact, and praying such judge to cause the compensation to be paid to the owner to be assessed. . . . Persons interested, whose names are unknown, may be made parties defendant by the description of the unknown owners;" and by § 11, provides that "any person not made a party may become such by filing his cross petition, setting forth that he is the owner or has an interest in the property, and which will be taken or damaged by the proposed work; and the rights of such last-named petitioner shall thereupon be fully considered and determined."

The opinion of the court below is in the record, but has not been reported.

Mr. Henry S. Robbins for appellant.

Messrs. John P. Wilson and W. W. Gurley, for appellees:

The railroad company being the owners of the leasehold estate and buildings upon the premises in question, and in possession of the

same, has the right to devote all or any portion of said premises to railroad purposes without resorting to proceedings under the eminent domain act to acquire the interest of the lessor.

The railroad company is the judge of the necessity for the appropriation of the property.

Bowman v. Venice & C. R. Co. 102 Ill. 459; *Smith v. Chicago & W. I. R. Co.* 105 Ill. 511; *O'Hare v. Chicago, M. & N. R. Co.* 139 Ill. 151.

Where premises sought to be taken are under lease, and a portion only of the premises are taken, the tenant is not relieved from the obligation to pay the full amount of rent reserved in the lease, and, during the continuance of the lease, the landlord is entitled to no compensation for the taking of the premises, but only damages to his reversion.

Stubbings v. Evanston, 136 Ill. 37, 11 L. R. A. 889, and cases therein cited; *Stetson v. Chicago & E. R. Co.* 75 Ill. 74; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 85; *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158; *White v. Metropolitan West Side Elev. R. Co.* 154 Ill. 620.

The appellant has not been damaged by the changes made in the building by the appellee, the Metropolitan West Side Elevated Railroad Company.

Any judgment for damages obtained by the appellant, on account of or by reason of the construction or operation of the railroad of the railroad company, would be a first lien upon the entire railroad property of the railroad company, superior to its mortgage indebtedness.

Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 85.

The bill of complaint in this case is a bill for specific performance, and under the rules of law governing such cases relief will not be granted as a matter of absolute right to either party, but will be given or withheld, in the discretion of the court, as the circumstances may appear.

Chicago Municipal Gaslight & Fuel Co. v. Lake, 130 Ill. 42; *Willard v. Tayloe*, 75 U. S. 8 Wall. 557, 19 L. ed. 501; *Chicago, B. & Q. R. Co. v. Reno*, 113 Ill. 39; *Chicago & A. R. Co. v. Shoeneman*, 90 Ill. 258; *Franz v. Orton*, 75 Ill. 100.

Neither the railroad company nor its receiver has violated any of the covenants of the lease in question here.

Hawes v. Favor, 161 Ill. 440.

The alterations made in the building and the proposed construction and use of railroad tracks do not constitute waste.

Hawes v. Favor, 161 Ill. 440.

Woods, Circuit Judge, delivered the opinion of the court:

It is not disputed that injunction is the proper remedy against the appropriation of land for the use of a public corporation which has not acquired a right to the proposed use either by purchase or by condemnation; and, contrary to the general rule that equitable relief is granted only when equitable considerations require it, the injunction in such cases may be and perhaps more frequently than otherwise is, sought in vindication of a purely legal right; and, if the technical right and a threatened infringement of it be established, the relief will be

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granted without inquiry into the general equities of the case. By this we do not mean that a specific equity, like an estoppel, may not be a defense to such a suit; but, if a complete defense be not shown, the court will not refuse the relief on grounds of equitable discretion, as it might do in a suit for specific performance or rescission or other cause involving no special constitutional or statutory right of such a nature as to be capable of vindication or enforcement only by injunction. "In cases of this character," said the supreme court of Illinois in *Cobb v. Illinois & St. L. R. & Coal Co.* 68 Ill. 233, 235, "courts of equity have acted on broader principles [than in ordinary cases], and have adopted as a rule that an injunction will be granted to prevent a railway company from exceeding the powers granted in their charter.

The courts do not require, where the effort is manifested by a railway company to wrongfully appropriate private property, or force their structures to places not authorized, that there should be a want of a remedy at law." And in *Lewis on Eminent Domain* (§ 632), it is said, in substance, that the jurisdiction of equity in such cases may be placed upon the broad grounds that when the power of eminent domain has been delegated to public officers or others who are threatening to make an appropriation of private property to public uses in excess of the power granted, or without complying with the conditions on which the right to make the appropriation is given, equity will prevent the threatened wrong. "without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation." The controlling inquiry therefore is whether the Metropolitan Company, which, it is not denied, has been in rightful possession, has appropriated or is about to appropriate any part of the leased premises to a corporate use which is not justified by the lease.

It is not to be doubted that, by consenting to the transfer of the leasehold to the railroad company, the appellant consented to any use of the property which was permitted to the original lessee; but it is not to be inferred that she thereby consented, as it is contended she did, to the particular use proposed, since there were various other railroad purposes which might have been in contemplation, and which in no sense would have been inconsistent with any condition or covenant of the lease. Of the elaborate and forceful argument made here on the part of the appellees the primary proposition is that "the railroad company, being the owner of the leasehold estate and of the buildings upon the premises in question, and in possession of the same, has the right to devote all or any portion of the premises to railroad purposes without resorting to proceedings under the eminent domain act to acquire the interest of the lessor." As corollary or subordinate propositions, it is asserted that the appellant has not been damaged by the changes made in the building; that the bill of complaint is a bill for specific performance, on which relief need not be granted as a matter of absolute right; that neither the railroad company nor its receiver has violated any covenant of the lease; and that the alterations made in the building and the proposed construction and use of rail-

road tracks do not constitute waste. In the first of these propositions is the explicit assertion, on which the entire argument mainly depends, that the railroad company owns the building erected upon the leased premises; and the same view finds expression in the opinion of the court below, where, after reference to some of the provisions in the lease, it is said, "In other words, the building now on the premises is subject to a lien for the rents to become due." While it is true that the intention to give the lessor a lien upon the building, as well as "upon all improvements and tenements, and the materials thereof which may be at any time put upon the said leased premises," and on "other property" of the tenant on the premises, is very explicitly declared, and it is also stipulated that at the end of the term the owner of the fee shall purchase the building or extend the term of the lease, it is clear upon the whole instrument that in no event was a removal from the premises of the building, which the lessee undertook to erect and keep in repair, contemplated. On no conceivable contingency can there arise under the contract a right on the part of the lessee to remove the building, even were it a physical possibility to do so. In contemplation of law, the building was intended to be, and accordingly in the process of construction it became, a part of the realty. "The well-settled rule is, that such erections as this become a part of the land, as each stone and brick are added to the structure." *Kutter v. Smith*, 69 U. S. 2 Wall. 491, 17 L. ed. 880; *Elves v. Mau*, 8 East. 38; *Tift v. Horton*, 58 N. Y. 380, 13 Am. Rep. 537; *Sanders v. Yonkers*, 168 N. Y. 491; *Ford v. Cobb*, 20 N. Y. 844; *Deane v. Hutchinson*, 40 N. J. Eq. 83; *Fortman v. Goepfer*, 14 Ohio St. 558; *Sword v. Low*, 122 Ill. 487; *Dooley v. Crist*, 25 Ill. 553; *Corrigan v. Chicago*, 144 Ill. 587, 21 L. R. A. 212. See also *Hawes v. Favor*, 161 Ill. 440, cited by the appellees. In legal effect, the contract was that the lessee should erect upon the premises for the lessor a building, and maintain it in good repair to the end of the term of the lease, and that in consideration therefor (the rent, taxes, and other charges meanwhile having been discharged) the lessor should then pay to the lessee the specified percentage of the appraised cash value of the building, or, at her option, extend the term of the lease. Though in form the lessor is bound to purchase the building, the evident intention is simply that, in one or the other mode prescribed, compensation shall be made for the erection of the structure, and for keeping it in repair during the term of the lease. As a covenant running with the land, this may be a charge upon the entire property, but not upon the building alone. Against this construction of the lease, it is urged that the declaration of a lien on the building is made meaningless; but it is to be observed that, without a stipulation therefor, the landlord could have no lien on fixtures or other movable property of the tenant; and since it is not always easy to determine certainly what is or is not removable as a fixture, it was not necessarily ill advised or unnecessary to include the building in the stipulation for a lien.

The proposition being established that the title to the building, like that to the land, is in 39 L. R. A.

the appellant, it results that the rights of the parties in other respects must be determined on that basis; that is to say, by the same rules as if the building in its original form of construction, with its corner intact, had been upon the lot when the lease was executed. The contract required that the structure should cover the entire lot, and should cost not less than a stated sum, but it was always competent for the parties to waive any term of the agreement; and when, with the consent of the lessor, and by choice of the lessee, a building was constructed at a larger cost than was stipulated, and upon foundations which did not include a part of the lot next to the river, the rights and obligations of the parties became the same as if the actual construction and cost had been specifically required by the lease. And so if, by the original construction, the northeast corner had been of the shape caused by cutting away the stories above the first, that, being assented to, would have become the structure of the contract; and the question before us would have been, as suggested in the opinion below, whether, without the consent of the appellant, the railroad company, by virtue of its rights as assignee of the leasehold estate, could lay its girder and track and run its cars as it proposes to do. The repairs made on the building by the railroad company, after it took possession, were for the most part necessary, and therefore came within the covenant to repair; but if they had been entirely voluntary, and if other improvements were made, whereby the premises have an increased value, the building, nevertheless, remained the property of the appellant. The railroad company did not, by repairing or improving one part, acquire a right to destroy another part; and it is not material to the question of relief by injunction that the floor space of the part removed is small and insignificant in comparison with the space that remains. With all repairs and improvements, the building as it stood at the instant when the cutting away of the corner was commenced, belonged to the appellant. The title to the space taken and the reversionary right to the use of it were hers, and, as we conclude, it was not the privilege of the railroad company, without her consent, to remove any part of the structure in order to occupy the space with its tracks, the right to do so not having been acquired by condemnation.

The removal of the corner, for whatever purpose done, it seems clear, on the authorities cited, was an act of waste, which before its commission might have been enjoined. *Brock v. Dole*, 66 Wis. 142; *Phelan v. Boylan*, 25 Wis. 679; *Hunt v. Browne*, Sausse & S. 178; *Davenport v. Magoon*, 18 Or. 3, 57 Am. Rep. 1; *Kidd v. Dennison*, 6 Barb. 9; *Agate v. Louvenbein*, 57 N. Y. 604; *Stetson v. Day*, 51 Me. 434; *Cannon v. Barry*, 59 Miss. 289; 6 Wait, Act. & Def. 238, 239; 28 Am. & Eng. Enc. Law, p. 870. But whether, in any case where the question is solely one of waste already committed, and no appropriation of property to corporate use is intended, the court would interfere to compel reconstruction or a repair of the waste, is not the present question. If it were, possibly it would be proper to give weight to such equitable considerations as that the appellant's security is not to be impaired, and to other like

suggestions which have been urged; but when, as here, waste has been committed by removing a substantial part of the building which was intended to be a permanent structure, for the purpose of making way perpetually or indefinitely for the track of a railroad, the work of removal is not to be considered by itself, but as a step in the execution of a scheme to take property for a corporate use without making compensation, which as already stated, the court will enjoin, though the right invaded be a purely legal or technical one. Only in that way can the policy of the enactments against the taking of private property for corporate uses without compensation be fully vindicated; and without an order for the restoration of the building to its original form, or, in default thereof, a forfeiture of the lease, the relief would not be adequate or complete.

It is of course, true, as said below, that the leasehold estate is in the entire lot, and that the tenant has possession of all the space above it, as well what is not actually filled by the building as what is; but, whatever might be the thought of the case if the space in question had been open at the start, the tenant, it is clear, had no right to take down the upper stories of the building in order to create the unfilled space; and therefore, as we conceive, it is not true, as was further stated, that while the term of the lease continues, nothing is invaded but the interest of the tenant. There has been already a destruction of property which constitutes a taking in violation of the law of eminent domain as distinctly as would the digging out and removal of earth from the corner of the lot; and, besides, the reversionary interest has been directly affected, and will be further affected if the proposed location of the girder and track of the railroad be not forbidden. The demand of the appellant for present relief against the wrong done and intended is not met by the suggestion that, "if the leasehold estate should be extinguished, of course the railroad company would be a trespasser, if it did not remove its girder." The railroad company might abandon possession, leaving to the landlord the expense both of removing the girder and of reconstructing the torn-down

corner, with recourse for the outlay upon no responsible party; but more likely, the trespasser would surrender possession, if at all, only at the end of a litigation, to the expenses and contingencies of which the appellant or her successor in interest ought not, by judicial sanction, to be subjected. The proposed occupation of the premises is shown to be necessary in order to overcome engineering difficulties which otherwise are practically insuperable, but, if it were only a matter of convenience, it would be equally evident that the occupation is intended to be, and will be, perpetual, as, doubtless, the public interest will require that it shall be. If, as was stated at the hearing, the charter of the present railroad company is limited to fifty years, that signifies only that from time to time, when necessary, new companies will be organized, to which, in succession, the road and its equipment will be transferred. As against the lessor such an occupation of her property is wrongful from the beginning. The possessory right is in the lessee, and for that reason, it may be, the railroad company, until the lease shall have ended by lapse of time or by forfeiture, cannot be dealt with as a trespasser; but, that being so, it is the more important that the remedy here invoked should not be denied. If the lease were for a short term, one year or ten, instead of ninety years, it would be evident that the railroad company has exceeded its privileges as tenant, and has invaded, appropriated, and injured present property rights of the landlord and reversionary interests, which, without consent or proceedings to condemn, it had no right to take or injure. The bill, it is plain, is not one for specific performance merely. It is not a valid objection to our conclusion that it may be difficult, or even impossible by any certain rule, to estimate the compensation which, in a proceeding to condemn, should be awarded the appellant.

The decree below is reversed, and the cause remanded for further proceedings. In order to obviate destruction or serious injury to property, the court may grant reasonable time for proceedings to condemn.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Re James STETSON'S WILL.

Edmund HOBART *et al.*, Admrs., etc., of
James Stetson, Deceased,

v.

Mary N. COOK *et al.*
(187 Mass. 55.)

1. Objection to the admission in evidence of a will because it is not proved by

NOTE.—*Opinions of subscribing witnesses as to sanity or insanity.*

I. *Admissibility.*

II. *Necessity of giving.*

III. *Scope.*

IV. *Contradiction.*

V. *Weight.*

I. *Admissibility.*

The law places subscribing witnesses to a will around the testator to try, judge, and determine as
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the subscribing witnesses is obviated by the subsequent calling and examination of the witnesses, who testify to the execution of the will by the testator.

2. A ruling in accordance with the claim of proponents of a will that its formal execution is to be assumed will not preclude their subsequently calling the subscribing witnesses to testify to its execution.

to his competency to execute it. *Poole v. Richardson*, 3 Mass. 380; *Hastings v. Rider*, 99 Mass. 623; *Needham v. Ide*, 5 Pick. 510; *McDaniel v. Crosby*, 19 Ark. 533; *Ethridge v. Bennett*, 9 Houst. (Del.) 295; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Kelly v. McGuire*, 15 Ark. 600; *Chase v. Lincoln*, 3 Mass. 230; *Fleld's Appeal*, 36 Conn. 277.

And they are permitted to testify as to the opinion they form at the time as to the condition of his mind, whether sound or unsound. *Ethridge v.*

(October 23, 1896.)]

EXCEPTIONS by contestants to rulings of the Superior Court for Hampshire County made during the trial of issues sent down from

the Supreme Judicial Court as to the testamentary capacity of testator. *Overruled.*

Contestants appealed from the decree of the probate court admitting the instrument to probate. And the supreme judicial court framed

Bennett, 9 Houst. (Del.) 295; Jamison v. Jamison, 3 Houst. (Del.) 108; Walker v. Walker, 34 Ala. 469; McDaniel v. Crosby, 19 Ark. 533; Kelly v. McGuire, 15 Ark. 600; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Call v. Byram, 39 Ind. 499; Harper's Will, 4 Bibb, 244; Poole v. Richardson, 3 Mass. 330; Hastings v. Rider, 99 Mass. 623; Needham v. Ide, 5 Pick. 510; Martin v. Perkins, 56 Miss. 204; Hamblett v. Hamblett, 6 N. H. 333, *dictum*; Dewitt v. Barley, 9 N. Y. 371; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Holcomb v. Holcomb, 95 N. Y. 316, *dictum*; Crowell v. Kirk, 14 N. C. (3 Dev. L.) 355; Gibson v. Gibson, 9 Yerg. 329.

Attesting witnesses to a will have always been permitted to express their opinions as to the sanity of the testator on the ground that the law has made it their duty to inspect the testator's capacity, and presumes they did observe and judge of it. Appleby v. Brock, 76 Mo. 314.

The witnesses to a will are not called upon to attest the fact of signing alone, but to determine both the capacity of the testator and as to whether he is sane or insane at the time of its execution. Heyward v. Hazard, 1 Bay. 335.

And they are competent to testify as to the state of the testator's mind, and may, in addition to the facts stated, give their opinions as to their competency. Pidcock v. Potter, 68 Pa. 343, 8 Am. Rep. 181.

No one should subscribe his name as a witness to a will until he is clearly satisfied that the testator is possessed of a sound and disposing mind and memory, and that in executing it he acts understandingly and with full knowledge of its contents. Scribner v. Crane, 2 Paige, 147.

And their opinions as to the capacity of a testator are admitted because they are supposed from their experience and study to have peculiar knowledge upon the subject of inquiry which jurors generally have not, and are thus supposed to be more capable of drawing conclusions from the facts, and of passing opinions thereon, than the jurors are presumed to be. *Re McCarthy*, 55 Hun, 7.

And the attesting witnesses to a will may express an opinion as to the capacity of the testator the same as an expert may, without being confined to narratives of facts and conduct as other witnesses are. *Martin v. Perkins*, 56 Miss. 204.

And they may testify as to sanity without being called upon as experts. *Parsons v. Parsons*, 66 Iowa, 754.

An exception exists to the New York rule that a nonexpert witness can only characterize as rational or irrational the acts and declarations to which he testifies, and cannot express an opinion on the general question whether the mind of a testator was sound or unsound in case of an attesting witness to a will. *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

So, the general rule is that the subscribing witnesses to a will may give their opinions as to the testamentary capacity of a testator without giving the facts upon which they are founded. *Titlow v. Titlow*, 54 Pa. 216, 93 Am. Dec. 691; *Logan v. McGinnis*, 12 Pa. 27; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Williams v. Lee*, 47 Md. 321; *Crowell v. Kirk*, 14 N. C. (3 Dev. L.) 355; *Van Huss v. Rainbolt*, 2 Coldw. 139; *First Nat. Bank v. Wirebach*, 12 W. N. C. 150.

And without assigning cause or reason. *Gibson v. Gibson*, 9 Yerg. 329; *Puryear v. Reese*, 6 Coldw.

And without stating the grounds upon which
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they are formed. *Lodge v. Lodge*, 2 Houst. (Del.) 419.

The rule that the opinions of nonexpert witnesses in a will contest must be based on facts to be entitled to weight does not apply to the subscribing witnesses to the will who are regarded in law as placed around the testator to ascertain and judge as to his capacity. *Young v. Barner*, 27 Gratt. 96.

The condition of a testator's mind as evidenced by his actions, conduct, and conversations at the time of making his will is a part of the *res gestæ* of the transaction, and witnesses to the will are competent to speak thereof and give opinions in relation thereto without any knowledge other than that derived from his conduct on such occasions. *Re Coleman*, 111 N. Y. 220.

And a request to an attesting witness to give his opinion as to the testator's capacity to make a disposition of his property by will is not subject to the objection that he has not seen the testator sufficiently to be able to judge. *Foster v. Dickerson*, 64 Vt. 233.

The subscribing witnesses to a will may be examined by either party, however, as to what transpired at the time he witnessed the instrument. *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473.

And they need not be examined by the proponent in a will contest as to the sanity of the testator upon their first examination. The party contesting may cross-examine them as to that point, and need not wait until he puts in his side of the case and then recall them. *Puryear v. Reese*, 6 Coldw. 21.

The condition of mind of the testator at the time of the execution of his will is a part of the *res gestæ* in a will contest, and it is competent to ask a subscribing witness upon cross-examination what the condition of the mind of the testator was as to soundness or unsoundness when he signed it. *Egbert v. Egbert*, 78 Pa. 323.

And permitting the contestants of a will to cross-examine the subscribing witnesses on the question of the soundness or unsoundness of mind of the testator before they have opened their case is not a departure from the rule of evidence that a defendant who has not opened his case will not be allowed to introduce it to the jury by cross-examining the witness for the adverse party. *Egbert v. Egbert*, 78 Pa. 323.

And a subscribing witness to a will, who testified in chief as to its execution and the testator's sanity at the time, and the facts connected with its preparation and interviews with the testator concerning it, may be examined anew on rebuttal without restriction upon the points in controversy. *Nash v. Hunt*, 116 Mass. 237.

It has been held, however, that the evidence of a subscribing witness to a will as to the insanity of the testator is not admissible in a proceeding to contest the will. *Kenworthy v. Williams*, 5 Ind. 373.

And that a subscribing witness to a will cannot give her opinion that the testator was insane at the time the will was made, where she testifies to no facts indicating insanity. *Dickinson v. Dickinson*, 61 Pa. 401.

And the rule has been laid down that the opinions of witnesses to a will as to the testamentary capacity or incapacity of the testator are competent, when the facts and circumstances on which such opinions are founded are disclosed. *Abraham v. Wilkins*, 17 Ark. 292; *Walker v. Walker*, 14 Ga. 215; *Cilley v. Cilley*, 34 Me. 162.

And refusal to permit a witness to a will, who

issues for trial in the superior court as to whether or not testator was of sound and disposing mind and memory, and whether or not the bill was procured through undue influence.

Counsel for the administrators offered a paper purporting to be the will in evidence which was objected to because it was not proved by the subscribing witnesses. Counsel

had testified as to what occurred when he witnessed it, and that the conversations and acts of the testator detailed by him impressed him at the time as perfectly rational, to answer a question whether there was anything in his manner or appearance different from what he had seen for the year past, is not erroneous within the rule that a subscribing witness can give his opinion generally as to the soundness of mind of a testator where the objection was general; if the party asking the question desired the benefit of the exceptional rule applicable to such witness the form of the question should have distinctly indicated it. *Petrie v. Petrie*, 2 Silv. Sup. Ct. 438.

So, a nonexpert witness who is the subscribing witness to a deed offered to prove the mental capacity of a grantor has been held to be within the same principle which allows a subscribing witness to a will to give his opinion of the sanity of the testator. *Brand v. Brand*, 39 How. Pr. 133; *Dewitt v. Barley*, 9 N. Y. 371.

But, upon the other hand, the rule has been adopted that deeds are good without subscribing witnesses, and the rule allowing subscribing witnesses to wills to testify as to their opinions of the testator's capacity to make a will does not apply to the subscribing witnesses to a deed who must testify to facts only on the question of the sanity or capacity of the grantor. *Dean v. Fuller*, 40 Pa. 474.

The opinions of the subscribing witnesses to a deed or other contract, however, are competent in all cases where the object is to prove capacity or incapacity to make a contract when the facts or circumstances are disclosed on which the opinion is founded. *Kelly v. McGuire*, 15 Ark. 555.

A subscribing witness to a codicil is not a competent witness on the question of the sanity of the testator at the time of making it, where he was a legatee under the original will. *Gass v. Gass*, 3 Humph. 278.

And it is not competent to ask a subscribing witness to a will whether he would have attested it had he known of the dispositions contained in it as tending to establish fraud or imbecility. *Spence v. Spence*, 4 Watts, 165.

And that the testator had a dislike for one of the subscribing witnesses to his will is not admissible as tending to show fraud or imbecility. *Spence v. Spence*, 4 Watts, 165.

As to the effect of subscribing a will on the privilege of the subscribing witness, see note "*Non-expert opinions as to sanity or insanity*," to *Ryder v. State* (Ga.) 88 L. R. A. 721.

II. Necessity of giving.

Witnesses to a will are placed around a testator to ascertain and judge of his capacity, and the heir has a right to insist that the testimony of all such witnesses be given to the jury, and they must all be produced if living and under the power of the court. *Chase v. Lincoln*, 3 Mass. 236; *Field's Appeal*, 36 Conn. 277; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; *Bootle v. Blundell*, 19 Ves. Jr. 494.

The heir in a will contest has the right to insist that the triers shall have the benefit of the observation and opinions of all the witnesses to the will if practicable, and that the parties seeking to establish the will shall put them upon the stand; but this right may be waived, and is waived unless insisted upon at the time. *Field's Appeal*, 36 Conn. 277.

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And the rule of the English court of chancery is that upon a bill filed to establish a will all the subscribing witnesses, if living and competent to testify, must be called by the party seeking to establish it, and must be examined by him so as to give the adverse party an opportunity to cross-examine them as to the sanity of the testator and the circumstances attending the execution of the will; and the rule is the same upon the trial of an issue *devisavit vel non* awarded by the court of chancery. *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424, *dictum*.

So, a subscribing witness to a deed must be called in an action thereon where *non est factum* is pleaded, though he has become blind, and it is not enough to prove his handwriting. *Crank v. Frith*, 2 Moody & R. 262, 9 Car. & P. 197.

It is not necessary to the establishment of a will, however, that the subscribing witnesses should have stated their opinions as to his mental capacity, as such opinions are necessarily mere inferences drawn by them from facts observed. *Cilley v. Cilley*, 34 Me. 182; *Mayo v. Mayo*, 114 Mo. 536.

And the inability of a subscribing witness to a will, who had been introduced to the testator for that purpose, to testify to his capacity, does not invalidate the will, but goes only to the credibility of such witness in case he is called upon to testify as to sanity or mental capacity. *Huff v. Huff*, 41 Ga. 604.

While a will is required to be attested by two witnesses, it may be proved by one of them who testifies to the attestation by the other and to the competency of the testator, though the other does not testify. *Cheatham v. Hatcher*, 80 Gratt. 56, 32 Am. Rep. 650.

And where any of the witnesses of a will are dead or in such a situation that their testimony cannot be obtained, proof of their signatures is received as secondary evidence of the facts to which they have attested by subscribing the will as witnesses thereto. *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424.

And where there is a failure to prove testamentary capacity of a testator by the subscribing witnesses to the will, the executor or proponent is not precluded from establishing his insanity by other testimony. *Frear v. Williams*, 7 Baxt. 550.

So, in *Butler v. Benson*, 1 Barb. 528, it was held generally that if the subscribing witnesses to a will fail to prove it, other witnesses may be called, but the proof in such case must be very clear.

The fact that a party attested the execution of a will affords prima facie evidence that he considered the testator sane. *Williams v. Lee*, 47 Md. 321.

And proof of the signature of a deceased subscribing witness to a will establishes prima facie the competency of the testator to make it. *Harden v. Hays*, 9 Pa. 151.

Subscribing as a witness to a will is an assertion by the subscriber that the testator was of sound mind when he executed it. *Egbert v. Egbert*, 78 Pa. 326.

And a will is established where the attesting witnesses, who must necessarily be called to prove its execution if living and within the reach of process, do not impeach the testator's sanity, or if, being absent or dead, their handwriting is proved, unless proof of insanity is offered by the contestants, the sanity of the testator being sustained by the presumption that every one is sane. *Perkins v. Perkins*, 39 N. H. 163.

So, where the attesting witnesses to a deed are dead, it will be taken in an action involving its va-

for the administrators insisted that the will was admissible under the issues to be tried without being duly proved, and the court sustained the contention.

lidity that they would have sworn to the sanity of the grantor. *Towart v. Sellars*, 5 Dow, P. C. 231.

And a deed attested by a witness who afterwards became blind may be read in evidence on proof of the witness's handwriting without calling him. *Pedler v. Paige*, 1 Moody & R. 258.

So, where attesting witnesses to a will speak as to the execution thereof only, documents in the testator's handwriting, showing both capacity and knowledge of contents, though not mentioning the residue, supply proof of capacity, and will warrant its admission to probate, where she managed her own property, received her dividends, and did various acts of business, corresponded rationally with her friends, and was not shown to be under any delusion, though she drank excessively and was guilty of great extravagances, and the will totally excluded her next of kin with whom she had quarreled, and was in the handwriting and executed in the office of her attorney, who was one of the executors and a residuary legatee to a large amount, he and his family both having large legacies. *Wheeler v. Alderson*, 3 Hagg. Eccl. Rep. 574.

A will will not be admitted to probate, however, where the attesting witnesses testified merely that the signature is that of the testator, and he is proved to have been a person of imbecile mind not capable of understanding anything. *Starnes v. Marten*, 1 Curt. Eccl. Rep. 294.

And an instruction in a will contest that the law presumes from the certificate of the subscribing witnesses that at the time of the execution of the will the testator was of sound and disposing mind and memory is erroneous as likely to mislead the jury into a belief that the presumption was conclusive. *Keithley v. Stafford*, 126 Ill. 507.

And the failure to examine the scrivener who wrote the will, and the subscribing witnesses thereto, to uphold it, in a will contest in a doubtful case, is a material and damaging circumstance against the proponents having much adverse force. *Ulmer's Appeal* (Pa.) 11 Cent. Rep. 403.

And the contrary rule has been held that the fact that a person attested a will does not furnish evidence of any opinion on his part as to the sanity of the testator. *Baxter v. Abbott*, 7 Gray, 71.

And that when the attesting witnesses to a will are dead there is no presumption that if living they would testify that the testator was of sound mind at the time of making his will. *Boardman v. Woodman*, 47 N. H. 120.

And the same rule has been applied to deeds, *Flanders v. Davis*, 19 N. H. 139.

So, proof of a will by one of the subscribing witnesses only is insufficient to establish it under the Missouri statute of wills requiring the subscribing witnesses to a will to attest, not only the corporal act of signing, but also the sanity of the testator. *Withinton v. Withinton*, 7 Mo. 589.

And to entitle a will devising real estate to probate in New York, in addition to the formal proof of due execution, it must also appear that the testator at the time of executing it was in all respects competent to dispose of his estate, and not under any restraint, by the testimony of at least two subscribing witnesses to the will who should have had at least some acquaintance with him. *Swenarton v. Hancock*, 9 Abb. N. C. 326.

And testimony of a single subscribing witness in a will contest, who was a stranger to the testator, the other subscribing witnesses being dead, as to the formalities of execution and that the testatrix understood the provisions of the instrument, stating that she was of sound mind at the time, is not 89 L. R. A.

Further facts appear in the opinion.

Messrs. F. S. Hopkins, E. V. Wilson, and F. B. Smith for appellants.
Mr. C. N. Clark for appellees.

sufficient proof of mental competency under N. Y. Code Civ. Proc. § 2623, providing for the admission of a will to probate where it appears to the surrogate that the testator was competent to make a will, and the proceedings thereon will be dismissed on motion. *Ramaddell v. Viele*, 6 Dem. 244.

All that the New York statute requires in such cases, however, is that it shall appear from the proof taken before the surrogate that the will was duly executed by a testator who was competent to make a will and free from restraint, and it is not necessary that each witness thereto should be able to swear that all the requisites of the statute had been complied with. *Jauncey v. Thorne*, 2 Barb. Ch. 40.

So, the testimony of the subscribing witnesses only to a will is admissible on the question of the testator's sanity under the Illinois statute, on appeal taken on an order of the county court allowing probate thereof. *Bice v. Hall*, 120 Ill. 597; *Andrews v. Black*, 43 Ill. 258; *Walker v. Walker*, 3 Ill. 291.

But other evidence than that of the subscribing witnesses may be heard where the probate of the will has been refused. *Andrews v. Black*, 43 Ill. 258.

And it is not necessary that the subscribing witnesses should be called in an issue out of chancery in a will contest on the ground of testamentary incapacity, or that when called they should concur in their testimony; other witnesses may be examined even to contradict them. *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419.

But where, upon the probate of a will, one subscribing witness testifies that the testator was sane at the time of the making of the will, and the other testifies that he was insane, the evidence of other witnesses is not admissible to establish the will. *Weld v. Sweeney*, 85 Ill. 50.

Though a witness to a will need not swear positively, as a matter of fact, that the testator was sane on an application to probate, in order to procure its admission under the Illinois statute, requiring the subscribing witnesses to swear they believe the testator to have been of sound mind; their opinion or belief is all that is required. *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

But testimony of a witness on an application for probate, that he did not know whether the testator was of sound mind or not, that he might have been or might not, is not sufficient to procure its admission to probate. *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

III. Scope.

The opinion of a witness in regard to the sanity of a testator is not rendered competent by the fact that the witness was a subscribing witness, where the question was not limited to an inquiry as to the opinion of the witness in regard to the sanity of the testator at the time of the will. *Re McCarthy*, 55 Hun. 7.

And the opinion of an attesting witness to a will, formed at another time before or after the execution of the will, in respect to the testator's mental capacity, stands like that of any other witness, and is not admissible in a state where opinions of ordinary witnesses are inadmissible. *Williams v. Spencer*, 150 Mass. 346, 5 L. R. A. 790.

And the subsequently formed opinion of a subscribing witness as to the soundness or unsoundness of mind of a testator, based on what he had heard subsequent to the execution of the will, is not admissible in evidence in a proceeding to contest it. *Gwin v. Gwin* (Idaho) 48 Pac. 295.

So, an opinion by a subscribing witness to a will

Morton, J., delivered the opinion of the court:

It was conceded at the argument that when the issues were framed no question was raised

concerning the execution of the alleged will. At the trial in the superior court it was admitted by the appellants that the paper which was offered and read against their objection

as to whether the testator had mind sufficient at the time he is alleged to have executed it to give specific directions with reference to the disposition of his property to his attorney is incompetent, as the inquiry embraced in the question covers the whole issue as to testamentary capacity, the opinion covering the only question in dispute. *Re McCarthy*, 55 Hun, 7.

And the opinion of an attesting witness to a will, not an expert, as to the strength of mind required to comprehend a clause creating charitable trusts in a will, and as to whether the testator had sufficient strength of mind to comprehend it, is not admissible in a will contest. *Melaney v. Morrison*, 152 Mass. 473.

And an inquiry of an attesting witness upon cross-examination in a will contest as to whether he thought the testator had mind sufficient at the time he is alleged to have executed his last will to give specific directions with reference to the disposition of his property to his attorney is not competent for the purpose of ascertaining the degree of intelligence possessed by the witness for the purpose of enabling the court to determine the reliance which should be placed upon his evidence given on direct examination, where he had only stated facts which had come within his observation, and expressed no opinion as to the soundness of mind and memory of the testator. *Re McCarthy*, 55 Hun, 7.

A witness in a will need not use the statutory formula "sound mind and memory," however, in stating his belief as to the testamentary capacity of the testator, in a proceeding to probate his will; it is sufficient if he states his belief in equivalent words. *Bice v. Hall*, 120 Ill. 597.

And the answer of a subscribing witness to a will as to his belief of the testator's mental capacity will not be suppressed when his disposition shows that he used the word "belief" as synonymous with opinion. *Hughes v. Hughes*, 31 Ala. 519.

So, the subscribing witnesses to a will are not debarred by any rule of law from giving evidence of a testator's insanity, however improper it may be to witness a will believing the testator to be incapable of making it. *Garrison v. Blanton*, 48 Tex. 299.

The fact that a party has testified to the execution of a will, while it affords prima facie evidence that he considered the testator insane, does not prevent him from testifying as to her mental condition, and whether in point of fact he considered her to be sane or insane. *Williams v. Lee*, 47 Md. 321; *Howard v. Braithwaite*, 1 Ves. & B. 202.

But see *Dickinson v. Dickinson*, 61 Pa. 401, *supra*, I.

IV. Contradiction.

The opinions of subscribing witnesses to a will as to the sanity or insanity of the testator are not conclusive. *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60.

Wills may be established against the testimony of subscribing witnesses who depose against the testator's capacity. *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60; *Cheatham v. Hatcher*, 30 Gratt. 56, 82 Am. Rep. 350; *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419.

The capacity of a testator to make a valid will may be established by other evidence, though the subscribing witnesses thereto testify that the testator was not of sound mind at the time it was made. *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Jenkins' Will*, 43 Wis. 610; *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *LeBreton v. Fletcher*, 2 Hagg. Eccl. Rep. 558; *Boote v. Blundell*, 19 Ves. Jr. 494; *Abbot v. 89 L. R. A.*

Plumbe, 1 Dougl. 216; *Lowe v. Joliffe*, 1 W. Bl. 365, citing *Pike v. Bradmering*, and *Austin v. Willes*, Bull. N. P. 264; *Hudson's Case*, Skinner, 79.

Other witnesses in a will contest than the subscribing witnesses are competent to testify as to the mental condition of the testator, the only difference being that the subscribing witnesses may give their opinions as to his mental condition, while the other witnesses are confined to a narration of facts, and where such testimony is satisfactory the will should be probated though the subscribing witnesses may testify against the testator's capacity. *Martin v. Perkins*, 56 Miss. 204.

The attesting witnesses to a will being produced and examined, it is not essential that they should sustain the legal presumption of sanity, and they may all deny the sanity of the testator; and yet if a sane condition of mind is shown by the whole evidence the will must be established. *Perkins v. Perkins*, 39 N. H. 163, citing *Le Breton v. Fletcher*, 2 Hagg. Eccl. Rep. 558; *Lowe v. Joliffe*, 1 W. Bl. 365; *Austin v. Willes*, Bull. N. P. 264; *Pike v. Bradmering*, cited in 2 Strange, 1096; 1 Wms. Exrs. 290, note; *Phillips' Ev. Cowen & Hill's notes*, 392.

Thus, the party calling a subscribing witness to a will, who declares his belief that the testator was incompetent at the time he made his will, may contradict him by reading his evidence taken on a former trial, and by proof or declarations previously made. *Harden v. Hays*, 9 Pa. 151.

And evidence of previous inconsistent declarations on the part of an attesting witness is admissible on behalf of the proponent in a will contest, where the attesting witness had testified that the testator did not have testamentary capacity, and the proponent had examined him only so far as the law made it his imperative duty. *Thornton v. Thornton*, 39 Vt. 122.

So, evidence as to mental capacity, contradicting that of an attesting witness to a will, may be received to invalidate the will. *Spencer v. Moore*, 4 Cal. (Va.) 423.

And declarations of a deceased subscribing witness that the testator was incompetent at the time of the execution of his will, are admissible in evidence where the will is proved by evidence of his signature. *Harden v. Hays*, 9 Pa. 151.

And declarations of an attesting witness in a will, who has since died, made on the same day that the will was executed, that he did not believe that the testator was sane at the time he executed it, and that he signed as witness merely to gratify him, are properly admissible in evidence in a proceeding to contest the will. *Townshend v. Townshend*, 9 Gill, 506.

And an admission made by an attesting witness to a will that the testator was not competent at the time the will was executed, and that he signed as an attesting witness only to attest her signature, is admissible in evidence in an action involving the validity of a will for the purpose of rebutting the prima facie effect of his attestation. *Colvin v. Warford*, 20 Md. 357.

Evidence by a subscribing witness to a will that the testator was *non compos* at the time it was made, and contradictory statements made on a previous trial, and declarations as to capacity previously made, introduced to contradict him, should be left with the jury on the question of the capacity of the testator. *Harden v. Hays*, 9 Pa. 151.

And where subscribing witnesses do not agree in opinion as to the capacity of the testator, or as to facts upon which they found their opinions, either side may show, either by collateral circumstances

and exception was the identical paper which was signed by the testator, and attested by the three subscribing witnesses, who subsequently were called and testified, and was the same

paper offered in the probate court, and on which the appeal was taken to the supreme judicial court. The appellants contended, however, that the paper was not admissible in

or by direct proof, that one of them is more credible than the other, or that one of them is mistaken in his facts. *Bell v. Clark*, 31 N. C. (9 Ired. L.) 230.

So, a deed may be upheld where the subscribing witnesses detailed facts and circumstances evidencing a competent mental capacity, and a preponderance of disinterested evidence sustains the grantor's capacity, though one of the subscribing witnesses expresses it as his opinion that he was not of sufficient capacity to make a contract. *Jones v. Evans*, 7 Dana, 96.

The declarations of one of three subscribing witnesses to a will that the testator was insane when it was executed are not admissible, however, to defeat the will, where he was absent from the state, and no proof as to his handwriting had been given, and the will had been proved by the other two witnesses. *Fox v. Evans*, 3 Yeates, 506.

And evidence in a will contest that one of the attesting witnesses, who had testified in probate court to the testator's sanity, and who had since died, declared after the probate that he wished to live to unsay what he had said, and that the testator was insane, is not admissible, as his attestation furnishes no evidence that he believed the testator to be sane. *Baxter v. Abbott*, 7 Gray, 71.

And where a subscribing witness to a will swears at the trial of a contest thereof that in his opinion the testatrix was of sound and disposing mind at the time of the execution of the will, and denies that he ever made any inconsistent declarations, evidence of another witness that he heard the subscribing witness make such inconsistent statements, though admissible as discrediting the subscribing witness, is not admissible as primary evidence, as it would be mere hearsay. *Stirling v. Stirling*, 64 Md. 138.

And the rule has been adopted by some of the cases that the declarations of a deceased subscribing witness to a will, tending to show that he thought the testator to be insane, are not admissible in evidence in a proceeding to contest the will. *Boardman v. Woodman*, 47 N. H. 120; *Sellars v. Sellars*, 2 Heisk. 430.

As by attesting he asserted in legal effect the mental capacity of the testator. *Sellars v. Sellars*, 2 Heisk. 430.

And that declarations of an attesting witness to a will respecting the capacity of the testator at the time he made it cannot be given in evidence after his death to impeach the evidence given by him in probate court which is read in evidence in the court above, where he has not been interrogated as to such admissions; and the fact that opportunity for such interrogation was cut off by his death does not affect the rule. *Kunyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

So, evidence in an action involving the validity of a will of conversations between the attesting witnesses with reference to the competency of the testator is not admissible as tending to rebut the effect of their attestation. *Colvin v. Warford*, 20 Md. 357.

And evidence of statements made by an attesting witness to a will who has since died, in derogation of the testator's capacity to make a will, is inadmissible. *Sewall v. Robbins*, 139 Mass. 164.

And a subscribing witness to a will is not competent to testify in a contest upon the ground of undue influence and mental incapacity of the testator, that the object of making the will was to quiet the testator. *Stephenson v. Stephenson*, 62 Iowa, 163.

So, in *Goodtitle, Alexander, v. Clayton*, 4 Burr. 2225, in which witnesses who attested a will were called to give evidence against their own attestation, and 39 L. R. A.

other witnesses were called to support the will, the whole court expressed its disapprobation of permitting witnesses to give evidence against a will to which they acknowledged they had attested as subscribing witnesses.

For special statutory rules as to the admissibility of the testimony of the subscribing witnesses on the question of mental capacity, see *Illinois cases*, *supra*, II.

V. Weight.

Opinions of attesting witnesses to a will, and facts stated by them as occurring at the time of its execution, are entitled to great weight on the question of testamentary capacity in a will contest. *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Turner v. Chessman*, 15 N. J. Eq. 248; *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Kelly v. Perrault* (Idaho) 48 Pac. 45; *Cornelius v. Cornelius*, 52 N. C. (7 Jones, L.) 593; *Martin v. Thayer*, 37 W. Va. 38; *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 W. Va. 680, 2 L. R. A. 668; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Field's Appeal*, 36 Conn. 277.

If they were persons of intelligence and veracity. *Jamison v. Jamison*, 3 Houst. (Del.) 108.

The attesting witnesses to a will are called upon by duty to examine into and satisfy themselves as to the capacity of the testator, and their evidence is most to be relied upon, and next after them those who were present at the execution, their opportunities being equal. *Stevens v. Vancleve*, 4 Wash. C. C. 262.

The opinion of an expert is entitled to little weight as against the evidence of the attesting witnesses. *Kelly v. Perrault* (Idaho) 48 Pac. 45.

And the incapacity of a testator should be sustained by strong testimony as to facts showing a defect of mind existing in a form that the subscribing witness may not have detected, to invalidate the will where its execution was marked by circumstances of fair dealing, and the subscribing witnesses were above suspicion and fully aware of their duty and competent to perform. *Means v. Means*, 5 Strobb. L. 167.

And where the attesting witnesses to a will are disinterested medical men who speak strongly to sanity, the court will not set aside a will on proof by interrogatories but without plea that the testator many years before had been under an insane delusion. *Kemble v. Church*, 3 Hagg. Eccl. Rep. 273.

So, positive opinions upon the part of an attesting witness to a will that the testator's mind was sound are sufficient to overcome testimony to the effect that the testator had not disposed of all of his real estate by his will, and the opinions of two or three witnesses that he was much broken and very forgetful, testifying particularly to several slight instances of want of recollection. *Buckminster v. Perry*, 4 Mass. 568.

And the evidence of three out of four disinterested subscribing witnesses to a will as to the testamentary capacity of a testator ninety-three years of age outweighs that of ten other witnesses, all of whom were related to the testator either by blood or affinity, where the other subscribing witness was dead, and the testator's attending physician, although subpoenaed and present at the trial, was not examined. *Sutton v. Morgan*, 30 N. J. Eq. 629.

So, testimony of a priest, who drew a will for a person afflicted with epileptic fits, and who had no interest thereunder, that the testator fully comprehended the will, showing all the circumstances under which it was executed, is sufficient to sustain it, though he had an epileptic fit about five minutes after signing it, after which he sank rapidly

evidence except upon proof of the signature of the testator, by the subscribing witnesses, as in the case of other instruments when the signature is attested by subscribing witnesses.

and died the next morning; and the testimony of one of the subscribing witnesses that the testator did not know what was going on will not affect its validity in view of the impropriety of attesting a will when the testator was known to be in such a condition, and of the fact that such witness propounded the will for probate and stated in his sworn petition that he believed the instrument propounded to be the testator's last will and testament. *Re Lewis*, 51 Wis. 101.

And a finding by a judge of probate that a testator was of sound and disposing mind will not be disturbed on appeal where five witnesses and the draftsmen of the will and the subscribing witnesses gave their opinions that he was of sound and disposing mind, founding them upon facts and rational reasons to which they testify, though twelve witnesses testify to his insanity, giving facts and reasons tending to show insanity upon which they base their conclusions, four of whom were physicians and three of whom had attended the testator from time to time and expressed the opinion that he could not have had a lucid interval. *Brock v. Luckett*, 4 How. (Miss.) 459.

Where the subscribing witnesses to a will state their opinion as to the condition of the testator's mind, giving the facts upon which the opinions are founded, however, reliance should be placed on the facts proved rather than on the opinions expressed by the witnesses. *Cilley v. Cilley*, 34 Me. 162.

And the mere opinion of a subscribing witness to a will, unsupported by the facts upon which it is based, is entitled to no more weight in a will contest than that of other witnesses. *Garrison v. Garrison*, 15 N. J. Eq. 236.

And the opinion of a witness in a will contest, who is a stranger to the testator, and who sees or hears nothing except what is necessary to enable him to attest the instrument, should be given less weight than that of a neighbor, and familiar acquaintance of the testator, and neither is of any weight except as proved to be correct from facts which justify and warrant it. *Garrison v. Garrison*, 15 N. J. Eq. 236.

So, the testimony of the subscribing witnesses is not the only evidence as to testamentary capacity that can be given. *Field's Appeal*, 38 Conn. 277; *Martin v. Perkins*, 56 Miss. 204; *Morton v. Heidorn*, 125 Mo. 606.

And the inability of an attesting witness to a will to testify to the mental capacity of a testator does not render the will invalid, but goes only to the credibility of the witness in case he is called upon to testify as to sanity or mental capacity. *Huff v. Huff*, 41 Ga. 696.

And probate of a will will be granted where there is nothing in the evidence to negative testamentary capacity except while the testatrix was actually under the influence of an epileptic fit to which she was subject, though there was an entire absence of proof of instructions or knowledge of contents, and the attesting witnesses could not recollect any of the circumstances attending its execution, where they recognized their signatures and thereupon had no doubt of the truth of their attestation. *Foot v. Stanton*, 1 Deane & S. 19.

So, the subscribing witnesses to a will are not necessarily the best to prove the sanity of the testator. *McTaggart v. Thompson*, 14 Pa. 149.

The testimony of a subscribing witness to a will as to the sanity of a testator is not invested by law with any fictitious value beyond what it is worth under the usual considerations governing the value of testimony, but is to be weighed with reference

to his special opportunity and occasion to observe at the precise moment in question, as well as with reference to his care, skill, judgment, memory, and veracity. *Thornton v. Thornton*, 39 Vt. 122.

And a will may be set aside on the ground of the insanity of a testator against the testimony of the subscribing witnesses to sanity, where there was proof of previous insanity and the dispositions made were not rational or natural, and circumstances of mystery and suspicion attended the subscription of the will. *Griffin v. Griffin*, R. M. Charit. (Ga.) 217.

So, the opinions of the subscribing witnesses to a will, given twenty years after their attestation, that the testator was incompetent, should be received with great jealousy. *Howard's Will*, 5 T. B. Mon. 199, 17 Am. Dec. 60.

And an instruction in a will contest that ordinarily those witnesses whose testimony comes nearest to the very time of making the will would be the most valuable if they seem worthy of credit, and that therefore the testimony of the subscribing witnesses to the will is to be carefully considered and scrutinized, is not objectionable as telling the jury that the testimony of an attesting witness was entitled to greater weight than that of other witnesses having the same means of knowledge. *Foster v. Dickerson*, 64 Vt. 238.

So, where subscribing witnesses to a will concur in the facts which go to make up the execution, but differ as to the degree of intoxication of the testator and its effect on his mind and memory, the weight due to their respective opinions may depend upon their intelligence and the opportunity they had of knowing how far the party's faculties were ordinarily overcome by intoxication and the actual effects at the time of the execution of the instrument. *Bell v. Clark*, 81 N. C. (9 Ired. L.) 239.

A witness to a will by his act of attestation solemnly testifies to the sanity of the testator, however, and if he afterwards attempts to impeach the validity of the will his evidence, though not to be positively rejected, is to be received with the most scrupulous jealousy. *Young v. Barner*, 27 Gratt. 96; *Lamberts v. Cooper*, 29 Gratt. 61; *Cheatnam v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Gwin v. Gwin* (Idaho) 48 Pac. 296; *Hoerth v. Zable*, 92 Ky. 202; *Harrison v. Rowan*, 3 Wash. C. C. 580; *Den, Stevens, v. Vancleve*, 4 Wash. C. C. 262; *Bootle v. Blundell*, 19 Ves. Jr. 494; *Howard v. Braithwaite*, 1 Ves. & B. 202.

As it is an impeachment of his own act. *Bootle v. Blundell*, 19 Ves. Jr. 494.

And as he is guilty of great misbehavior in attesting when his opinion is against sanity. *Harrison v. Rowan*, 3 Wash. C. C. 580.

And it detracts largely from the weight which would otherwise be given to their opinions. *Re Storey*, 20 Ill. App. 183.

The act of attesting a will solemnly asserts the testator's competency, and a person who, believing that this does not exist, nevertheless signs his name as a witness, becomes an instrument of fraud; and if he subsequently attempts to impeach his own act his evidence, though not positively inadmissible, is of little if any value. *Cook's Estate*, 16 Phila. 322; *McMeekin v. McMeekin*, 2 Bush, 79; *Cheatnam v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Jones v. Goodrich*, 5 Moore, P. C. C. 16.

Especially where he assigns no satisfactory reasons for his opinion. *Jones v. Goodrich*, 5 Moore, P. C. C. 16.

And it has been held that no weight should be

subsequently called, and testified to the execution of the will by the testator. Although the ruling admitting the will in evidence seems to have gone on the footing that its formal execution was as the appellees contended to be assumed, they were not thereby precluded from calling the subscribing witnesses later; and when called they did not cease to be subscribing witness, and examinable as such.

If the appellants had expressly admitted the formal execution of the will, it nevertheless would have been competent for the court to have allowed the appellees to call the subscrib-

ing witnesses to testify as such. *Com. v. McCarthy*, 119 Mass. 354.

We do not see that it was any the less within its power to do so because it had ruled that the formal execution was to be assumed, or that the appellees were to be regarded as having waived the right to call the subscribing witnesses to testify as such because the ruling was as they had contended it should be. Neither the court nor the appellees were limited, in the conduct of the trial, to the phase of the case presented by the ruling.

Exceptions overruled.

given to an opinion as to a testator's capacity in a will contest by one who subscribes the will attesting that the testator is of sound mind and memory and then repudiates the attestation under oath. *Garrison v. Garrison*, 15 N. J. Eq. 208.

And refusal to instruct that certain testimony against the sanity of the testator creates a strong presumption against the validity of the will is not error in a will contest, where the testimony is that of an attesting witness who was also the attending physician of the testator. *Thornton v. Thornton*, 39 Vt. 122.

And the evidence of one of the attesting witnesses to a will that the testator was not competent will not affect the validity of the will as against testimony of the other in favor of capacity, where it was directly at variance with previous statements made shortly after the will was executed. *Cheat-ham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650.

So, in *Maupin v. Woods*, 1 Duv. 223, a will dictated by the testatrix and written out by a disinterested neighbor just as it was dictated was upheld, though the attesting witnesses and their father, at whose house the will was made, expressed the opinion that she was not competent to make a valid will, there being abundant proof, both extrinsic and intrinsic, that she had a disposing mind.

And in *Lowe v. Joliffe*, 1 W. Bl. 385, a will was

established notwithstanding all the subscribing witnesses swore that the testator was utterly incapable where other persons who were with the testator on the day it was made, and two physicians who occasionally attended him, and several others, strongly deposed to his sanity.

And in *Digges's Case*, cited in *Powell on Devises*, 710, the person who wrote the testator's will, and who was an attesting witness, swore that the testator was of sound mind, but two other witnesses to the will swore that he was of unsound mind, but the verdict found the will a good testament.

A verdict against a will will not be disturbed, however, though it was natural and was attested by a disinterested physician who testified in favor of testamentary capacity, where the other attesting witnesses testified that the testator was not competent, and that they signed to avoid giving offense, and other witnesses, including another attending physician, testified against capacity. *Sydney v. Cunningham*, 13 Ky. L. Rep. 34.

And a subscribing witness to a will, who contradicts his own attestation by statements that the testator was incompetent and not in his right senses, may be a good witness to support another subscribing witness with reference to other circumstances. *Broome v. Ellis*, 2 Lee, Ecol. Rep. 523. F. H. B.

ILLINOIS SUPREME COURT.

POSTAL TELEGRAPH CABLE COMPANY, *App't*,
v.

Henry A. EATON.

(170 Ill. 513.)

1. A telegraph line is an additional burden on the fee of a public highway for which compensation must be made to the owner.
2. Ejectment may be maintained to compel the removal of telegraph poles from a public highway over plaintiff's land on which the line constitutes an additional burden for which compensation has not been made to the owner.
3. A transfer of land over which a telegraph line has been constructed without right gives the purchaser all his grantor's rights, including the right to bring ejectment.

(December 22, 1897.)

APPEAL by defendant from a judgment of the Circuit Court for Madison County in

NOTE.—As to ejectment for street, see note to *Hancock v. McAvoy* (Pa.) 18 L. R. A. 751; also *Thomas v. Hunt* (Mo.) 32 L. R. A. 337.

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favor of plaintiff in an action brought to recover possession of land upon which defendant had erected its poles without authority. *Affirmed.*

The facts are stated in the opinion.

Messrs. William P. Bradshaw, Loesch Brothers & Howell, and Frank J. Loesch, for appellant:

The license from the county commissioners necessarily gave the telegraph company the right to construct its line upon any highway outside of an incorporated city, town, or village between those two points, running in the general direction southwest from New Douglas.

2 Dill. Mun. Corp. § 698.

The license left the telegraph company free to seek any public road most convenient for its line within the directions limited in the consent of the county board.

Edwardsville R. Co. v. Sawyer, 92 Ill. 377.

Messrs. Travous & Warnock, for appellee:

Appellee is the absolute owner of the *locus in quo*, subject only to the easement in the public to use it for highway purposes. Neither the legislature nor the board of supervisors has the power to authorize appellant to appropriate it

without rendering compensation as provided by law.

Smith v. Chicago, A. & St. L. R. Co. 67 Ill. 195; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 489, 16 Am. Rep. 624; *Gebhardt v. Reeves*, 75 Ill. 301; *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 458; *Olney v. Wharf*, 115 Ill. 524, 56 Am. Rep. 178; *Sadorus v. Black*, 65 Ill. App. 72; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 269, 29 L. R. A. 485; *Elliott, Roads & Streets*, pp. 519, 537; *Stevenson v. Chattanooga*, 20 Fed. Rep. 586; *Robert v. Sadler*, 104 N. Y. 229; *Alden v. Murdock*, 13 Mass. 257; *Proprietors of Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 12.

Ejectment will lie.

Elliott, Roads & Streets, 535, 536, and authorities cited; *Terre Haute & S. R. Co. v. Rodel*, 89 Ind. 123, 46 Am. Rep. 164; *Peck v. Smith*, 1 Conn. 103, 6 Am. Dec. 216; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 863; *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498; *Cooper v. Smith*, 9 Serg. & R. 26, 11 Am. Dec. 659.

Craig, J., delivered the opinion of the court:

This was an action of ejectment brought by Henry A. Eaton, appellee, against the Postal Telegraph Cable Company, for the purpose of compelling the removal of the defendant's line of telegraph poles from a public highway known as the "Edwardsville and Hillsboro Road," which was located over and upon appellee's land. It appears from the record that the Board of Trade Telegraph Company in 1882 constructed its telegraph line over a public highway known as the "Edwardsville & Hillsboro Road" by the consent of the board of supervisors of Madison county, under a resolution of the board adopted at a regular meeting, upon the request of the telegraph company. The resolution granting the right contained the following conditions: Said line shall start at or near New Douglas, and run in a southwest direction, and terminate at or near Venice, in said county, the poles to be set not over 2½ feet from the margin of the road, not to interfere with ditches and water drains; poles to be 18 feet high, and well set and braced, and the wire to be kept tight; and they are to establish but one line, and by them securing the right of way in the several townships. The telegraph company went on and constructed its line under this resolution of the board of supervisors, without, however, obtaining consent or right of way from the land owners along the highway. The Board of Trade Telegraph Company operated its line until 1886, when the line was leased to appellant, the Postal Telegraph Cable Company, and that company has continued to operate the line since that time under its lease. It is not denied that a telegraph company organized under the laws of this state may, under our eminent domain act, acquire property upon which it may erect its telegraph line. Indeed, § 2 of the act relating to telegraph companies (Rev. Stat. 1874, p. 1052) makes provision for such companies to acquire property as follows: "Every such company may enter upon any lands for the purpose of making surveys and

examinations with a view to the erection of any telegraph line, and take and damage private property for the erection and maintenance of such lines, and may, subject to the provisions contained in this act, construct lines of telegraph along and upon any railroad, road, highway, street, or alley, along or across any of the waters or land within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad, highway, street, or alley, or interrupt the navigation of such waters." Section 4 of the same act provides: "No such company shall have the right to erect any poles, posts, piers, abutments, wires, or other fixtures of their lines along or upon any road, highway, or public ground outside the corporate limits of a city, town, or village, without the consent of the county board of the county in which such road, highway, or public ground is situated, nor upon any street, alley, or other highway or public ground within any incorporated city, town, or village, without the consent of the corporate authorities of such city, town, or village."

It is contended in the argument that, the county board having given consent to occupy the highway, and the consent having been acted upon, the owner of the fee of the highway cannot maintain an action of ejectment. Where a highway is laid out over lands outside of the incorporated city, town, or village, the public acquires only an easement of passage over the lands, with the rights and incidents thereto, while the owner of the land over which the road is laid out retains the fee and ownership of everything connected with the soil for all purposes not incompatible with the right of the public to a free and unobstructed use of the road as a public highway. *Palatine v. Kreuger*, 121 Ill. 74. *Elliott*, in his work on Roads and Streets (p. 519), in the discussion of the question, says: "[The abutter has] the exclusive right to the soil, subject only to the easement of the right of passage in the public and the incidental right of properly fitting the way for use. Subject only to the public easement, the proprietor has all the usual rights and remedies of the owner of a freehold. He may sink a drain below the surface of the road; . . . he may mine under it. So the herbage and trees growing thereon belong to him." At pages 535 and 536 the author says: "He may maintain trespass against one who unlawfully cuts and carries away the grass, trees, or herbage, and even against one who stands upon the sidewalk in front of his premises and uses abusive language towards him, refusing to depart. . . . The abutter may also maintain ejectment against a railroad company which has placed its track upon his side of a street without paying or tendering damages therefor, or against an individual who has wrongfully and unlawfully encroached thereon." In *Cole v. Drew*, 44 Vt. 49, in considering the question, the court said: "The owner of the soil over which a highway is located is entitled . . . to the entire use of the land, except the right which the public have to use the land and materials thereon for the purpose of building and maintaining a

highway, suitable for the safe passage of travelers. This doctrine has been long established." Other cases holding the same doctrine might be cited, but the rule that the owner of the land upon which a public highway is laid out has the exclusive right of the soil, subject to the easement of the right of travel in the public, and the incidental right of keeping the highway in proper repair for the use of the public, is so well established that the citation of other authorities is not deemed necessary. If, then, appellee was the owner of the fee, subject to the easement, as we have seen he was, has he the right to maintain ejectment? In *Smith v. Chicago, A. & St. L. R. Co.* 67 Ill. 192, it was held that ejectment would lie against a railroad corporation by the owner of the fee for land taken and used by it for the purposes of its road, where the land had not been condemned under proceedings instituted for that purpose in the mode prescribed by law. If an action of ejectment may be maintained against a railroad company, by the owner of the fee whose land has been taken by the railroad company, without instituting proceedings to condemn upon the same ground, no reason occurs to us which would prevent the owner of the fee from maintaining an action of ejectment where possession has been taken by a telegraph company. Indeed, the two cases stand upon the same ground, and if a recovery may be had in the one case, a recovery may also be had in the other. The question whether the owner of the fee of a highway may bring ejectment has arisen in other states, and it has been expressly held that the action will lie. In *Terre Haute & S. R. Co. v. Rodel*, 46 Am. Rep. 166, 89 Ind. 128, in the discussion of the question, the court said: "The doctrine that the owner of the fee may maintain ejectment for the land covered by a public highway is as old, at least, as *Goodtitle, Chester, v. Alker*, 1 Burr. 188. Lord Mansfield there said: 'I see no ground why the owner of the soil may not bring ejectment as well as trespass. . . . 'Tis true, . . . he must recover the land subject to the way; but, surely, he ought to have a specific remedy to recover the land itself, notwithstanding its being subject to an easement upon it.'" The court again says (p. 167): "We have no doubt at all as to the right of the owner of the fee to maintain ejectment against a wrongdoer, although the fee is burdened by a public easement. Our own cases, as we have shown, so declare, and so do all the well-considered cases." See also *Carpenter v. Oswego & S. R. Co.* 24 N. Y. 655; *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498. In *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624, it was held, where the public have acquired an easement over a person's land for an ordinary street or highway, the location of the track of a railroad on the same is an additional burden and servitude upon the land, which will entitle the owner to additional compensation; that such an act was an exclusive appropriation by the railroad company of the soil to its own use, which the owner had the right himself to use for any purpose not inconsistent with the public easement, and hence it is taking private property for public use, which cannot be done without making just compensation. In *Board*

of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453, an action of trespass was brought by a landowner abutting on a highway, to recover damages alleged to have been sustained by the erection of a telegraph line on the highway, and the court held that the construction and maintenance of a telegraph line upon the highway were a new and additional burden on the fee, to which it was not contemplated it should be subjected when the road was laid out, and the owner of the fee was entitled to recover additional compensation for such use. If the construction of the telegraph line was an additional burden on the fee, as the fee belonged to appellee, that burden could not be imposed upon the land unless compensation was made as provided by law.

The appellee here was the owner of the fee, subject to the easement of the public to use the land for a public highway. He had been compensated for this public use, and could make no objection to the right of the public to use the land for a public highway, but no additional burden could be imposed upon the fee without compensation. When appellant, therefore, entered upon and took possession of the land, and erected its line, without instituting proceedings to condemn as required by law, it was a trespasser, and no reason appears why appellee might not sue in trespass, and recover such damages as he had sustained, or bring ejectment, and regain his property in the condition it was in when the appellant entered upon it. But it is said the telegraph company obtained the right to construct its line from the county board of Madison county, and the authority of the county officers to grant a license of this character cannot be questioned in a proceeding of this kind. The consent of the county board of Madison county that the line might be erected on the public highway would, no doubt, be binding on the county and the road authorities in the several towns through which the highway runs upon which the line was authorized to be constructed, but the county board could give no consent which would be binding on any owner of the fee in the highway where the line was constructed. The right of the owner of the fee was beyond the control of the county board. His right is predicated on that provision of the Constitution which declares that "private property shall not be taken or damaged for public use without just compensation." Const. art. 2, § 13. The legislature had no authority to confer power on the county board to authorize the appellant company to take appellee's land without compensation, and hence the county board was powerless to give such authority. But it will not be necessary to consider this question further, as it was settled against appellant in *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453, as will be found upon an examination of that case. It is, however, said that appellee purchased the land after the telegraph line was constructed, with full notice that the line had been constructed, and hence he took the land with the burden upon it. It is no doubt true that appellee purchased the land subject to all rights appellant possessed in it, but the trouble with appellant is, by taking possession without making compensation to the owner of the fee, it acquired

no rights against such owner, and when appellee purchased he acquired all the rights in the land possessed by his grantor, and, if his grantor was entitled to bring ejectment, this right passed to appellee. Whether appellee could maintain trespass, or whether he would be barred by the statute of limitations, had such

an action been brought, is a question not presented by this record. The sole question here is the right of appellee to maintain ejectment.

The circuit court held that he had this right, and we think the judgment correct, and it will be affirmed.

INDIANA SUPREME COURT.

FRANKLIN NATIONAL BANK *et al.*,

Appls.,

v.

William C. WHITEHEAD *et al.*

(.....Ind.....)

1. **Only such corporations as are authorized by the law under which they are organized to carry on the business of warehousemen can avail themselves of the provisions of the Indiana act of 1875, as amended 1879, entitling "any person or incorporated company" to obtain a permit to keep a public warehouse.**
2. **One who is not a warehouseman cannot give a valid warehouse receipt upon his own property, in his own possession, to secure his own debt.**
3. **A public warehouseman cannot issue warehouse receipts upon its own property, in its own possession, and deliver them as a pledge to secure its own indebtedness.**
4. **A warehouse receipt is subject to a statute respecting the acknowledgment and recording of an assignment of goods by way of mortgage, when the receipt is issued by a debtor upon his own property, in his own possession, as a pledge to secure his debt.**
5. **A special finding to sustain an estoppel must clearly state the facts, leaving nothing to intendment.**
6. **The doctrine of estoppel does not apply to contracts which are forbidden by statute or contrary to public policy.**
7. **A corporation is not estopped from denying that it is a warehouseman or that its receipts, as such, are valid as against a holder of them who took them with knowledge of the facts respecting the character and powers of the corporation.**
8. **A general creditor has the right to intervene in case of a receivership, and contest the validity, as well as the priority, of other claims or asserted liens.**
9. **A receiver may avoid an assignment of goods by way of mortgage made by a corporation, on the ground that it was not recorded within the time required by law in order to make it valid, "as against any other person than the parties."**

(February 24, 1898.)

A PPEAL by interveners from a judgment of the Circuit Court for Hancock County

NOTE.—For a somewhat similar case, see *Gellfuss v. Corrigan* (Wis.) 37 L. R. A. 166.

As to the effect of recitals in warehouse receipts, see note to *Dean v. Driggs* (N. Y.) 19 L. R. A. 302.

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denying their claim to a lien on property of the Greenfield Iron & Nail Company which had been placed in the hands of a receiver. *Affirmed.*

The facts are stated in the opinion.

Messrs. Baker & Daniels, for appellants:

The position of the receiver and the general creditor in this proceeding is no better than the position of the debtor.

Union Trust Co. v. Trumbull, 137 Ill. 146; *Warner v. Jameson*, 52 Iowa, 70.

The position of the receiver is no better than the position of the debtor except fraud be proved. He takes subject to all liens and equities.

Lorch v. Aultman, 75 Ind. 162; *J. W. Dann Mfg. Co. v. Parkhurst*, 125 Ind. 817; *Cook v. Tullis*, 85 U. S. 18 Wall. 382, 21 L. ed. 933; *Hawkins v. Blake*, 108 U. S. 422, 27 L. ed. 775.

Where a cause of action depends upon the establishment of fraud, the special finding must state that there was fraud.

Phelps v. Smith, 116 Ind. 387.

Fraud is an ultimate fact which must be found as a substantive fact in a special finding, and it will never be presumed.

Wilson v. Campbell, 119 Ind. 286; *Farmers' Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 250, 11 L. R. A. 740; *Fulp v. Beaver*, 136 Ind. 819; *Bruner v. Brown*, 139 Ind. 600; *Personette v. Cronkhite*, 140 Ind. 586; *First Nat. Bank v. Doretail Body & G. Co.* 143 Ind. 550.

A finding that the Greenfield Iron & Nail Company was guilty of a fraudulent act or had a fraudulent purpose would not be sufficient to impeach the bona fides of the transaction as against the Rockville Bank.

Old Nat. Bank v. Findley, 131 Ind. 225.

It is not seemly for a corporation, any more than for an individual, to make a contract and then break it at its own pleasure; to abide by it so long as it is advantageous and repudiate it when it becomes onerous.

Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107.

Where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation.

Wright v. Hughes, 119 Ind. 324; *First Nat. Bank v. Stewart*, 107 U. S. 676, 27 L. ed. 592; *Thompson v. Saint Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956; *Chicago & A. R. Co. v. Derkes*, 103 Ind. 525.

The position of a general creditor who seeks

to have declared *ultra vires* a contract of a corporation after such corporation has become insolvent is no better than the position of the corporation itself.

Tod v. Kentucky Union Land Co. 57 Fed. Rep. 47; *High, Receivers*, § 315.

Under the warehouse acts a warehouseman can issue receipts on his own property when stored in his own warehouse.

Cochran v. Ripy, 18 Bush, 495; *Merchants' & Mfrs. Bank v. Hibbard*, 48 Mich. 118, 42 Am. Rep. 465; *National Exch. Bank v. Wilder*, 84 Minn. 149; *Eggers v. National Bank of Commerce*, 40 Minn. 182; *Easton v. Hodges*, 18 Fed. Rep. 677.

And when such receipt is to be used as collateral security, it may be issued to the pledgee.

National Exch. Bank v. Wilder, 84 Minn. 149; *Merchants' & Mfrs. Bank v. Hibbard*, 48 Mich. 118, 42 Am. Rep. 465; *Easton v. Hodges*, 18 Fed. Rep. 677; *Babcock v. People's Sav. Bank*, 118 Ind. 212.

The Rockville Bank must be held to be the owner of valid warehouse receipts of the nail company and the legal title of the property covered by these receipts passed to the Rockville Bank, and it was entitled to delivery of this property upon surrender of the receipts.

Gibson v. Stevens, 49 U. S. 8 How. 384, 12 L. ed. 1123; *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612; *Parshall v. Egbert*, 54 N. Y. 18; *Babcock v. People's Sav. Bank*, 118 Ind. 212.

And if the warehouseman has commingled this property with his own property, so that the receipt holder's property cannot be distinguished, then in equity such receipt holder is entitled to take such goods of like kind with his own as will make good his receipt.

Bank of Rome v. Haselton, 15 Lea, 216; *Sharp v. Philadelphia Warehouse Co.* (C. C. E. D. Pa.) 9 Fed. Rep. 572; *Hoffman v. Schoyer*, 143 Ill. 598.

In equity the transaction was a pledge; the receipts were intended as collateral security, and equity can carry out the intent of the parties because a warehouse receipt can constitute a valid pledge.

Merchants' & Mfrs. Co. v. Hibbard, 48 Mich. 118, 42 Am. Rep. 465; *Cochran v. Ripy*, 18 Bush, 495.

As against all but bona fide purchasers or encumbrancers, a warehouse receipt is valid even though the goods pledged are not specifically separated and set apart.

Merchants' & Mfrs. Bank v. Hibbard, 48 Mich. 118, 42 Am. Rep. 465; *Bank of Rome v. Haselton*, 15 Lea, 216; *Fifth Nat. Bank v. Providence Warehouse Co.* 17 R. I. 112, 9 L. R. A. 260; *Hoffman v. Schoyer*, 143 Ill. 598.

The nail company and all parties standing in its place are estopped to set up the want of segregation for the purpose of defeating the rights of the Rockville Bank.

Goodwin v. Scannell, 6 Cal. 541; *Union Trust Co. v. Trumbull*, 137 Ill. 146.

The nail company is estopped to deny its representations that induced the loan; it is estopped to deny that it was a lawful warehouseman; it is estopped to deny that it held the nails described in these receipts as a warehouseman.

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Babcock v. People's Sav. Bank, 118 Ind. 212; *M'Neil v. Hill*, Woolw. 96.

Courts should be especially careful not to throw doubt upon mercantile usages and the customs of business men.

Gibson v. Stevens, 49 U. S. 8 How. 384, 12 L. ed. 1123; *M'Neil v. Hill*, Woolw. 96; *Merchants' & Mfrs. Bank v. Hibbard*, 48 Mich. 118, 42 Am. Rep. 465.

Mr. Daniel Wait Howe also for appellants.

Messrs. Frederick E. Matson and William A. Ketcham, for appellees:

It sometimes happens that a power to borrow exists, and the company exercises it and obtains a loan, and gives to secure the advances, securities, *e. g.*, mortgages which are outside its powers. These improper documents, though themselves void as securities, will not avoid the loan.

Brice, Ultra Vires, 8d Eng. ed. § 91, p. 224; *Utica Ins. Co. v. Cadwell*, 3 Wend. 296; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652.

By means of the appointment of a receiver, a court of equity takes possession of the property which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds or profits, and ultimately disposes of them according to the rights and priorities of those entitled, whether regular parties in the cause, or only parties in interest coming before the court in a reasonable time, and due course of proceeding, to assert and establish their pretensions. The receiver appointed is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct, and having in his character of receiver no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties. It is of no consequence to him how or when, or to whom, the court may dispose of the funds in his hands, provided the order or decree of the court furnishes to him a sufficient protection.

High, Receivers, § 6, note; *Beverly v. Brooke*, 4 Gratt. 187.

These warehouse receipts cannot operate as liens because the issuing thereof was an act *ultra vires*.

Cook, Stock & Stockholders, ¶ 681; *Brice, Ultra Vires*, 8d Eng. ed. p. 60, § II, pp. 139, 140; *Beatty v. Knowler*, 29 U. S. 4 Pet. 152, 7 L. ed. 813; *State Bd. of Agri. v. Citizen's Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629.

These receipts being *ultra vires*, were, therefore, wholly void.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 59, 35 L. ed. 68.

The banks were bound to take notice that these receipts were *ultra vires* and void.

Pearce v. Madison & I. R. Co. 62 U. S. 21 How. 441, 16 L. ed. 184; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221.

These warehouse receipts, being *ultra vires* and wholly void, constitute no lien, equitable or otherwise, as against the general creditors.

Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 58, 35 L. ed. 68; *Pittsburgh, C. & St. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S.

371, 33 L. ed. 157; *Morville v. American Tract Soc.* 123 Mass. 129, 25 Am. Rep. 40; *Utica Ins. Co. v. Cadwell*, 8 Wend. 296; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Boyd v. Mill Creek School Twp.* 124 Ind. 194.

The conditions which attended the issuing of these receipts were not such as to constitute them liens.

The transactions were against public policy.

Mechanics' Trust Co. v. Dandridge, 18 Ky. L. Rep. 625; *State v. Miller*, 140 Ind. 168.

The receipts do not meet the requirements of, and do not constitute, warehouse receipts.

Mechanics' Trust Co. v. Dandridge, 18 Ky. L. Rep. 625; *Sinsheimer v. Whitley*, 111 Cal. 378; *Steaubli v. Blaine Nat. Bank*, 11 Wash. 426; *Fishback v. Van Dusen*, 83 Minn. 111; *Shepardson v. Cary*, 29 Wis. 42; *Rucher v. Com.* 103 Pa. 584; *Edwards, Bailm. § 332*.

The Greenfield Iron & Nail Company, as debtor, issued the receipts upon its own goods, which were retained in its own possession, direct to the banks, as creditors.

A receipt issued by the owner of goods stored in his own store is not a warehouse receipt at all.

Vogelsang v. Fisher, 128 Mo. 386; *Conrad v. Fischer*, 37 Mo. App. 352, 8 L. R. A. 147; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Adams v. Merchants' Nat. Bank*, 9 Biss. 396; *Yenni v. McNamee*, 45 N. Y. 614; 1 Jones, Pledges, § 325; *Hale, Bailments & Carriers*, p. 128.

The instrument creating the lien is not effectual unless it plainly designates the property to be charged.

1 Jones, Liens, § 83.

A warehouse receipt, on a part of certain goods stored in bulk, passes no title until such goods are separated, set apart, and marked so as to distinguish them from the general mass, unless the receipt provides the means for making such separation.

Jones, Pledges, § 317; *Ferguson v. Northern Bank*, 14 Bush, 555, 29 Am. Rep. 418; 1 Jones, Liens, § 84; *Merchants' & Mfrs. Bank v. Hibbard*, 48 Mich. 118, 42 Am. Rep. 465; *Anderson v. Brenneman*, 44 Mich. 198.

The receipts do not constitute pledges.

There was no separation or setting apart of the specific goods pledged.

Jones, Pledges, § 26.

The receipts do not constitute chattel mortgages valid as against third parties.

Adams v. Merchants' Nat. Bank, 9 Biss. 396; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Yenni v. McNamee*, 45 N. Y. 614.

There are no equities in favor of the appellant banks.

Ferguson v. Northern Bank, 14 Bush, 555, 29 Am. Rep. 418; *Adams v. Merchants' Nat. Bank*, 9 Biss. 396.

Messrs. Morris, Newberger, & Curtis also for appellees.

Monks, J., delivered the opinion of the court:

In January, 1894, in a proceeding brought for that purpose, the court below appointed a receiver for the Greenfield Iron & Nail Company, an insolvent corporation, located at Greenfield, Indiana, who took possession of the 39 L. R. A.

property of said corporation under the order of the court, for the purpose of applying its assets to the payment of its debts. Appellants, two of the creditors of said corporation, filed their separate intervening petitions, claiming that, by virtue of certain receipts, purporting to be public warehouse receipts, issued by said corporation, they had liens upon a large portion of the property of said corporation, and were entitled to have the same set apart and applied to the payment of their claims. To these intervening petitions the receiver and the First National Bank of Brazil, on behalf of themselves and the other general creditors, filed separate answers. The court made a special finding of facts, upon which conclusions of law were stated against the Franklin National Bank and the National Bank of Rockville, intervening petitioners, and, over their separate motions for a new trial, judgment was rendered against them.

The errors assigned call in question each conclusion of law and the action of the court in overruling the motions for a new trial.

It appears from the special finding that the Greenfield Iron & Nail Company was organized on November 3, 1899, under the laws for the incorporation of manufacturing and mining companies, having its office and principal place of business at the city of Greenfield, Indiana. The object of said corporation, as set forth in its articles of association, was "the manufacture and sale of nails and other products of steel and iron." In December, 1890, said company made a written application to the auditor of Hancock county for a permit to keep a public warehouse, and received a paper purporting to authorize it to operate a public warehouse of class B. Said company never owned or operated a public warehouse of either class A or B, or pretended to, other than the room used in the manufacture of nails, never received any goods, wares, or merchandise on storage, or owned or leased a place for the storage of goods, and never issued any papers purporting to be warehouse receipts, except the papers so designated in this case, and a similar one to one of appellants, the Franklin National Bank, in a transaction similar to the one in which said bank received the papers mentioned in its intervening petition. The effort of said Greenfield Iron & Nail Company to occupy the position of a warehouseman was to enable it to borrow money without impairing its credit by giving chattel mortgages or making pledges of its stock. While the company was engaged in carrying on its business, the nails manufactured were put in kegs, and upon the head of each keg was branded the name of the company and the kind and size of nails contained therein, and the kegs were placed in rows on one side of the room where made. Prior to December 9, 1890, the Greenfield Iron & Nail Company, by its president, applied to appellant the Franklin National Bank for a loan of \$5,000, and promised to secure said loan by giving as collateral security therefor a warehouse receipt covering nails of sufficient value belonging to said company; and on the 9th of December, 1890, said bank loaned said company \$5,000, for which said company executed its note, payable 120 days after date,

indorsed by five persons; and it was required that said company should ship and store said nails in a regular warehouse in Indianapolis. Afterwards, in January, 1891, said company made out a statement showing the sale of 870 kegs of nails and the size and kind of nails in each keg, to said bank, valued at \$5,009.95, and at the same time made out a receipt which recited that the Greenfield Iron & Nail Company, in its capacity of a public warehouseman, hereby certifies that it has received of the Franklin National Bank the following described property (describing the kegs of nails the same as in the invoice aforesaid, except no value is mentioned, and the words "marked 'Lot A.'" were used), which is deliverable to the order of said Franklin National Bank upon the return of "this receipt and the payment or tender of proper charges." This receipt was signed by the company. Both of these papers were delivered by said company to the bank for the purpose of complying with its promise to secure said note. Afterwards, in April and May, 1891, loans were made by the National Bank of Rockville to said company, under like arrangements and condition, to secure which like papers, except the kegs of nails, were not designated as being marked "Lot A" or otherwise, were executed and delivered to the National Bank of Rockville. Afterwards, in July, 1893, the company executed and delivered to the Rockville Bank, as additional security for said loans, papers of like kind for "800 kegs of cut steel nails, 10 d com." No nails were in fact sold by said company to either of said banks, and said bank made no actual deposit of nails with the company, but said company, at the times said papers were delivered, had in its general stock, in its manufacturing establishment at Greenfield, nails of the kind described in said receipts. The failure of said company to ship the nails to Indianapolis, as agreed with the Franklin National Bank, was not known or assented to until said receipt and invoice were received and accepted by said bank, about February 1, 1891. The nails described in said several receipts were not removed from the room where manufactured, and were not set apart or separated from the general stock then on hand of the same and different kinds, nor were they marked "A," or in any other manner except in common with all other nails manufactured by the company. The bank officers of said banks did not know the method of manufacture and storage of said nails or the kind of places where stored, or that said nails, described in the receipt of the Franklin National Bank, had not been set apart and marked "Lot A" as indicated in said receipt to the Franklin National Bank. Nor did they make any inquiry or effort to ascertain the character of the pretended warehouse at Greenville, or whether said nails were stored therein or at any other place, or as to what had been done or was being done with respect to said nails, but wholly relied upon said receipts. The loans evidenced by said notes were renewed from time to time by giving other notes with the same indorsers, and the same were accepted by the banks in reliance upon the papers held, respectively, as security for said loans. After the execution of said receipts the Greenfield Iron & Nail

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Company continued to manufacture nails, and when so manufactured the kegs in which they were placed were mingled indiscriminately with other kegs containing nails of a similar kind on hand at the dates of the execution of said receipts to said banks, and kept in the company's building, and sales were made by the company from time to time, and the nails sold were taken indiscriminately from the stock on hand, and no effort was made to distinguish between the nails on hand when said receipts were executed and those subsequently made. At the time of the execution and acceptance of said receipts the nail company and the appellants intended to create a valid lien on the nails therein described as collateral security for said loans. On January 4, 1894, the president of the Greenfield Iron & Nail Company gave directions that nails of the same kind and quality specified in the receipts held by said banks, respectively, be set apart and marked for said banks. On said day the company, to secure the Franklin National Bank a lien on said nails, without the knowledge of said bank, commenced to set apart nails of the same kind and quality and description as those mentioned in the receipt given to said bank, so far as they were on hand, and the same were placed in piles and separated from other nails, and the piles so set apart were designated as "Lot I." This was completed on January 13, 1894, before the appointment of a receiver. It cannot be determined how many of the nails, if any, so set apart were on hand when said receipt was given to said bank. No nails were set apart for the Rockville Bank for the lack of time, as the receiver was appointed immediately after the completion of the work of setting apart the nails designated "Lot I." At the time the order was given to set apart said nails, on January 12, 1894, the Greenfield Iron & Nail Company was insolvent and in embarrassed circumstances, and was unable to meet or pay the claims against it, and when said order was given the officers of said company well knew that said company could not continue in business, and said order was made in contemplation and expectation of the appointment of a receiver, and that the same would be wound up as an insolvent concern.

The receiver was appointed on January 13, 1894, and took possession of the property of said company, including the nails, in separate piles designated as "Lot I," but in resorting the nails in order to take an invoice, and in removing them from exposure to the weather, the nails in said piles were mingled with other nails of the same kind in the building. No warehouse charges for storage or other expense was charged by said company against the holder of said receipts, nor was any scale or schedule of charges ever fixed or adopted by said company.

To constitute a valid pledge, there must be an actual or symbolical delivery of possession of the thing pledged, and, to preserve the pledge, the pledgee must retain the possession of the property. Ordinarily the physical possession of the property is delivered to and retained by the pledgee. If, however, the property is delivered by the owner to a warehouseman,

and a warehouse receipt is given therefor by the warehouseman, the indorsement of the warehouse receipt, and the delivery thereof to the pledgee, is regarded in law as the delivery of possession to the pledgee of the property described in the warehouse receipt. Burns's Rev. Stat. 1894, §§ 9716, 8722, 8729 (Horner's Rev. Stat. 1897, §§ 6537, 6548, 6550); Hale, Bailments & Carriers, 127; Jones, Pledges, §§ 23, 280, 281, 287.

The first question to be determined is whether the Greenfield Iron & Nail Company was authorized to engage in the business of public warehouseman, and as such issue warehouse receipts. The special finding shows that said Greenfield Iron & Nail Company was organized under the laws for the incorporation of manufacturing and mining companies, and that its object, as stated in the articles of association, was to manufacture and sell nails and other products of steel and iron. A corporation possesses only such powers as are expressly given by law, and such implied powers as are necessary to enable them to exercise the powers expressly given. *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 409, 17 Am. Rep. 702; *Clark, Corp.* 120. The business of public warehouseman was not necessary or incidental to the business of said company in manufacturing or selling nails or other products of steel or iron. It is evident that such company was not authorized, by the laws under which it was organized, to engage in the business of public warehouseman or to issue warehouse receipts. It is insisted, however, by appellants, that as said company made a written application to the auditor of Hancock county, and obtained a permit from him to carry on the business of public warehouseman under the provisions of § 8704, Burns's Rev. Stat. 1894 (Horner's Rev. Stat. 1897, § 6525), it was fully authorized by said section to carry on that business and issue warehouse receipts. The section referred to is the 1st section of the public warehouse act of 1875, as amended in 1879, and the part relied upon by appellants is as follows: "Any person or incorporated company desiring to keep any such public warehouse shall be entitled to do so upon receiving a permit therefor from the auditor of the county in which such warehouse shall be kept." If appellants' construction of said section is the correct one, then all the corporations in the state, whether educational, charitable, religious, commercial, or otherwise, whatever may be the provisions of the law under which organized, are given the right of going into and carrying on the business of public warehousemen. While the language quoted from said section is very broad, it was certainly not the intention of the legislature to confer on all the corporations in the state, without regard to the law under which they were organized, and the purposes and objects of their organization, the privileges of public warehousemen. As well hold that persons without capacity to contract on account of infancy, insanity, or other disqualifications were, by said statute, authorized to engage in the business of public warehousemen and execute valid warehouse receipts. A "warehouseman" is defined to be the owner of a warehouse; one who, as a business and for hire, keeps and stores the goods of others. Black, Law Dict. A person who re-

ceives goods and merchandise to be stored in his warehouse for hire. Bouvier, Law Dict.; 28 Am. & Eng. Enc. Law, pp. 686, 687; Edwards, Bailm. § 332; Hale, Bailments & Carriers, 288. Only such corporations as are authorized by the law under which they are organized to carry on the business of warehouseman can avail themselves of the provisions of said act of 1875 (Acts 1875, p. 172), as amended by the act of 1879 (Acts 1879, p. 230, being Burns's Rev. Stat. 1894, §§ 8704, 8719; Horner's Rev. Stat. 1897, §§ 6525, 6540). It follows that said nail company was not authorized to operate as a public warehouseman, or issue any warehouse receipts, under the provision of said act of 1875, as amended by the act of 1879.

Appellants insist that, if the nail company could not become a public warehouseman, then its acts, as stated in the special finding, made it a private warehouseman, under the act of 1879 (Acts 1879, p. 231; Burns's Rev. Stat. 1894, §§ 8720-8729; Horner's Rev. Stat. 1897, §§ 6541-6550); and the receipts issued to appellants are sufficient, in equity, to carry out the intent of the nail company and appellants, by creating in appellants a lien upon the nails described in said receipts. Section 8720 (6541), *supra*, provides that "every person, firm, company, or corporation receiving cotton, tobacco, pork, grain, corn, rye, oats, wheat, hemp, whisky, coal, any kind of produce, wares, merchandise, commodity, or any other kind or description of personal property or thing whatever, in store, or undertaking to receive or take care of the same, with or without compensation or reward therefor, shall be deemed and held to be a warehouseman." Said nail company was not authorized by the law under which it was organized to engage in the business of private warehouseman any more than it was authorized to carry on the business of public warehouseman, and the special findings show that the said nail company never received any goods, wares, or merchandise or other property on store from anyone, and that it was not engaged in business as a warehouseman, and never had been, and did not operate a warehouse, and that no receipts were ever issued by it, except to said appellants. It is clear from the finding that the nail company never in fact kept a warehouse to store goods in, and was not engaged in business as a public or private warehouseman, nor was it authorized to engage in such business. In *Sinsheimer v. Whitely*, 111 Cal. 378, the court said: "It is only persons who pursue the calling of warehousemen—that is, receive and store goods in a warehouse as a business for profit—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it." *Shepardson v. Cary*, 29 Wis. 42; *Butcher v. Com.* 103 Pa. 594; Edwards, Bailm. § 332. In Minnesota, where the rule that a warehouseman can pledge his own goods in his warehouse to secure an indebtedness, by issuing a warehouse receipt to the pledgee, prevails, it is held that one who is not a warehouseman cannot give a valid warehouse receipt upon his own property, in his own possession, to secure his own debt. *National Exch. Bank v. Wilder*, 34 Minn. 149, 155, 157; *Fishback v. Van Dusen*, 83 Minn.

111. In the case in 34 Minn. and cited, the court said: "The owner of goods, if a warehouseman, can pledge the same by issuing and delivering his own warehouse receipt to the pledgee. . . . When the pledgee or the vendor is a warehouseman, the public has notice from that fact that the title and legal possession of property in his warehouse may be in others, although the actual physical possession is in himself." In *Geiffuss v. Corrigan*, 95 Wis. 651, 37 L. R. A. 166, one Schleisinger owned two corporations,—one the Buffalo Mining Company, a mining corporation engaged in mining ore in Michigan; the other the Douglas Furnace Company engaged in smelting ore in Pennsylvania. The furnace company had a large stock of pig iron constantly on hand in its yards in Pennsylvania. In order to raise money for the furnace company, Schleisinger caused the furnace company to issue apparent storage receipts to the mining company, without consideration and without agreement to purchase, and without selection or delivery, and with the agreement that the receipts should be returned whenever the furnace company needed them on account of sale of iron. On receiving the receipts, he borrowed money of the plaintiff bank upon the notes of the mining company, secured by assignment of the receipts as collateral. The plaintiff bank took said receipts innocently, and without knowledge of any defect. The court said: "In order to be such [warehouse receipts] they must be issued by a warehouseman or one openly engaged in the business of storing property for others for a compensation. *Bucher v. Com.* 103 Pa. 528; *Shepardson v. Cary*, 29 Wis. 34. And the fact that the receipt was executed by a warehouseman must affirmatively appear in the evidence. *Shepardson v. Cary*, 29 Wis. 34. Not only was there no proof in this case that the furnace company was in the warehousing or storage business, but, on the contrary, the proof was conclusive that it was not in such business, and never had been. The fact that it surreptitiously issued the false receipts in question did not constitute a warehousing corporation. As well might it be argued that the issuance of counterfeit bank bills constitutes the counterfeiter a bank. It seems that, had the certificates been negotiable warehouse receipts, the bank would have acquired a valid lien upon the iron they represented by the transfer and indorsement of the receipts to it by the Buffalo Mining Company. But we may dismiss this question, because they were not such certificates, and the plaintiff obtains no advantage from the fact that they were in the usual form thereof. Nor were the certificates valid as chattel mortgages upon the iron named in them, not only because they were not chattel mortgages in legal effect, but also because, by the law of Pennsylvania, as well as by the law of Wisconsin, a chattel mortgage is only valid as to third persons when filed in the proper recorder's office, and there is no claim of any filing here." The private warehouse act of this state (Acts 1879, p. 231; Burns's Rev. Stat. 1894, §§ 8720-8729 [Horner's Rev. Stat. 1897, §§ 6541-6550]), is substantially the same as the warehouse act of March 6, 1869, of the state of Kentucky, and was no doubt taken from

that act. In *Mechanics' Trust Co. v. Dandridge*, 18 Ky. L. Rep. 625, Dandridge gave a receipt purporting to be a warehouse receipt for property left in his possession, which receipt was pledged to Mason, Gooch, & Hodge Co. by its holder as collateral security for a debt, and the Kentucky court of appeals, in construing said statute, held that the same was not a warehouse receipt, and that Mason, Gooch, & Hodge Co. had no lien at all on the property. The court said: "The statute evidently refers to only such persons as in fact keep a warehouse to store goods in and are engaged in that business. It cannot be that it was the intention of the legislature to provide that any and all persons might become legal warehousemen by simply receiving one particular piece of property in store and issuing a receipt therefor. There is no pretense that Dandridge was engaged in keeping a warehouse and storing property therein as a business. It therefore follows that the receipt in question was and is invalid and ineffectual, and the indorsement thereof passed no interest in the property. It is, as a general rule, indispensable, that possession must accompany the pledge of property in order to vest the pledgee with title or interest therein. . . . It is, therefore, perfectly manifest that there was no change of possession and nothing to warn the public of any change. . . . If appellee [Mason, Gooch, & Hodge Co.] desired to acquire a lien on the property it could have done so by obtaining a mortgage, and then it would have been secure, and no other creditor need to have been misled. It is not necessary to discuss the question of notice, because appellees have no lien at all on the property, and it is wholly immaterial whether appellant knew of the receipt or not." It follows that, even if the nail company was authorized by statute to engage in business as a private warehouseman, it not having done so, said receipts, even if they purported to be issued by it as a private warehouseman, would be invalid and ineffectual, and would not create a lien on the property described therein. Besides, we do not think that the nail company had any power or authority to issue warehouse receipts upon its own property, in its own possession, and deliver the same as a pledge to secure an indebtedness, even if it was engaged in business as a public warehouseman, and was fully authorized by the law to carry on such business. Such a receipt would not, in a technical sense, be a warehouse receipt, and even if between the parties it created a lien, as to which we need not and do not decide, it would be void as against all other persons, under § 10 of the act for the prevention of frauds and perjuries, being § 6638, Burns's Rev. Stat. 1894 (Horner's Rev. Stat. 1897, § 4913), which provides that "no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee or assignee and retained by them, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance, and be recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof." *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465, 474. It may be true,

as claimed by appellants, that a private warehouseman is authorized by § 5 of the act of 1879, p. 281, being § 8724, Burns's Rev. Stat. 1894 (Horner's Rev. Stat. 1897, § 6545), to issue warehouse receipts for his own property actually in store and under his control at the time of giving the receipt. The entire act, of which said § 8724 (6545), *supra*, forms a part, seems to have been taken from the statute of Kentucky, and the court of last resort in that state has held that said section authorizes a warehouseman to issue warehouse receipts upon his own property in the manner and under the conditions provided in said act. *Cochran v. Rippy*, 18 Bush, 495; *Ferguson v. Northern Bank*, 14 Bush, 555, 29 Am. Rep. 418. If a private warehouseman has such authority in this state, it is by virtue of said § 8724 (6545), *supra*, and without said section he would have no such power. Jones, Pledges, § 825; Hale, Bailments & Carriers, p. 128. Said act, however, is distinct in form and purpose from the public warehouse act of 1875, as amended March 29, 1879 (Burns's Rev. Stat. 1894, §§ 8704-8719 [Horner's Rev. Stat. 1897, §§ 6525-6540]), and said acts are entirely independent of each other. *Miller v. State*, 144 Ind. 401, 404. It is clear that said section does not authorize a public warehouseman to issue warehouse receipts on his own property, nor is there anything in the public warehouse act which authorizes it. It follows that a public warehouseman would have no more power to issue a warehouse receipt upon his own property in his warehouse, as security for a debt, unless there was a statute expressly authorizing it, than would a debtor who is not a warehouseman. Where a debtor who is not a warehouseman issues a receipt purporting to be a warehouse receipt, on property in his possession and owned by him, for the sole purpose of securing a creditor, the same is not in any sense a warehouse receipt. *Conrad v. Fischer*, 87 Mo. App. 352, 8 L. R. A. 147; *Mechanics' Trust Co. v. Dandridge*, 18 Ky. L. Rep. 625; *Sinsheimer v. Whiteley*, 111 Cal. 378; *Geiffuss v. Corrigan*, 95 Wis. 651, 17 L. R. A. 166; *National Exch. Bank v. Wilder*, 84 Minn. 149; *Steubli v. Blaine Nat. Bank*, 11 Wash. 426; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Union Trust Co. v. Trumbull*, 137 Ill. 146, 164; Jones, Pledges, §§ 325, 326. In *Union Trust Co. v. Trumbull*, 137 Ill. 146, T. W. Hall & Co., merchants and factors in wool, issued a receipt for their own wool in their own possession to one Velh Meyer, as security for money borrowed from him, and the court held that he was not entitled to a lien on the wool described in said receipts. The court on page 164, 137 Ill., said: "His claim is based on a receipt issued by Hall & Co., who were not public warehousemen, and which was therefore of no more effect as a lien than a certificate issued by any other property owner. It is only where property is stored in a public warehouse that a receipt may be given which will evidence a lien upon the property." In *Thorne v. First Nat. Bank*, 37 Ohio St. 254, it was held that an instrument, substantially like a warehouse receipt, issued to a creditor by a debtor, who was not a warehouseman, on his own property, for the sole purpose of securing the creditor, was void as against other

creditors, when the property remained in the possession of the debtor, for the reason that it was an attempt to create a lien upon personal property contrary to the provisions of the statute making chattel mortgages void if not accompanied by delivery of possession unless the mortgage, or a copy thereof, was deposited in the office of the officer named in the statute.

It is insisted, however, by appellants, that the nail company is estopped from denying that it was a warehouseman, and that it held as such the nails mentioned in the receipts, for and subject to their order. We do not think the nail company was estopped as claimed by appellants. It is true, as urged by appellants, that when a person is carrying on the business of warehouseman, public or private, under our statutes, and he issues warehouse receipts which comply with the requirements of the statutes under which he is operating his warehouse, and the person to whom said receipts have been issued indorses to innocent holders for value, that the warehouseman is estopped from denying that he holds the goods described on the terms specified in the receipts; but this rule has no application here, for the reason that it is not shown by the special finding that the nail company is a public or private warehouseman, or that it was engaged in such business or had any power to do so, or that said receipts have been indorsed to an innocent holder, but the special finding shows that said company was not a warehouseman, public or private, and never had been, and had no power to engage in such business or issue warehouse receipts. The rule is that, to constitute a valid estoppel by conduct, there must be knowledge on the part of the person to be estopped, and a want of knowledge on the part of the party relying on the estoppel, and there can be no estoppel when there is notice or knowledge on the part of the person relying upon the estoppel. *First Nat. Bank v. Williams*, 126 Ind. 423, 429, 430; *Buck v. Milford*, 90 Ind. 291-298, and cases cited; *Stewart v. Beck*, 90 Ind. 458.

If the nail company could be estopped as insisted by appellants, it would only be, if at all, when appellants had no notice or knowledge that the nail company was not a warehouseman, and was not engaged in such business, and had no power to engage in such business or issue warehouse receipts, but believed in good faith that it was engaged in such business, and had the power to do so and issue warehouse receipts, and that, relying upon such facts, they accepted the receipts and made the loan on the faith thereof. To sustain the estoppel claimed by appellants against the nail company, the facts necessary to constitute the same must be clearly stated in the special finding, leaving nothing to intentment. *First Nat. Bank v. Williams*, 126 Ind. 430. No such facts are stated in the special finding, but, on the contrary, so far as the special finding shows, appellants knew that the nail company was engaged in the manufacture of nails, and that it was organized under the laws for the incorporation of manufacturing and mining companies, and was not a warehouseman, public or private, and never had been, and was not authorized to carry on such business or issue such receipts. Besides, they were bound to

know that, under our statutes, a corporation, organized under the law for the incorporation of manufacturing and mining companies, had no power to carry on either a public or private warehouse or issue warehouse receipts; and that a public warehouseman had no authority to issue warehouse receipts on his own property in his public warehouse, as a security for his own debts or the debts of others.

It is insisted by appellants that if the nail company was not authorized to be a public warehouseman, and had no right to issue public warehouse receipts on its own property to secure its own debts, its acts in doing so were merely *ultra vires*, and, as such contracts have been performed by appellants in loaning said nail company the money, that, after receiving the benefits of the contract, it cannot avoid such warehouse receipts on the ground that it has exceeded its corporate powers in issuing them. There is much conflict in the decisions of courts of last resort as to the doctrine urged, but in the jurisdictions where it prevails the rule is that when a corporation enters into a contract merely beyond its powers, which, if made by a private person, would have been binding upon him, and such contract has been performed by the other party thereto, the corporation will not be permitted to deny its power to make such contract, but the same may be enforced against it. It would seem that what we have already said in regard to the nail company being estopped to deny that it was a warehouseman, and had the power to issue said receipts and hold said nails for appellants, is a sufficient answer to this contention of appellants, but we think there are also other reasons why such contention cannot prevail. But, as we have shown, a public warehouseman, whether a corporation or an individual, cannot issue a public warehouse receipt on his own property, in such warehouse, as security for his own debts or the debts of others, and such receipt, if issued, creates no lien on such property. The rule urged cannot, therefore, apply to this case, even if it were conceded that the nail company was authorized by law to engage in the business of public warehouseman, and was actually engaged in such business. Besides, the doctrine urged does not apply to contracts where the same are forbidden by statute or are contrary to public policy. *State Bd. of Agri. v. Citizens' Street R. Co.*, 47 Ind. 407, 411, 17 Am. Rep. 702; 27 Am. & Eng. Enc. Law, p. 878. As we have shown, any attempt by any person to create a lien on his personal property, except in the manner provided in § 10 of the statute for the prevention of frauds and perjuries, is void, and, if by an assignment by way of mortgage, the same, unless recorded within ten days after its execution, is void as to all persons except the parties thereto. As there was no law authorizing the nail company to issue said receipts, and thus create a lien on said personal property, the creation of a lien in that manner is expressly forbidden by section 10 of the act for the prevention of frauds and perjuries, being § 6638 (4913), *supra*. *Saint Joseph Hydraulic Co. v. Wilson*, 138 Ind. 474. It is clear that the only interest appellants can claim in said nails under said receipts is that of a lien thereon as pledgees. To make a

valid pledge, there must have been either an actual or constructive delivery of the property described in the receipts. Good faith does not make good a pledge unless there has been a delivery and possession, either actual or constructive. The special finding shows that there was no actual delivery when the receipts were executed. There was no delivery unless the delivery of the receipts to appellants was a constructive delivery. If the nail company had been a warehouseman, and authorized to issue said receipts, upon its own property, and they had in all respects conformed to the requirements of our statutes, the delivery thereof, as collateral security to secure said loans, might have been sufficient constructive delivery. But this rule, as we have shown, does not apply to property in the possession of the pledgeor, who is not a warehouseman, and in such case the delivery of the receipts is not a constructive delivery of the property described in the receipts. *Shepardson v. Cary*, 29 Wis. 84; *Geilfuss v. Corrigan*, 95 Wis. 651, 87 L. R. A. 166. The setting apart of the nails described in the receipt to the appellant the Franklin National Bank, just before the appointment of a receiver, was without the knowledge of said bank, and was not a delivery to said bank, nor did said bank then or at any time take or have possession of said nails. As there was no actual or constructive delivery of the nails to appellants, and they never had actual or constructive possession thereof, they had no lien thereon as pledgees. There is no mode under the law of this state, except by chattel mortgage, duly acknowledged and recorded, by which the owner of personal property, retaining its possession, can give another a lien upon it that can be enforced against any person except the parties thereto. *Saint Joseph Hydraulic Co. v. Wilson*, 138 Ind. 474. There having been no delivery of possession, actual or constructive, of said property, said receipts, even if valid as to the nail company and appellants, were void as to third parties, under § 10 of the act for the prevention of frauds and perjuries, being § 6638 (4913), *supra*. It will be observed that under said section an assignment of mortgaged goods as security is only valid as to the parties thereto, and is void as to all other persons, while in many of the other states it is only void as to creditors and purchasers for value without notice. In *Saint Joseph Hydraulic Co. v. Wilson*, 138 Ind. 474, this court, in speaking of equitable and other liens, where there was no delivery and retention of possession of the property upon which the lien was claimed, said: "But in each there is that feature of an assignment of goods" which, "as against any other person than the parties," renders it invalid under our statute, unless acknowledged and recorded. The cases of *Kennedy v. Shaw*, 38 Ind. 474; *Lockwood v. Slevin*, 26 Ind. 124; *Ross v. Menefee*, 125 Ind. 432; *Scarry v. Bennett*, 3 Ind. App. 167; Boone, Mortg. § 258, notes 14, 15,—establish the invalidity of such an assignment of goods, even as to third persons with actual notice of the lien. This court held in *Granger v. Adams*, 90 Ind. 87, "that one who asserts a right under such an instrument paramount to the claims of creditors, must show that all has been

done that the statute requires." Under said section, therefore, an assignment of goods by way of mortgage, if not recorded within ten days after its execution, is void as against a subsequent purchaser, even though he had actual notice thereof. *Ross v. Menefee*, 125 Ind. 482; *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 474, 475; *Stengel v. Boyce*, 143 Ind. 642, 646, and cases cited; *Granger v. Adams*, 90 Ind. 87; *Kennedy v. Shaw*, 88 Ind. 474. Such an assignment of goods is also void as against an assignee under a voluntary assignment for the benefit of creditors, and it is his duty to take advantage of the failure to record the same in ten days after its execution. *Lockwood v. Stevin*, 26 Ind. 125, 128; *Saint Joseph Hydraulic Co. v. Wilson*, 133 Ind. 474; *Haines v. Tiffany*, 25 Ohio St. 549; *Blandy v. Benedict*, 42 Ohio St. 295; *Thorne v. First Nat. Bank*, 37 Ohio St. 254; *Bingham v. Jordan*, 1 Allen, 373, 79 Am. Dec. 748; *Adams v. Merchants' Nat. Bank*, 9 Biss. 396, 403, 2 Fed. Rep. 174; 2 Cobbey, Chat. Mortg. § 619; Jones, Chat. Mortg. § 814, and cases cited. The assignee is regarded as representing and standing in the place of the creditors, as well as the assignor, and he therefore has the right to contest claims and the rights to property which the assignor did not possess. *Lockwood v. Stevin*, 26 Ind. 124; *Voorhees v. Carpenter*, 127 Ind. 800, 301, and cases cited; *Cooper v. Perdue*, 114 Ind. 207; *Seibert v. Milligan*, 110 Ind. 106; *Hasseld v. Seyfort*, 105 Ind. 534; *Adams v. Merchants' Nat. Bank*, 9 Biss. 396. The assignment is made for the benefit of creditors, and the assignee holds the property in trust for them, and as such he can enforce any right and reach any property that a general creditor could enforce either before or after obtaining judgment and execution, in case there had been no assignment. *Lockwood v. Stevin*, 26 Ind. 124; *Kilbourne v. Fay*, 29 Ohio St. 264, 278, 279, 23 Am. Rep. 741; *Hanes v. Tiffany*, 25 Ohio St. 549; *Adams v. Merchants' Nat. Bank*, 9 Biss. 396. It is clear from the language of § 6638 (4913), *supra*, that as such trustee for the creditors he is not a party to any assignment of personal property by way of mortgage made by the assignor, within the meaning of said section. If an unrecorded assignment of goods by way of mortgage is void as against the assignee for the benefit of creditors, for the same reason it is also void as against a receiver of an insolvent corporation. When a court has taken possession of the property of an insolvent corporation for administration, and appointed a receiver, the property of the corporation is a trust fund for the payment of its debts. *First Nat. Bank v. Donetail Body & G. Co.* 143 Ind. 534, 542, 543, and cases cited; *Id.* 143 Ind. 550, 553, 554; *Henderson v. Indiana Trust Co.* 143 Ind. 561; *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120. And a general creditor has a lien upon such property, and therefore has the right to intervene and contest the validity as well as the priority of other claims or asserted liens. *Farmers' Loan*

& T. Co. v. San Diego Street Car. Co. 45 Fed. Rep. 518, 520; *Washburn v. Green* (*Richardson v. Green*), 133 U. S. 30, 44, 38 L. ed. 516, 522; 2 Cook, Stock & Stockholders, § 788, p. 1272, and notes 1 and 2. Such receiver represents the creditors as well as the stockholders, and holds the property for the benefit of both. He is the trustee for both, and, as trustee for the creditors, can maintain and defend actions which the corporation could not. *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 356, and authorities cited; *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120; *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 12 L. R. A. 588; *Farmers' Loan & T. Co. v. Minneapolis Engine & Mach. Works*, 35 Minn. 543, 545; 5 Thomp. Corp. §§ 6945, 6946, 6952; Gluck & B. Receivers, p. 168; Beach, Receivers, Alderson's ed. §§ 298, 455. As trustee representing the creditors of an insolvent corporation, he is not, therefore, a party to an assignment of goods made by the corporation to secure an indebtedness within the meaning of § 6638 (4913), *supra*. As such trustee, representing the creditors, he may avoid an assignment of goods by way of a mortgage made by the corporation, on the ground that it was not recorded within the time required by law. *Farmers' Loan & T. Co. v. Minneapolis Engine & Mach. Works*, 35 Minn. 543; *Rudd v. Robinson*, 54 Hun, 389, 346, 348; *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120; *Hopper v. Lovejoy*, 47 N. J. Eq. 573, 12 L. R. A. 588; Gluck & B. Receivers, p. 168; Beach, Receivers, Alderson's ed. 726; 5 Thomp. Corp. § 6952.

It is clear, therefore, even if said receipts created a lien on said nails as against the nail company, that they were void as to the general creditors and the receiver as trustee for them, and that the general creditors could reach the same through the receiver and by intervening petitions, the same as the general creditors could have done after levying writs of attachment thereon, or after obtaining judgment and execution, if there had been no receivership. Appellees claim that, as the receipts did not state any distinguishing marks, they were invalid. The public warehouse law requires that "all warehouse receipts for property stored in public warehouses of class B shall distinctly state on their face the brand or distinguishing mark on such property." Such receipts must so describe the property that it can be identified by such description from other property of like kind. The private warehouse law contains a like requirement. The view we have taken of this case renders it unnecessary for us to determine whether or not the description of the property contained in the receipts complied with the law. We have read the evidence, and the same sustains the finding of the trial court. It follows from what we have said that the court did not err in its conclusions of law, nor in overruling the motion for a new trial.

Judgment affirmed.

IOWA SUPREME COURT.

James HOLLENBECK, *Appt.*,

v.

P. E. HALL.

(.....Iowa.....)

It is not libelous to publish of a debtor that he pleaded the statute of limitations in an action on the claim, under Code 1873, § 4097, defining libel to be the malicious defamation of a person made public by writing, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; and the publication is not rendered libelous by characterizing such conduct on his part as dishonest.

(October 15, 1897.)

A PPEAL by plaintiff from a judgment of the Superior Court of Cedar Rapids in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Affirmed.*

Statement by Ladd, J.:

The plaintiff alleged in his petition that "on or about the 1st day of June, 1898, the defendant, P. E. Hall, for the purpose of injuring the good name and reputation of the plaintiff herein, and to expose to the public hatred, contempt, and ridicule, and to deprive him of the benefit of public confidence and social intercourse, did publish of and concerning the plaintiff the following false, libelous, and defamatory matter, to wit:

Cedar Rapids, Iowa, Dec. 7, 1892.

P. E. Hall, Pres. C. R. & M. C. Ry. Co., Cedar Rapids, Iowa—Dear Sir: For some years past, one of your old and trusty conductors, Mr. James Hollenbeck, has owed us a bill for professional services rendered his family in the way of consultations with his family physician at his home, in Marlon. His attention has been repeatedly called to the subject but to no purpose. We finally sued him, to which he responds by employing an attorney, and contesting the claim. Having no other defense, he cowardly sinks behind that of statutory limitation. Such a course is not exactly in accordance with our idea of strict integrity. So far as we are concerned, we would prefer not to be connected in an official capacity with a corporation giving employment to men of this character; especially when permitted to occupy positions of trust.

Yours courteously,

H. & J. M. Ristine.

Then follows a denial in detail of the statements contained in the letter, the allegations that it was published by mailing copies to persons named, and that plaintiff has been damaged to the sum of \$5,000, for which amount

judgment is prayed. No special damages are alleged. To this petition the defendant demurred in these words: "(1) No sufficient publication of the alleged libel is shown to render the defendant liable. (2) The alleged letter or publication set out in the petition is not libelous or actionable, even if published." It is not libelous to charge plaintiff with having availed himself of the statute of limitations, and no language is contained in the alleged letter or publication from which injury or damage to the plaintiff can be inferred. The demurrer was sustained, and, the plaintiff electing to stand on the ruling, judgment was entered against him for costs, and he appeals.

Messrs. J. H. Crosby, H. Rickel, and John T. Christie, for appellant:

A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse.

Code 1873, § 4097.

In order to constitute a libel *per se* it is not necessary to charge a person with a crime or offense.

Halley v. Gregg, 74 Iowa, 565. See also *Call v. Larabee*, 60 Iowa, 212; *Allen v. News Publishing Co.* 81 Wis. 120; *Buckstaff v. Viall*, 84 Wis. 129; *Gaither v. Advertiser Co.* 102 Ala. 458; *Ostrom v. Calkins*, 5 Wend. 264; *Mattice v. Wilcox*, 71 Hun. 485; *Cooper v. Stone*, 24 Wend. 434; *Winchell v. Argus Co.* 69 Hun, 354; 18 Am. & Eng. Enc. Law, pp. 300, 303, 306, 307.

To even use opprobrious epithets concerning a person is libelous *per se*.

Crocker v. Hadley, 102 Ind. 416; *Bell v. Stone*, 1 Bos. & P. 381; *Villers v. Monley*, 2 Wils. 408; *Hoare v. Silverlock*, 12 Q. B. 624; *Eaton v. Johns*, 1 Dowl. P. C. N. S. 602; *Cooke v. Hughes*, Ryan & M. 112; *Campbell v. Spottiswoode*, 3 Best & S. 769; *Thorley v. Lord Kerry*, 4 Taunt. 355; *Austin v. Culpeper*, Skinner, 124; *Newell v. How*, 81 Minn. 235; *Cox v. Lee*, L. R. 4 Exch. 284; *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 Hurlst. & N. 87; *Watson v. Trask*, 6 Ohio, 531, 27 Am. Dec. 271; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574; *Jones v. Greeley*, 25 Fla. 629; *Oser v. Hildebrand*, 92 Ind. 19; *McCorkle v. Binns*, 5 Binn. 341, 6 Am. Dec. 420; *Massuere v. Dickens*, 70 Wis. 83; *Pladger v. State*, 77 Ga. 242.

Language contained in a letter which intimates a suspicion of dishonesty is libelous.

Hart v. Reed, 1 B. Mon. 166, 35 Am. Dec. 179; *Robbins v. Treadway*, 2 J. J. Marsh. 540, 19 Am. Dec. 152; *Huse v. Inter-Ocean Pub. Co.* 12 Ill. App. 627.

The words used need not necessarily impute

NOTE.—For defamatory words which import degraded or dishonorable character, see *Smith v. Smith* (Mich.) 3 L. R. A. 52; *Morey v. Morning Journal Assn.* (N. Y.) 9 L. R. A. 622, and note; *Carveny v. Chicago Daily News Co.* (Ill.) 18 L. R. A. 39 L. R. A.

894; *Lewis v. Daily News Co.* (Md.) 29 L. R. A. 58; *Morgan v. Kennedy* (Minn.) 30 L. R. A. 521; and *Peterson v. Western U. Teleg. Co.* (Minn.) 33 L. R. A. 302.

disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous in the estimation of others.

Montgomery v. Knox, 20 Fla. 372; *Watson v. Trask*, 6 Ohio, 531, 27 Am. Dec. 271; *Bradley v. Cramer*, 59 Wis. 309, 48 Am. Rep. 511; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 456.

Any language published of a person that tends to degrade him or to bring him into ill repute, or to destroy the confidence of his neighbors in his integrity, or other like injury, is actionable *per se*.

Montgomery v. Knox, 22 Fla. 575; 18 Am. & Eng. Enc. Law, p. 299, and cases cited in note 6; *Thorley v. Lord Kerry*, 4 Taunt. 355; *Thomas v. Oronnell*, 7 Johns. 264, 5 Am. Dec. 269; *More v. Bennett*, 48 N. Y. 472; *Cooper v. Greeley*, 1 Denio, 362; *Bennett v. Williamson*, 4 Sandf. 60; *Townshend, Slander & Libel*, p. 275, 8d ed. note 2.

As soon as the manuscript passes out of the publisher's possession it is deemed a publication.

Newell, *Defamation, Slander & Libel*, p. 288; *Townshend, Slander & Libel*, 8d ed. § 104.

Messrs. Jamison & Smyth, also for appellant on rehearing:

The mere tendency of the matter charged as libelous to provoke a person to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse is sufficient to constitute libel.

Halley v. Greggs, 74 Iowa, 565; *Call v. Larabee*, 60 Iowa, 212; *Allen v. News Publishing Co.* 81 Wis. 120; *Buckstaff v. Viall*, 84 Wis. 129; *Montgomery v. Knox*, 22 Fla. 575; *Cooper v. Greeley*, 1 Denio, 362.

To charge another with dishonesty or any dishonorable conduct, is libelous *per se*.

Montgomery v. Knox, 22 Fla. 575; 18 Am. & Eng. Enc. Law, p. 299, and cases cited in note 6; *State v. Armstrong*, 106 Mo. 895, 18 L. R. A. 419; *Muetze v. Tuteur*, 77 Wis. 236, 9 L. R. A. 86; *Dennis v. Johnson*, 42 Minn. 301; *Johnson v. Com. (Pa.)* 14 Atl. 425.

To intimate a suspicion of dishonesty is libelous *per se*.

Hart v. Reed, 1 B. Mon. 166, 35 Am. Dec. 179; *Robbins v. Treadway*, 2 J. J. Marsh. 540, 19 Am. Dec. 152; *Huse v. Inter-Ocean Pub. Co.* 12 Ill. App. 527; *Newell v. How*, 31 Minn. 235; *Austin v. Culpeper*, Skinner, 124; *Coz v. Lee*, L. R. 4 Exch. 284.

It would be a strange rule if, under our statute defining libel, a party could, with impunity, publish any opinion he might entertain of another, whether that opinion was justified by the facts or not.

Williams v. Karnes, 4 Humph. 9; *St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 L. R. A. 667; 18 Am. & Eng. Enc. Law, p. 328, note 2; *Townshend, Slander & Libel*, 8d ed. § 484; *Coz v. Lee*, L. R. 4 Exch. 284; *Soloverson v. Peterson*, 64 Wis. 198, 54 Am. Rep. 607.

Mr. Charles A. Clark, for appellee:

There must be "malicious defamation" or there can be no libel, no matter how much the complaining party may think he is exposed to public hatred or contempt or ridicule, or deprived of public confidence or social inter-

course, and no matter how mad he may get over a written or printed utterance.

Words which produce any perceptible injury to the reputation of another are called defamatory, and defamatory words if false are actionable.

Odgers, Libel & Slander, pp. 1, 18.

By defamation is understood a false publication, calculated to bring one into disrepute. *Cooley, Torts*, p. 193.

Epithets applied to the defense do not change it, and do not touch or call into action plaintiff's character or standing.

Kimble v. Kimble, 14 Wash. 369; *McCaleb v. Smith*, 22 Iowa, 243; *Kidd v. Ward*, 91 Iowa, 372; *Barton v. Holmes*, 16 Iowa, 254.

Defamatory sense must be pleaded unless words are clearly actionable *per se*.

Kinyon v. Palmer, 18 Iowa, 377; *Clarke v. Jones*, 49 Iowa, 478; *Webb's Pollock, Torts*, 314; *Tebbett v. Goding*, 9 Gray, 254; *Bullock v. Koon*, 9 Cow. 30; *Wilson v. Fitch*, 41 Cal. 368; *Cooley, Torts*, p. 193.

The mere written accusation of something assumed to be morally dishonest while it accords with the law is not libelous; as that the person, in answer to a suit, set up the statute of limitations, or the prohibitory liquor law.

Bishop, Non-Cont. L. § 283; *Stone v. Cooper*, 2 Denio, 298; *Greville v. Chapman*, 5 Q. B. 731; *Bennett v. Williamson*, 4 Sandf. 60; *Homer v. Engelhardt*, 117 Mass. 539.

To sustain an action for libel the plaintiff must either show special damage, or the nature of the charge must be such that the court can legally presume he has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss either in property, character, or business, or in his domestic or social relations, in consequence of the publication.

Townshend, Slander & Libel, § 176, p. 204; *Cooper v. Stone*, 2 Denio, 209.

It is not libelous to charge one with setting up the statute of limitations as a defense in a lawsuit.

Homer v. Engelhardt, 117 Mass. 540; *Urban v. Helmick*, 15 Wash. 155; *Donaghue v. Gaffy*, 54 Conn. 257, 53 Conn. 43; *Stone v. Cooper*, 2 Denio, 300; *Achorn v. Piper*, 66 Iowa, 695; *Gaither v. Advertiser Co.* 102 Ala. 458; *Hanaw v. Jackson Patriot Co.* 98 Mich. 506; *Hackett v. Providence Telegram Pub. Co.* 18 R. I. 589; *Mitchell v. Sharon*, 15 U. S. App. 853, 59 Fed. Rep. 980, 8 C. C. A. 429; *Gallup v. Belmont*, 41 N. Y. S. R. 283; *Dooling v. Budgett Pub. Co.* 144 Mass. 259, 59 Am. Rep. 83; *Dickson v. Phillips*, 19 Jones & S. 162; *Walker v. Tribune Co.* 29 Fed. Rep. 827; *Trimble v. Anderson*, 79 Ala. 514; *Stewart v. Minnesota Tribune Co.* 40 Minn. 101; *Walker v. Hawley*, 56 Conn. 559; *People v. Jerome*, 1 Mich. 142; *Reg. v. Coghlan*, 4 Fost. & F. 316; *Clay v. Roberts*, 8 L. T. N. S. 397, 9 Jur. N. S. 580; *Lang v. Gilbert*, 8 Allen (N. B.) 445; *Tappan v. Wilson*, 7 Ohio, pt. 1, p. 192.

No publication is shown. It is not enough that the alleged libel was composed to injure or defame the plaintiff, nor that it was maliciously composed. It must be distinctly averred that the publication itself was malicious, or the complaint will be insufficient.

2 Chitty, Pl. 261; *Townshend, Slander &*

Libel, 4th ed. 328; *DeMedina v. Grove*, 10 Jur. 426; Newell, Defamation, Slander, & Libel, 612; *Sylvia v. Miller*, 96 Tenn. 94; *Warnock v. Mitchell*, 43 Fed. Rep. 428; *Fry v. McCord*, 95 Tenn. 678.

If plaintiff by his acts procures the libel to be read or given to his friends or agents, this is no publication.

Irish-American Bank v. Bader, 59 Minn. 329; *Fonville v. M'Nease*, Dud. L. 308, 81 Am. Dec. 556; *Sutton v. Smith*, 13 Mo. 120; *Smith v. Wood*, 8 Campb. 323; *Gordon v. Spencer*, 2 Blackf. 286; *Haynes v. Leland*, 29 Me. 283; *Henry v. Moberly*, 6 Ind. App. 490; *Hunt v. Great Northern R. Co.* [1891] 2 Q. B. 189.

Ladd, J., delivered the opinion of the court:

Conceding the letter to have been published, was it libelous? Our statute defines "libel" to be "the malicious defamation of a person made public by any printing, writing, sign, picture, representation, or effigy tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse." Code 1878, § 4097. "Defamation" is denied by Webster as "the taking from another's reputation." Odgers, in his work on Libel and Slander, p. 1, says: "Words which produce any perceptible injury to the reputation of another are called defamatory." It is "a false publication calculated to bring one in disrepute." Cooley, Torts, p. 198. The derivation of the word leaves no doubt as to its meaning. Was there anything in the letter injurious to the good name of the plaintiff, or tending to bring him into disrepute? It is not dishonorable to be indebted to another, nor is it libelous to publish of another that he owes money. *Reg. v. Coghlan*, 4 Fost. & F. 316. To be in debt is very common, and to be unable to make payment does not necessarily involve moral turpitude. Nor is the debtor's reputation brought in question by making a defense which the law sanctions and which rests on sound reason and long experience. Formerly, pleading the statute of limitations was looked upon with disfavor. Lord Mansfield remarked in *Quantock v. England*, 5 Burr. 2630, that, "in honesty, he [a defendant] ought not to defend himself by such a plea." The statute is now generally conceded to be beneficial, and the defense as legitimate as any other. As said by Justice Story in *Spring v. Gray*, 5 Mason, 523: "The defense, therefore, which it puts forth, is an honorable de-

fense, which does not seek to avoid the payment of just claims and demands, admitted now to be due, but which encounters, in the only practical manner, such as are ancient and unacknowledged; and, whatever may have been their original validity, such as are now beyond the power of the party to meet, with all the proper vouchers and evidence to repel them. The natural presumption certainly is that claims which have been long neglected are unfounded, or, at least, are no longer subsisting demands. And this presumption the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors and guards innocent persons from being betrayed by their ignorance, or their overconfidence in regard to transactions which have become dimmed by age." See 3 Parsons, Contr. 61; *Penley v. Waterhouse*, 3 Iowa, 418. It cannot be libelous to accuse one of doing what the law approves. In *Homer v. Engelhardt*, 117 Mass. 589, it is held that to accuse one of availing himself of the prohibitory liquor law, in order to defeat an indebtedness for liquor sold, is not libelous, the court remarking that, "the plaintiff having the right to make this defense, it is not libelous to publish the statement that he had done so." *Bennett v. Williamson*, 4 Sandf. 60, is precisely in point. Since the law recognizes this defense as legitimate and honorable, to accuse one of making it would not amount to defamation. Bishop, Non-Cont. L. § 288.

2. The entire letter must be considered, and therefrom the plain import and natural meaning as intended, and the sense in which it was understood determined. The alleged facts are clearly stated. There is no mistaking them from the opinions expressed by the writers of the letter. The characterization of the acts is based entirely on the assumption that the conduct of plaintiff in availing himself of the defense was not honest and in accord with their standard of integrity. The spirit and purpose of the letter may well be said to indicate an element of character quite as inconsistent with the golden rule as that which permits omissions in the matter of pecuniary obligations. Such a letter may be the subject of just criticism, but its publication does not expose to public hatred or contempt in the sense or to the degree required by the law of libel. See *Urban v. Helmick*, 15 Wash. 155; *Donaghue v. Gaffy*, 54 Conn. 257.

Affirmed.

Rehearing denied.

OHIO SUPREME COURT.

Bushrod KELCH, *Pff. in Err.*,
v.

STATE of Ohio.

(55 Ohio St. 143.)

*1. Where, in a trial for murder, the accused sets up his insanity as a defense, he is bound to establish it by a preponderance of the

*Headnotes by the COURT.

NOTE—Measure of proof of insanity in criminal cases.

- I. Beyond a reasonable doubt.
- II. To the satisfaction of the jury.
- III. A preponderance of the evidence.
 - a. General rules.
 - b. What constitutes a sufficient preponderance.
- IV. Clearly proved, reasonable certainty, etc.
- V. Reasonable doubt of insanity.
 - a. General rules.
 - b. What constitutes reasonable doubt.
 - c. Submission of the question to the jury.
- VI. Summary.

I. Beyond a reasonable doubt.

Some of the earlier cases seem to have based the measure of proof of insanity as a defense in criminal cases upon the measure of proof of guilt.

Within this rule it was held that the proof of insanity in a criminal prosecution at the time of committing the act ought to be as clear and satisfactory in order to acquit the accused on the ground of insanity as the proof of committing the act ought to be in order to find a sane man guilty. *State v. Spencer*, 21 N. J. L. 197.

And the jury in a criminal prosecution must be fully satisfied that the defense of insanity is made out beyond the reasonable doubt of a well-ordered mind. *State v. Marier*, 2 Ala. 43, 36 Am. Dec. 398, Collier, Ch. J., dissenting and expressing the opinion that insanity must be established by a preponderance of proof; *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 490; *People v. McCann*, 3 Park. Crim. Rep. 272, Reversed in 16 N. Y. 53, 69 Am. Dec. 642; *State v. Johnson*, Cited in 88 N. C. 611.

It is incumbent upon the state in a criminal prosecution to make out the prisoner's guilt beyond all reasonable doubt, and where the act is incontestably proved, and insanity is relied upon as an excuse, the case is reversed, and the prisoner is bound to make out by testimony beyond all reasonable doubt that he was insane at the time. *State v. Brinyea*, 5 Ala. 241; *Sellick's Case*, 1 N. Y. City Hall Rec. 186; *State v. Johnson*, 40 Conn. 186.

And where it is admitted, or clearly proved, that the accused in a criminal prosecution committed the act, but it was insisted that he was insane at the time, and the evidence leaves the question of insanity in doubt, the presumption of sanity turns the scale, and the prisoner should be held responsible. *State v. Spencer*, 21 N. J. L. 197; *Sellick's Case*, 1 N. Y. City Hall Rec. 185.

So, an allegation of insanity as a defense in a prosecution for murder admits the act of killing, and is to be proved by the accused to the satisfaction of the jury beyond a reasonable doubt. *State v. West*, *Houst. Crim. Rep. (Del.)* 371.

Insanity interposed as a defense in a criminal prosecution must be proved as any other fact to the satisfaction of the jury, and if the proof of insanity does not arise out of the evidence offered by the state, the accused must establish the fact of insanity by distinct evidence, and prove it beyond a reasonable doubt, otherwise the presumption of

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evidence, but should be held to no higher degree of proof.

2. The proof should be deemed to preponderate in favor of this, as of any other, disputed fact, whenever its existence is made probable upon a full and fair consideration of all the evidence adduced for and against it.

3. An instruction given to the jury in such case, to the effect that the evidence introduced to establish insanity is not "sufficient" if it merely show it to have been probable. The

sanity remains unrebutted. *State v. Pratt*, *Houst. Crim. Rep. (Del.)* 249.

As will be seen by reference to the subsequent sections of this note, however, all the preceding cases must be regarded as overruled.

In Louisiana, however, the rule requiring proof of insanity beyond a reasonable doubt appears to have been retained, at least until a recent date.

Thus, a special plea of temporary insanity as a defense in a criminal prosecution must be proved by the prosecution beyond a reasonable doubt. *State v. DeRance*, 84 La. Ann. 186, 44 Am. Rep. 428.

And where insanity is set up in a criminal action in avoidance of a penalty prescribed by law, the burden of proving it rests with the accused, and he must make out his case by proof which satisfies the minds of the jury beyond a reasonable doubt that he was insane at the time of the commission of the act. *State v. Clements*, 47 La. Ann. 1088; *State v. Coleman*, 27 La. Ann. 691; *State v. Burns*, 25 La. Ann. 302.

In *State v. Scott*, 49 La. Ann. 252, 86 L. R. A. 721, however, the court refused to follow the previous Louisiana decisions on the subject, and held that insanity must be established to the satisfaction of the jury by clear and convincing proof, and that they should consider all the testimony before them, whether produced by the accused or the state, and give due weight to the presumption of sanity; if, on the whole testimony, and giving to such presumption its full operation, they are satisfied that the accused was insane when the act was committed, they should acquit, but if not thus satisfied they should deem him sane and responsible.

So, where insanity is interposed as a defense in a prosecution for crime the accused is required, under Hill's (Or.) Code 1338, to establish the fact beyond a reasonable doubt. *State v. Hansen*, 25 Or. 391.

And the finding of a jury in a criminal prosecution, in which insanity is interposed as a defense on the question of sanity, cannot, under that statute, be disturbed on appeal. *State v. Hansen*, 25 Or. 391.

But insanity, to operate as a defense in a criminal prosecution, must consist of a diseased state of the mind which is so excessive as to overwhelm the reason, conscience, and judgment, and must be proved beyond a reasonable doubt. *State v. Murray*, 11 Or. 418.

II. To the satisfaction of the jury.

By many of the cases the plea of insanity in a prosecution for crime is regarded as one of confession and avoidance. *State v. Lewis*, 136 Mo. 84; *State v. Wright*, 134 Mo. 404.

Which must be established by the accused to the satisfaction of the jury. *People v. McDonell*, 47 Cal. 184; *State v. Danby*, *Houst. Crim. Rep. (Del.)* 166; *State v. Harrigan*, 9 *Houst. (Del.)* 369; *State v. Hurley*, *Houst. Crim. Rep. (Del.)* 23; *Beck v. State*, 76 Ga. 452; *Holsenbake v. State*, 45 Ga. 55; *Fisher v. People*, 23 Ill. 233; *People v. Walter*, 1 Idaho, 386; *State v. Bruce*, 48 Iowa, 533, 30 Am. Rep. 403; *State v. Felter*, 32 Iowa, 49; *Graham v. Com.*

proof must be such as to overcome the legal presumption of sanity; it must satisfy you he is insane,"—requires of the defendant more than a preponderance of the evidence to maintain this defense, and is therefore erroneous.

(Minshall, J., dissents.)

(October 20, 1896.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a

16 B. Mon. 587; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; State v. Gut, 13 Minn. 343; Baldwin v. State, 12 Mo. 227; State v. Huting, 21 Mo. 464; State v. McCoy, 34 Mo. 531, 86 Am. Dec. 121; State v. Hundley, 46 Mo. 414; State v. Schaefer, 116 Mo. 96; Geny v. State, 58 N. J. L. 482; State v. Vann, 82 N. C. 631; State v. Payne, 86 N. C. 609; State v. Haywood, 61 N. C. (Phill. L.) 376; Loeffner v. State, 10 Ohio St. 599; Com. v. Sayres, 12 Phila. 553, 88 Pa. 291; Ortwein v. Com. 76 Pa. 414, 18 Am. Rep. 420; State v. Stark, 1 Strobb. L. 479; Clark v. State, 8 Tex. App. 350; King v. State, 9 Tex. App. 515; Smith v. State, 22 Tex. App. 316; Glebel v. State, 28 Tex. App. 151; Leache v. State, 22 Tex. App. 279; Dejarrette v. Com. 75 Va. 867; State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606; State v. Douglass, 20 W. Va. 713, 43 Am. Rep. 799; State v. Robinson, 28 W. Va. 297; Boswell v. Com. 20 Gratt. 800; Baccigalupo v. Com. 38 Gratt. 807, 36 Am. Rep. 795; United States v. McGlue, 1 Curt. C. C. 1; Reg. v. Layton, 4 Cox, C. C. 149; M'Naghten's Case, 10 Clark & F. 200, 8 Scott N. R. 595, 1 Car. & K. 130; Reg. v. Stokes, 3 Car. & K. 185; Rex v. Offord, 5 Car. & P. 168.

Or by evidence which satisfies the jury. Beck v. State, 76 Ga. 452; State v. Geddis, 42 Iowa, 268; Kriel v. Com. 5 Bush, 363; Graham v. Com. 16 B. Mon. 587; Com. v. Heath, 11 Gray, 303; State v. Smith, 58 Mo. 267; People v. Pine, 2 Barb. 566; State v. Brandon, 53 N. C. (8 Jones, L.) 463; State v. Davis, 109 N. C. 780; Lynch v. Com. 77 Pa. 205; Com. v. Bezek, 188 Pa. 603; Com. v. Lynch, 3 Pittsb. 412; Lynch v. Com. 77 Pa. 205; Johnson v. State, 10 Tex. App. 571; Dejarrette v. Com. 75 Va. 867; Baccigalupo v. Com. 38 Gratt. 807, 36 Am. Rep. 795; United States v. McGlue, 1 Curt. C. C. 1.

Or to the reasonable satisfaction of the jury. Choice v. State, 31 Ga. 424; State v. Bruce, 43 Iowa, 530, 30 Am. Rep. 403; State v. Duestrow, 137 Mo. 44, 91; State v. Pagels, 92 Mo. 300; State v. Redemeyer, 71 Mo. 173, 36 Am. Rep. 462; State v. Smith, 53 Mo. 287; State v. Wright, 134 Mo. 404; State v. Lewis, 36 Mo. 84; Williams v. State, 37 Tex. Crim. Rep. —, 39 S. W. 637.

The jury must be satisfied from all the evidence, not only of the doing of the act which constitutes the crime, but that it proceeded from a responsible agent capable of committing the offense. Com. v. Heath, 11 Gray, 303.

And the question for the jury is not whether the person was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind. Reg. v. Layton, 4 Cox, C. C. 149; M'Naghten's Case, 10 Clark & F. 200.

And he must prove to the satisfaction of the jury that he was in such a state of mental weakness or disease that he did not know the nature or quality of his act, and that it was wrong. State v. Payne, 86 N. C. 609; Rex v. Offord, 5 Car. & P. 168; Reg. v. Higginson, 4 Car. & K. 129; Reg. v. Townley, 3 Fost. & F. 839.

He must clear himself by satisfying the jury that he was incapable of perceiving the criminality of the act. People v. Pine, 2 Barb. 566.

And it is not medical, but legal, insanity which is required to be proved to the satisfaction of the jury, to excuse from criminal responsibility. Leache v. State, 22 Tex. App. 279, 58 Am. Rep. 638, 39 L. R. A.

judgment of the Court of Common Pleas convicting defendant of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. Foran & Dawley for plaintiff in error.

Mr. F. L. Strimple for the State.

Bradbury, J., delivered the opinion of the court:

The plaintiff in error, Bushrod Kelch, in December, 1895, was indicted in the county of

The presumption of sanity will of itself sustain the burden of proof resting upon the state in a criminal case so far as the issue of sanity is involved, until it is rebutted and overcome by satisfactory evidence to the contrary. King v. State, 9 Tex. App. 515; Kriel v. Com. 5 Bush, 363.

Insanity is an unusual, unnatural, and exceptional condition, and its existence should not be found except upon proof of a reliable character which satisfies the mind of the jury. State v. Geddis, 42 Iowa, 268.

And the evidence must be satisfactory, not merely doubtful. Ortwein v. Com. 76 Pa. 414, 18 Am. Rep. 420.

It must satisfy the minds and consciences of the jury. Johnson v. State, 10 Tex. App. 571.

Where the claim of insanity set up as a defense in a criminal action is unusual, unnatural, and out of the ordinary course of affairs, the jury is not required to take the same for granted upon slight evidence, and should not find its existence except on evidence of a reliable character which satisfies them that the defense has been made out. State v. Hockett, 70 Iowa, 442.

And a mere reasonable doubt upon the part of the jury as to the sanity of the accused in a criminal prosecution does not entitle him to an acquittal. State v. Erb, 74 Mo. 199; State v. Johnson, 91 Mo. 439; State v. McCoy, 34 Mo. 531, 86 Am. Dec. 121; State v. Huting, 21 Mo. 464; Baldwin v. State, 12 Mo. 223; State v. Hanley, 34 Minn. 420; Bonfanti v. State, 2 Minn. 122; Lynch v. Com. 77 Pa. 205; Ortwein v. Com. 76 Pa. 414, 18 Am. Rep. 420; Com. v. Lynch, 3 Pittsb. 412; Baccigalupo v. Com. 38 Gratt. 807, 36 Am. Rep. 795; Boswell v. Com. 20 Gratt. 800; Dejarrette v. Com. 75 Va. 867; State v. Douglass, 20 W. Va. 297; State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606; People v. Barthleman (Cal.) 52 Pac. 112.

So, a jury cannot find the fact of insanity specially under Pa. Crim. Code March, 1880, § 66, requiring them upon acquitting a person accused of crime, to find specially whether he was insane at the time of the commission of the offense, and to declare whether the acquittal was on the ground of insanity, unless they are satisfied of it by the evidence, a reasonable doubt of the fact of insanity not being a true basis of the finding. Ortwein v. Com. 76 Pa. 414, 18 Am. Rep. 420.

But in passing upon the question they are to look to the whole evidence in the case, as well that for the state as for the prisoner. State v. Strauder, 11 W. Va. 745, 27 Am. Rep. 606; Com. v. Heath, 11 Gray, 303; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 458; Kriel v. Com. 5 Bush, 363.

And a person accused of crime is not to be acquitted upon the ground of insanity unless upon the whole evidence the jury are satisfied that he was insane at the time. United States v. McGlue, 1 Curt. C. C. 1.

Insanity is a simple question of fact to be proved like any other fact, however, and any evidence which reasonably satisfies the jury that the accused was insane at the time of the commission of the act is sufficient. State v. Hundley, 46 Mo. 414; State v. Pagels, 92 Mo. 300; State v. Smith, 53 Mo. 287; State v. Bruce, 43 Iowa, 530, 30 Am. Rep. 403.

Cuyaboga for murder in the first degree for killing a woman who had been his wife, but who, shortly before the homicide, had procured a divorce from him. In February, 1896, he was placed on trial in the court of common pleas in said county for such offense, and in March following was convicted of murder in the first degree, and adjudged to suffer death. Upon proceeding in error, this judgment was affirmed by the circuit court, whereupon the cause was brought to this court for review.

Positive and direct proof of insanity is not necessary. *State v. Pagels*, 92 Mo. 300.

It is the duty of the jury in a prosecution for homicide to acquit where insanity is proved by the evidence to their reasonable satisfaction. *State v. Wright*, 184 Mo. 404.

And if upon the whole evidence they believe he was insane when he committed the act they should acquit. *Dejarnette v. Com.* 75 Va. 867; *Boswell v. Com.* 20 Gratt. 660; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

Insanity interposed as a defense in a prosecution for homicide need not be established by the evidence beyond a reasonable doubt. *State v. Wright*, 184 Mo. 404; *Gunter v. State*, 83 Ala. 96; *Ford v. State*, 71 Ala. 385; *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *Danforth v. State*, 75 Ga. 614; *State v. Bruce*, 48 Iowa, 533, 30 Am. Rep. 403; *State v. Felter*, 32 Iowa, 53; *Kriel v. Com.* 5 Bush, 363; *State v. Duestrow*, 137 Mo. 44; *State v. Hundley*, 46 Mo. 414; *Genz v. State*, 58 N. J. L. 482; *State v. Davis*, 109 N. C. 780; *State v. Potts*, 100 N. C. 457; *Pannell v. Com.* 86 Pa. 200; *Williams v. State*, 37 Tex. Crim. Rep. —, 39 S. W. 687; *Burt v. State* (Tex. Crim. App.) 39 L. R. A. 305; *Boswell v. Com.* 20 Gratt. 660; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799; *Dove v. State*, 3 Heisk. 348.

So, mania a potu is the secondary effect of intemperance and a species of insanity, and a defense in a criminal prosecution when proved to the satisfaction of the jury. *State v. Hurley*, *Houst. Crim. Rep.* (Del.) 23.

And an instruction in a prosecution for homicide that a man is presumed to be sane until the contrary is shown to the satisfaction of the jury, accompanied by a subsequent statement that the burden of proof of insanity rests with the defendant, is not objectionable as making the presumption of sanity and the burden of proof of insanity too prominent. *Massengale v. State*, 24 Tex. App. 181.

III. A preponderance of the evidence.

a. General rules.

A large number of the cases regard insanity as an independent and affirmative defense in a criminal prosecution. *Com. v. Bezek*, 183 Pa. 603; *State v. Lewis*, 20 Nev. 333.

And hold with the principal case, that a person accused of crime who interposes insanity as a defense must prove it by a preponderance of the evidence. *Ford v. State*, 71 Ala. 385; *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 138; *Gunter v. State*, 83 Ala. 96; *Maxwell v. State*, 89 Ala. 150; *Coates v. State*, 50 Ark. 330; *Williams v. State*, 50 Ark. 517; *Casat v. State*, 40 Ark. 511; *People v. Allender*, 117 Cal. 81; *People v. Bemmerly*, 98 Cal. 399; *People v. Myers*, 20 Cal. 518; *People v. Bell*, 49 Cal. 485; *People v. Wilson*, 49 Cal. 13; *People v. Messersmith*, 61 Cal. 246; *People v. Travers*, 88 Cal. 233; *People v. Bawden*, 90 Cal. 195; *People v. McNulty*, 98 Cal. 427; *People v. Ward*, 105 Cal. 335; *Keener v. State*, 97 Ga. 388; *Carr v. State*, 96 Ga. 234; *State v. Larkins* (Idaho) 47 Pac. 945; *State v. Felter*, 32 Iowa, 53; *State v. Trout*, 74 Iowa, 545; *Moore v. Com.* 92 Ky. 630; *Graham v. Com.* 16 B. Mon. 587; *Ball v. Com.* 61 Ky. 662; *Cot-*
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That the plaintiff in error shot and killed the deceased was not denied or contested upon the trial; the chief contention being over the mental condition of the accused at the time the homicide was committed. Counsel for him contended: First, that the evidence of the state did not sufficiently establish deliberation or premeditation; and, second, that his evidence was sufficient to show insanity, superinduced by the excessive use of alcoholic stimulants. The question of the burden of proof,

rell v. Com. 13 Ky. L. Rep. 305; *Phelps v. Com.* 17 Ky. L. Rep. 706; *State v. Burns*, 25 La. Ann. 302; *State v. Lawrence*, 57 Me. 574; *Com. v. Eddy*, 7 Gray, 583; *State v. Bell*, 136 Mo. 120; *State v. McCoy*, 34 Mo. 531, 83 Am. Dec. 123; *Graves v. State*, 45 N. J. L. 203 and 347, 46 Am. Rep. 773; *State v. Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 45; *State v. Lewis*, 20 Nev. 333; *Bond v. State*, 23 Ohio St. 349; *Bergin v. State*, 31 Ohio St. 111; *State v. O'Grady*, 3 Ohio Legal News, 137; *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397; *Brown v. Com.* 78 Pa. 122; *Com. v. Bezek*, 183 Pa. 603; *State v. Paulk*, 18 S. C. 514; *State v. Bundy*, 24 S. C. 439, 58 Am. Rep. 262; *Riley v. State* (Tex. Crim. App.) 44 S. W. 498; *Lovegrove v. State*, 81 Tex. Crim. Rep. 491; *Boren v. State*, 32 Tex. Crim. Rep. 637; *Fisher v. State*, 30 Tex. App. 502; *Jones v. State*, 13 Tex. App. 1; *People v. Tidwell*, 4 Utah, 506; *State v. Lewis*, 20 Nev. 333; *People v. Dillon*, 8 Utah, 92.

And that the accused must establish by a preponderance of proof, not only the fact of insanity, but insanity of such a character as will amount in law to a defense. *People v. Bell*, 49 Cal. 485.

Within this rule one who relies upon insanity as a defense for the commission of a criminal act must prove by a preponderance of evidence that at the time of the commission of the crime his mind was so far affected with insanity as to render him incapable of distinguishing between right and wrong with respect to the act with which he is charged, or, if he were conscious and knew its consequences, that in consequence of his insanity he was wrought up to a frenzy which rendered him unable to control his actions or direct his movements. *Williams v. State*, 50 Ark. 517.

The presumption of law that all men are of sound mind sustains the burden of proof resting upon the prosecution in a criminal action until rebutted and overcome by a preponderance of the whole evidence. *Com. v. Eddy*, 7 Gray, 583; *State v. Lewis*, 20 Nev. 333.

And the rule requiring proof of the commission of a criminal act beyond a reasonable doubt does not apply to questions of insanity; on that question it is for him who alleges it to prove it in the same manner as other material allegations are proved. *State v. Starling*, 51 N. C. (6 Jones, L.) 266; *People v. Ward*, 105 Cal. 335; *State v. Hurley*, *Houst. Crim. Rep.* (Del.) 23.

Where the person accused of crime relies upon any substantive, distinct, separate, and independent matter as a defense which is outside of and does not necessarily constitute a part of the act or transaction with which he is charged, such as the defense of insanity, it devolves upon him to establish such special and foreign matter by a preponderance of the evidence. *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638; *Jones v. State*, 13 Tex. App. 1.

And it is not sufficient to merely raise a reasonable doubt as to his sanity. *State v. Bell*, 136 Mo. 120; *State v. Lewis*, 20 Nev. 333; *Graves v. State*, 45 N. J. L. 347, 46 Am. Rep. 773.

A reasonable doubt as to the prisoner's sanity, raised by all the evidence, does not authorize an acquittal. *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 138; *Maxwell v. State*, 89 Ala. 150; *Ford v.*

where insanity is set up as a defense in criminal causes, has been fruitful of discussion, and has occupied the attention of the ablest criminal jurists of this country and of England. The contention has not so much concerned the degree of proof as upon whom the burden rested. Some authorities entitled to great consideration have steadily held that this burden rested upon the state; that, while the presumption of sanity was sufficient to support this burden where the evidence did not suggest mental alienation, yet, if the defense was made, the state was bound to establish sanity

beyond a reasonable doubt. This view was founded upon the obligation which rests upon the state to establish beyond a reasonable doubt every fact necessary to create in the defendant criminal liability. Criminal intent being one of such facts, it was included within the general obligation above stated; and to establish this criminal intent a mental condition capable of entertaining it must be established. This course of reasoning would render immaterial the question whether the doubt of sanity arose upon the evidence of the state, or of the defendant, or upon that of both the state and the de-

State, 71 Ala. 385; Boswell v. State, 63 Ala. 307, 36 Am. Rep. 20; People v. Myers, 20 Cal. 518; People v. Barthleman (Cal.) 52 Pac. 112; People v. Bawden, 90 Cal. 195; Kriel v. Com. 5 Bush, 363; State v. Starling, 51 N. C. (6 Jones, L.) 366.

And this is the rule whether the reasonable doubt arises as to the fact of insanity or as to the actual connection between it and the criminal act. Gunter v. State, 59 Ala. 98.

And evidence tending to rebut the presumption of sanity in a criminal prosecution sufficient to raise a reasonable doubt upon the issue of sanity does not shift the burden of proof to the state to show beyond a reasonable doubt that the accused was sane at the time the alleged offense was committed. Cavanaugh v. State, 43 Ark. 331.

And refusal to instruct that if the evidence points to two conclusions, one consistent with the defendant's guilt and the other consistent with his innocence, the jury is bound to adopt the one of innocence and acquit him, is not error where the only defense is insanity. People v. Barthleman (Cal.) 52 Pac. 112.

And an instruction that if one set or chain of circumstances leads to two opposing conclusions, one pointing to guilt and the other to innocence, and the jury have any reasonable doubt as to which of such conclusions the chain of circumstances leads to, a reasonable doubt is thereby created and the defendant must be acquitted, is erroneous where the sole defense is insanity, as a reasonable doubt as to insanity is not sufficient to make out that defense, and the expression of a doubt about two opposing conclusions, to both of which a chain leads, is confusing. People v. Barthleman (Cal.) 52 Pac. 112.

After the state has made out her case in a prosecution for crime with the legal presumption of sanity on her behalf, however, it can be overcome by a preponderance of the evidence in the prisoner's behalf. Kriel v. Com. 5 Bush, 363.

And a conviction for murder by a grandmother of her three-year-old grandson will be set aside on appeal where the great preponderance of the testimony clearly shows insanity to have existed at the time. Newberry v. State, 22 Tex. Crim. Rep. 145.

So the evidence to overcome the presumption of sanity and responsibility in a criminal case may come as well from the witnesses for the government as from the witnesses for the defense. Com. v. Heath, 11 Gray, 308.

And the presumption of sanity in a criminal prosecution is overcome, and the burden of proof of insanity resting with the defendant, is satisfied by a mere preponderance of the evidence. State v. Larkins (Idaho) 47 Pac. 945; People v. Messersmith, 57 Cal. 573; State v. Jones, 64 Iowa, 356; Phelps v. Com. 17 Ky. L. Rep. 706; Ball v. Com. 81 Ky. 662; Com. v. Rogers, 7 Met. 500, 41 Am. Dec. 456; State v. Wright, 134 Mo. 404; State v. Williamson, 106 Mo. 162; State v. Hundley, 46 Mo. 414; State v. Klinger, 43 Mo. 127; State v. McCoy, 34 Mo. 531, 86 Am. Dec. 121; Cottell v. State, 12 Ohio C. C. 467; Bond v. State, 23 Ohio St. 349; Loeffner v. State, 10 89 L. R. A.

Ohio St. 590; Sharkey v. State, 4 Ohio C. C. 101; Pannell v. Com. 86 Pa. 260; Meyers v. Com. 88 Pa. 131; State v. Alexander, 30 S. C. 74.

Where a preponderance of the testimony shows the insanity of the accused in a criminal prosecution it raises a reasonable doubt of guilt. State v. Bruce, 48 Iowa, 533, 30 Am. Rep. 408.

And the accused is entitled to an acquittal if from the evidence it seems probable that he was insane. State v. Jones, 64 Iowa, 356. But see Sharkey v. State, 4 Ohio C. C. 101, *infra*, II.

Insanity is not required to be proved beyond a reasonable doubt. People v. Coffman, 24 Cal. 230; People v. Wilson, 49 Cal. 13; State v. Larkins (Idaho) 47 Pac. 945; Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480; Ball v. Com. 81 Ky. 662; State v. Wright, 134 Mo. 404; State v. Hundley, 46 Mo. 414; State v. Klinger, 43 Mo. 127; Graves v. State, 45 N. J. L. 203; Cottell v. State, 12 Ohio C. C. 467; Loeffner v. State, 10 Ohio St. 590; Pannell v. Com. 86 Pa. 260; Meyers v. Com. 88 Pa. 141; Com. v. Werling, 164 Pa. 559; State v. Alexander, 30 S. C. 74.

Though, unless there is a preponderance of evidence in favor of the insanity of the defendant in a criminal action, the jury will not be authorized to acquit him of the offense charged on that ground. Carter v. State, 56 Ga. 463; Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480.

So, the burden of proof in an inquiry as to the present sanity or insanity of a person accused of crime rests with him to show by a preponderance of the proof that he is insane. State v. O'Grady, 3 Ohio Legal News, 137.

b. What constitutes a sufficient preponderance.

The preponderance of proof required to establish insanity in a criminal action is one which can be perceived upon a fair consideration of the evidence. State v. Grear, 29 Minn. 221; Meyers v. Com. 88 Pa. 141.

It is not a preponderance in point of number of witnesses, but a preponderance of facts and circumstances, which are convincing to the minds of the jury. People v. Barberi, 47 N. Y. Supp. 163.

It consists of the greater weight of credible evidence in the case. State v. Trout, 74 Iowa, 545. And see principal case.

And before a recovery can be had in an action to set aside a contract because of the incapacity of one of the parties thereto the plaintiff's evidence must outweigh that of the defendant, and an instruction to find for the defendant if the evidence is equiponderant is not erroneous. Wall v. Hill, 1 B. Mon. 290, 36 Am. Dec. 578.

As the accused in a criminal prosecution is presumed to be sane, there must be sufficient evidence to overturn such presumption, to operate as a defense. Moore v. Com. 92 Ky. 630.

The evidence of insanity must outweigh and overcome the presumption of sanity, and the evidence in favor of sanity, in some appreciable degree. State v. Lewis, 20 Nev. 383.

Sufficient proof must be shown to overcome, in the first place, the presumption of sanity, and then any other proof that may be offered by a pre-

pendant; the doubt, however arising, being available by the defendant. This view of the question finds support in numerous well-considered cases, among which may be cited: *Hoppe v. People*, 81 Ill. 385, 88 Am. Dec. 281; *Chase v. People*, 40 Ill. 852; *State v. Crawford*, 11 Kan. 82; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 860; *Bradley v. State*, 31 Ind. 492; *McDougal v. State*, 88 Ind. 24; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Wright v. People*, 4 Neb. 407; *Ballard v. State*, 19 Neb. 609; *State v. Pike*, 49 N. H. 399, 6

Am. Rep. 538; *State v. Bartlett*, 48 N. H. 224, 80 Am. Dec. 154; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Dove v. State*, 8 Heisk. 848; *State v. Patterson*, 45 Vt. 808, 12 Am. Rep. 200.

The logical consistency of this view of the question is its chief support. In the practical administration of criminal law, however, experience has found much to commend in that opposite view which treats the defense of insanity as independent and affirmative, and

ponderance of evidence. *State v. Bundy*, 24 S. C. 499, 58 Am. Rep. 263.

The legal presumption is in favor of sanity, and one who does not deny the commission of the criminal act, but pleads insanity as an excuse, takes the burden of proof, and if he fails to produce evidence to change the presumption raised against him by the fact of the killing, the penalty of the law should be adjudged against him. *McKenzie v. State*, 26 Ark. 334.

To establish insanity as a defense in a criminal prosecution, it must be proved affirmatively that the accused was insane, and if it be left in doubt, and the crime charged be proved, it is the duty of the jury to convict. *Reg. v. Stokes*, 8 Car. & K. 185.

And the court, in a prosecution for homicide in which insanity is interposed as a defense, will not assume that the testimony of the defense showing epilepsy is not contradicted, and instruct the jury that this fact of itself should be sufficient to raise a doubt as to the prisoner's criminal responsibility. where, from the evidence, it was contended that he had not been afflicted with epileptic attacks for months, perhaps years, before the crime, and that the light character of the disease had but little, if any, effect on his mental condition. *Com. v. Bucieri*, 153 Pa. 585.

It is sufficient to establish insanity as a defense to crime, however, if the evidence be such as would justify a jury in a civil case in finding a defendant insane if the single issue sane or insane were submitted to them. *People v. Hamilton*, 62 Cal. 377; *People v. Messersmith*, 61 Cal. 246; *People v. Wilson*, 49 Cal. 13; *People v. McDowell*, 47 Cal. 134; *People v. Coffman*, 24 Cal. 230; *Com. v. Gerade*, 145 Pa. 289.

It is for him who alleges insanity to prove it as other material allegations are proved. *State v. Starling*, 51 N. C. (6 Jones, L.) 366.

And it has been held that a bare preponderance of testimony is all that is necessary to rebut the presumption of sanity in a prosecution for crime. *Bond v. State*, 23 Ohio St. 349.

But a mere probability of insanity is not sufficient. *Sharkey v. State*, 4 Ohio C. C. 101.

And some of the cases have qualified the rule by requiring fairly preponderating evidence of insanity. *Com. v. Bezek*, 168 Pa. 608; *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397; *Pannell v. Com.* 86 Pa. 260.

And a satisfactory preponderance has been required. *State v. Felter*, 32 Iowa, 53.

And also a clear preponderance. *State v. Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *Graves v. State*, 45 N. J. L. 203; *Farrer v. State*, 2 Ohio St. 70.

So, some of the cases have held that insanity must be established to the satisfaction of the jury by a preponderance of proof. *Gunter v. State*, 83 Ala. 96; *Ford v. State*, 71 Ala. 385; *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *People v. Messersmith*, 57 Cal. 575; *State v. Lewis*, 20 Nev. 833; *Com. v. Eddy*, 7 Gray, 533; *State v. Burns*, 25 La. Ann. 302; *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397.

And by the weight and preponderance of the evidence. *State v. Smith*, 53 Mo. 267.

And that it is sufficient if the jury is reasonably

satisfied by the weight or preponderance of the testimony. *State v. Wright*, 134 Mo. 404; *State v. Hundley*, 46 Mo. 414; *State v. Klinger*, 48 Mo. 127; *Loeffner v. State*, 10 Ohio St. 598; *Cottell v. State*, 12 Ohio C. C. 469.

Or if the proof of insanity preponderates and satisfies the jury. *State v. Williamson*, 106 Mo. 162; *Pannell v. Com.* 86 Pa. 260.

And a number of Pennsylvania cases have held that mental incapacity in a criminal prosecution is to be established by the weight of the evidence. *Com. v. Woodley*, 166 Pa. 463; *Com. v. Wering*, 164 Pa. 559.

And that a person accused of crime is entitled to the benefit of a reasonable doubt as to his guilt, and such reasonable doubt never shifts; but where he sets up a substantive defense admitting indirectly the commission of the act charged against him, he is required to establish that defense by the weight of evidence. *Com. v. Gentry*, 5 Pa. Dist. R. 708.

And that an instruction in a criminal prosecution that the accused should be held responsible for his acts until the fact is positively proved that he is not responsible is objectionable as requiring too high a measure of proof, but is not reversible error where it is followed by a statement that the jury should be satisfied,—not clearly, but by the weight of the evidence simply, because the accused is not bound to prove irresponsibility except by the weight of evidence,—a fair preponderance of evidence. *Com. v. Woodley*, 166 Pa. 463.

But, upon the other hand, it has been held that an instruction in a prosecution for crime requiring proof of insanity by clear, preponderating evidence, instead of fairly preponderating evidence, is reversible error. *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397.

And that an instruction in a prosecution for homicide that insanity must be clearly proved, is objectionable as imposing too great a burden upon the defendant; it need only be proved by fairly preponderating evidence such as is ordinarily required to prove a fact in civil issues. *Com. v. Gerade*, 145 Pa. 289.

And that error in instructing that insanity must be clearly proved is not remedied by a subsequent instruction that it must be proved by a preponderance of the evidence, as it cannot be determined which of the two measures the jury adopted. *Com. v. Gerade*, 145 Pa. 289.

And that an instruction in a criminal action that insanity as a defense should be shown to the satisfaction of the jury by a clear preponderance of the testimony is objectionable in the use of the word "clear" as tending to lead the jury to believe that something more than a preponderance or what would reasonably satisfy them was necessary. *State v. Hundley*, 46 Mo. 414.

An instruction in a criminal prosecution that insanity as a defense must be clearly proved, however, has been held not to be error, as a preponderance of the evidence is sufficient to constitute clear proof. *Smith v. State*, 19 Tex. App. 95.

And an instruction that insanity must be clearly

which, consequently, casts upon the accused who asserts it the burden of sustaining it by evidence sufficient to overcome the natural presumption of sanity. Among the cases that sustain this side of the contention may be cited: *State v. Jones*, 84 Iowa, 349; *Ford v. State*, 71 Ala. 885; *State v. Lawrence*, 57 Me. 574; *Com. v. Eddy*, 7 Gray, 588; *McKenzie v. State*, 26 Ark. 834; *Cavaness v. State*, 43 Ark. 831; *People v. Bell*, 49 Cal. 485; *Dejarnette v. Com.* 75 Va. 867; *Webb v. State*, 9 Tex. App. 490; *King v. State*, 9 Tex. App. 515; *Coyle v. Com.* 100 Pa. 578, 45 Am. Rep. 397; *Lynch v. Com.* 77

Pa. 205; *State v. Redemeier*, 71 Mo. 178, 86 Am. Rep. 462; *State v. Gut*, 13 Minn. 841 (Gil. 315); *State v. McCoy*, 84 Mo. 581, 86 Am. Dec. 121. This doctrine has prevailed in Ohio from an early period in its judicial annals. *Clark v. State*, 12 Ohio, 483; *Bond v. State*, 23 Ohio St. 849; *Bergin v. State*, 81 Ohio St. 111; *Loeffner v. State*, 10 Ohio St. 598.

This being the established doctrine of this state the burden of proving his insanity rested on the plaintiff in error. If this burden should be sustained, the law exonerates him from criminal responsibility for his act. It is apparent, there

established is not objectionable as requiring that the evidence must more than predominate, as it only requires that the preponderance must be plainly apparent. *People v. Hamilton*, 62 Cal. 377, Overruling *People v. Wreden*, 50 Cal. 362.

And an instruction in a criminal prosecution that insanity must be shown by the weight and preponderance of the testimony is a mere informality, and not a ground for reversal, though the jurors might be led to believe therefrom that it takes something more than a conviction of the mind to find in favor of a plea of insanity. *State v. Smith*, 53 Mo. 267.

In a large number of the states, however, as will be seen by reference to the cases cited *supra*, the terms "by a preponderance of the evidence" and "by satisfactory evidence" or "to the satisfaction of the jury" have been used interchangeably and indiscriminately by the court, leading to the inference that they were regarded as meaning the same. This is particularly the case with California, Georgia, Iowa, Kentucky, Massachusetts, Missouri, New Jersey, Ohio, Pennsylvania, South Carolina, and Texas.

IV. Clearly proved, reasonable certainty, etc.

The rule has been laid down by some cases that the accused in a criminal prosecution who sets up insanity as a defense must clearly prove that at the time of the act he was laboring under such a defect of reason by disease of the mind as not to know the nature of the act he was doing, or if he did know it that he was ignorant that he was doing wrong. *Casat v. State*, 40 Ark. 511; *Newcomb v. State*, 37 Miss. 388; *State v. Burns*, 25 La. Ann. 802; *State v. Martin*, 4 N. J. L. J. 252, 3 Crim. L. Mag. 44; *Webb v. State*, 5 Tex. App. 580; *Clark v. State*, 8 Tex. App. 360; *Smith v. State*, 19 Tex. App. 95; *Com. v. McCaulley*, 16 Phila. 502; *McNaghten's Case*, 10 Clark & F. 200; *People v. Klein*, 1 Edm. Sel. Cas. 13, cited in *Ray*, Med. Jur. 5th ed. § 42.

And that he had not knowledge and capacity enough to form a criminal intent or purpose. *People v. Klein*, 1 Edm. Sel. Cas. 13, cited in *Ray*, Med. Jur. 5th ed. § 42.

Within this rule insanity alleged as a defense must be clearly proved and shown to have existed at the time of the offense. *Com. v. Farkin*, 2 Clark (Pa.) 208.

And the insanity of a juror in a criminal prosecution alleged as a ground for a new trial must be proved by clear and full evidence. *State v. Scott*, 8 N. C. (1 Hawks) 24.

And to warrant a verdict of acquittal upon the ground of insanity in a criminal prosecution under Tex. Code Proc. art. 722, providing that when the defendant is acquitted on that ground the jury shall so state in their verdict, the evidence of insanity should be sufficiently clear to convince the minds and conscience of the jury. *Webb v. State*, 9 Tex. App. 490.

So, it has been held that insanity must be clearly established by satisfactory proof. *People v. McDonnell*, 47 Cal. 134.

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And that it must be made clear to the satisfaction of the jury. *Reg. v. Stokes*, 3 Car. & K. 185.

And that it must be established to the satisfaction of the jury, and clearly proved. *McNaghten's Case*, 10 Clark & F. 200.

And that there is nothing wrong in telling the jury that after weighing the evidence they must decide according to their consciences. *People v. Hubert* (Cal.) 51 Pac. 329.

An instruction in a criminal prosecution that the defendant must establish insanity by a preponderance of evidence instead of to the satisfaction of the jury, however, is not reversible error, as there might be a preponderance of the evidence and still a failure to satisfy the jury. *State v. Payne*, 86 N. C. 609.

And an instruction in a criminal prosecution requiring insanity to be clearly proved to establish a defense is not objectionable as a charge upon the degree or measure and not upon the weight of evidence. *Giebel v. State*, 28 Tex. App. 151.

So, to support the defense of insanity in a prosecution for murder it has been held that it ought to be proved by the most distinct and unquestionable evidence that the accused was incapable at the time of judging between right and wrong, and that he did not consider that murder was a crime against the laws of God and nature. *Bellingham's Case*, 1 Collinson on Lunacy, 636.

And the rule has been laid down that it is the duty of the jury in a criminal case to convict unless the evidence rationally convinces them that at the time of the criminal act the accused was laboring under such a state of mental aberration and disease as to deprive him of a knowledge of right and wrong, or, if he knew this, to take from him the moral power to resist his morbid inclination to its perpetration. *Kriel v. Com.* 5 Bush, 363.

And that insanity may be proved by such facts and circumstances as convince the mind of its existence the same as any other fact, and that it is not necessary that the proof should be direct and positive. *State v. Hockett*, 70 Iowa, 442.

And it has been held that it should be made to appear to a reasonable certainty that at the time of the commission of the criminal act the accused did not know the nature and quality of the act, or that it was wrong. *Humphreys v. State*, 45 Ga. 180.

And that to warrant an acquittal on a charge that the accused withdrew his allegiance from the King and served as a soldier against him, the jury must be perfectly satisfied that at the time of the commission of the crime the prisoner did not know right from wrong. *Parker's Case*, 1 Collinson, Lunacy, 477.

And it has been held that insanity must be established by the accused to the satisfaction of the jury, to a reasonable certainty. *Beck v. State*, 73 Ga. 452.

An instruction in a criminal action that the jury must be satisfied that the defendant was insane before they can acquit him, however, though perhaps too strongly stated, is not a ground for re-

fore, that to him it was of prime importance that an accurate measure of this burden should be given to the jury. If the charge of the court, in this respect, imposed on him a greater burden than the law prescribes, it contained error [prejudicial to this defense].

In most of the cases relating to the burden of proof of insanity in criminal causes the contention was confined to the question of where it rested,—whether on the state or on the defendant,—and the *quantum* or degree of proof, where made to rest on defendant, received little, if any, consideration, either by counsel or

the court; and language was sometimes employed by the court which seemed to require of the defendant, to establish his insanity, more than a preponderance of the evidence. In some of the cases, however, the question of the *quantum* of proof where the burden was placed on the accused came directly before the court. Among them is the case of *Coyle v. Com.* 100 Pa. 573, 45 Am. Rep. 397, where it was held that a charge to the jury which required of the defendant "clearly preponderating evidence" instead of "fairly preponderative evidence" of insanity, was error. In *Com. v. Rogers*, 7 Met.

versal where there is no evidence of the insanity before the jury. *Holsenbake v. State*, 45 Ga. 43.

"Clearly proved" and "proved beyond a reasonable doubt" are not convertible terms; the latter implies a higher degree of certainty than the former. If the preponderance of testimony is on the side of insanity it is to be regarded as clearly proved, although there is a reasonable doubt of its existence. *Farrer v. State*, 2 Ohio St. 70.

And it has been said that it would be error to declare that insanity as an affirmative defense must be clearly proved, as a preponderance of evidence meets the legal requirement. *People v. Nino*, 149 N. Y. 827.

But it is not reversible error to define reasonable doubt as fair doubt. *People v. Hubert* (Cal.) 51 Pac. 329.

By reference to the cases cited *supra*, however, it would appear that the courts of some of the states, notably Arkansas, North Carolina, Pennsylvania, and Texas, have used the expressions "clearly proved" and "by a preponderance of evidence" or "to the satisfaction of the jury," interchangeably, and as meaning the same thing.

V. Reasonable doubt of insanity.

a. General rules.

The doctrine adopted by many of the courts, including those of the United States and a number of the leading states, is that sanity is a necessary condition to the commission of a crime. *People v. McCann*, 16 N. Y. 58, 60 Am. Dec. 642.

And that it is an ingredient in crime as necessary as the overt act itself, without which there can be no crime. *Chase v. People*, 40 Ill. 363; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231.

Within this rule, where insanity is relied on as a defense in a prosecution for crime, and evidence is given tending to show it, and a reasonable, well-founded doubt is thereby raised of the sanity of the accused, he is entitled to the benefit of such doubt. *State v. Marler*, 2 Ala. 43, 38 Am. Dec. 398; *State v. Thomas*, Houst. Crim. Rep. (Del.) 511; *Anderson v. State*, 42 Ga. 9; *Armstrong v. State*, 80 Fla. 170, 17 L. R. A. 484; *Hodge v. State*, 26 Fla. 11; *Armstrong v. State*, 27 Fla. 366; *Chase v. People*, 40 Ill. 363; *Langdon v. People*, 133 Ill. 382; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *Gueltig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382; *Plake v. State*, 121 Ind. 433; *Grubb v. State*, 117 Ind. 277; *Stevens v. State*, 31 Ind. 485, 99 Am. Dec. 634; *State v. Mahn*, 25 Kan. 132; *State v. Nixon*, 32 Kan. 205; *State v. Crawford*, 11 Kan. 32; *Smith v. Com.* 1 Duv. 224; *People v. McCann*, 16 N. Y. 58, 60 Am. Dec. 642; *Wagner v. People*, 2 Keyes, 684; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *Farrer v. State*, 2 Ohio St. 54; *State v. Gardiner*, Wright (Ohio) 392; *Com. v. Winemore*, 1 Brewst. (Pa.) 356; *State v. Coleman*, 20 S. C. 441; *Lawless v. State*, 4 Lea, 179; *King v. State*, 91 Tenn. 617; *Dove v. State*, 3 Helsk. 348; *Revoir v. State*, 82 Wis. 296; *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499.

A reasonable doubt on the part of a jury in a criminal prosecution upon all the evidence as to

the capacity of the accused to know that his act was wrong, entitles him to an acquittal. *State v. Thomas*, Houst. Crim. Rep. (Del.) 511; *Coffee v. State*, 3 Yerg. 238, 24 Am. Dec. 570.

And a prisoner charged with murder is entitled to an acquittal if the jury entertain a reasonable doubt as to his soundness of mind at the time of the homicide, although they believed he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life. *Stevens v. State*, 31 Ind. 485, 99 Am. Dec. 634.

In *Chase v. People*, 40 Ill. 363, *supra*, *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231, *supra*, was explained, the court saying that what was decided in that case was that sanity is an ingredient in crime as essential as the overt act, and if sanity is wanting there can be no crime, and if the jury entertain a reasonable doubt on the question of sanity, the prisoner is entitled to the benefit of that doubt.

And in *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231, *Fligher v. People*, 23 Ill. 296, holding that insanity must be shown by sufficient proof, was overruled.

So, the burden of proof of sanity in a prosecution for murder, where evidence of insanity has been given, rests with the prosecution to establish beyond a reasonable doubt. *State v. Johnson*, 40 Conn. 133; *Stevens v. State*, 31 Ind. 485, 99 Am. Dec. 634; *Hite v. Sims*, 94 Ind. 333; *Bradley v. State*, 31 Ind. 492; *Hiler v. State*, 4 Blackf. 552; *State v. Reddick*, 7 Kan. 143; *State v. Crawford*, 11 Kan. 32; *Russell v. State*, 53 Miss. 367; *People v. Finley*, 38 Mich. 432; *Wright v. People*, 4 Neb. 407; *Furst v. State*, 31 Neb. 403; *Ballard v. State*, 19 Neb. 609; *Smith v. State*, 4 Neb. 277; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *State v. Jones*, 50 N. H. 399, 9 Am. Rep. 242; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Moett v. People*, 85 N. Y. 373; *People v. Nino*, 149 N. Y. 818; *Walker v. People*, 88 N. Y. 81; *O'Brien v. People*, 48 Barb. 274; *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499.

The defendant is to be acquitted unless the jury are satisfied beyond a reasonable doubt that the killing was not produced by mental disease. *State v. Jones*, 50 N. H. 399, 9 Am. Rep. 242; *Wright v. People*, 4 Neb. 407; *Ballard v. State*, 19 Neb. 609.

And the prosecution in a criminal action must satisfy the jury beyond all reasonable doubt that at the moment the criminal act was committed the accused had sufficient reason to understand and form and have a criminal intent, and to distinguish between right and wrong. *Moett v. People*, 85 N. Y. 373.

And that the accused possessed sufficient mental capacity to comprehend the nature of the act complained of. *State v. State*, 31 Neb. 403; *Russell v. State*, 53 Miss. 367.

Sanity is presumed, and the prosecutor in a criminal case may rest upon such presumption without other proof; but upon the general question whether the crime if committed was committed by a person responsible for his acts, the presumption of sanity and the evidence are both to be considered, the affirmative resting with the prosecution, and if a reasonable doubt exists as to whether the person

500, 41 Am. Dec. 458, in trial for murder, Shaw, Ch. J., presiding, the jury, after receiving the charge of the court, and consulting several hours, came into court for instructions respecting the degree of proof requisite to establish insanity, and were instructed that, "if the preponderance of the evidence was in favor of insanity of the prisoner, the jury would be authorized to find him insane." In *Bowell v. State*, the supreme court of Alabama laid down the rule as follows: "We hold, then, that insanity is a defense which must be proved to the satisfaction of the jury, by that measure

of proof which is required in civil causes." 68 Ala. 826, 35 Am. Rep. 20. In *State v. Jones*, 64 Iowa, 550, the charge was murder in the first degree. The supreme court held that "where one charged with murder relies upon his insanity as a defense, the burden is on him to establish by a preponderance of the evidence that at the time of the killing he was in such a state of insanity as not to be accountable for the act; but an instruction that, 'if the evidence goes no farther than to show that such a state of mind was merely probable, it was not sufficient,' was erroneous, because its effect was to

is sane or not he is entitled to the benefit of the doubt and to an acquittal. *Dacey v. People*, 116 Ill. 535; *Montag v. People*, 141 Ill. 75; *Bradley v. State*, 31 Ind. 492; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360; *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117; *Brotherton v. People*, 75 N. Y. 159; *Walker v. People*, 1 N. Y. Crim. Rep. 7; *People v. Coleman*, 1 N. Y. Crim. Rep. 1; *People v. Casey*, 2 N. Y. Crim. Rep. 187; *People v. O'Connell*, 62 How. Pr. 436; *King v. State*, 91 Tenn. 617.

Sanity being the normal state of humanity, the prosecution on a trial for the commission of a criminal act is at liberty to rest on the presumption that the accused was sane until such presumption is overcome by defendant's evidence, and when the jury come to consider the whole case upon the evidence, they must do so upon the basis that on each and every portion of it they are to be reasonably satisfied before they are at liberty to find the defendant guilty. *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162.

In *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, a number of cases holding that insanity in a criminal case must be proved by at least a preponderance of testimony were cited and criticised and disapproved, the court saying that these cases overlook or disregard an important and necessary ingredient in crime, and they strip the defendant of that presumption of innocence which the humanity of law casts over him and which attends him from the initiation of the proceedings until the verdict is rendered.

The presumption that every man is sane is sufficient to sustain the burden of proof of sanity resting with the prosecution in a criminal case until repelled by proof. *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Bradley v. State*, 31 Ind. 492.

And it is never incumbent upon the prosecution in a criminal case to give evidence that sanity which is presumed exists in a particular case. *Walter v. People*, 32 N. Y. 147; *Ferris v. People*, 35 N. Y. 125; *O'Brien v. People*, 48 Barb. 274; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89, 46 Conn. 331.

And the presumption of general sanity may be relied on in a prosecution for homicide without offering proof of a lucid interval at the time of the commission of the offense, where only temporary or recurrent insanity is shown. *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117.

Insanity as a defense for crime is an affirmative issue which the defendant is bound to prove, but if there is a well-founded doubt as to insanity the accused should be acquitted. *Brotherton v. People*, 75 N. Y. 159; *State v. McIntosh*, 30 S. C. 97; *State v. Coleman*, 20 S. C. 441; *Dove v. State*, 3 Helsk. 348; *King v. State*, 91 Tenn. 617; *Coffee v. State*, 3 Yerg. 283, 24 Am. Dec. 570; *United States v. Lancaster*, 7 Bls. 440.

In case evidence tending to rebut the presumption is introduced sanity must be affirmatively proved by the state beyond a reasonable doubt. *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117; *Bradley v. State*, 31 Ind. 492.

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Or at least by a preponderance of the evidence. *People v. Nino*, 149 N. Y. 317.

So, the accused in a prosecution for murder is entitled to an acquittal where the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond a reasonable doubt the hypothesis of insanity where some proof of insanity is adduced. *Davis v. United States*, 160 U. S. 469, 40 L. ed. 490; *State v. Crawford*, 11 Kan. 32.

An admission by a person accused of crime of the facts constituting the offense, however, calls for a verdict of guilty unless the proof offered in the case as to the mental condition of the accused at the time is such as to raise in the minds of the jury a reasonable doubt as to his legal responsibility for his acts. *United States v. Faulkner*, 35 Fed. Rep. 730.

But reasonable doubt of guilt upon the whole evidence authorizes an acquittal. *State v. Smith*, 53 Mo. 267.

And the defendant in a criminal prosecution is entitled to an instruction that the jury must be satisfied of his guilt beyond all reasonable doubt, and this is true of the defense of insanity so far as the facts attending the crime are concerned, or at least so far as those facts are included in the *res gestæ*; but if insanity is set up as a separate and distinct defense, and its proof does not consist of the facts attending the criminal act, then the proof must be made out by the defendant, the legal presumption of sanity being sufficient for the indictment in the absence of evidence to the contrary. *McAllister v. Territory*, 1 Wash. Terr. 380.

And it is immaterial whether the evidence tending to show insanity was adduced by the prosecution or the defense. *Hodge v. State*, 26 Fla. 11; *Montag v. People*, 141 Ill. 75; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360; *State v. Bartlett*, 43 N. H. 224, 30 Am. Dec. 154; *King v. State*, 91 Tenn. 617.

And an instruction in a prosecution for homicide that unless the accused had by affirmative evidence created a reasonable doubt as to his sanity at the time of the act charged, that question is not before the jury for consideration, is erroneous as the defendant is equally entitled to an acquittal if a reasonable doubt is created solely by the state's own evidence. *McDougal v. State*, 38 Ind. 24.

So, if there is a doubt as to the sanity of a person accused of crime he should not be put upon trial, but a jury should be impaneled to try the fact. *Ley's Case*, 1 Lewin, C. C. 230.

The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed, which constitutes murder, includes the element of a rational agency which must be shown by the state as well as any other element of the crime, and, while the law presumes all men sane, and, in the absence of evidence to the contrary, the court and jury are justified in acting upon such presumption, where the evidence establishes the criminal act, and indicates nothing as to the mental capacity of the accused, a conviction is authorized. If there arises from the evidence coming from any quarter a reasonable doubt

require more than a mere preponderance of the evidence to establish the defense." See *People v. Bell*, 49 Cal. 485-488. In *Bond v. State*, 23 Ohio St. 349, it is held: "The burden of proof to establish the defense of insanity in a criminal case rests upon the defendant, but a bare preponderance of testimony is all that is necessary for that purpose." This rule is reasserted in *Bergin v. State*, 81 Ohio St. 111, a case, like the one under consideration, of murder in the first degree: *Loeffner v. State*, 10 Ohio St. 598. Self-defense, in Ohio, as well as insanity, is regarded as affirmative defense.

as to his sanity, the presumption of law is overcome, and he is entitled to an acquittal, unless the state meets and overcomes the reasonable doubt arising in his favor. *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484.

And the jury in a criminal prosecution after all the evidence is in, while bearing in mind the presumptions that the accused is innocent until proved guilty, and that he is sane until the contrary appears, and considering the whole evidence in the case, must, if they still entertain a reasonable doubt on any ground either as to the commission of the criminal act or the responsible condition of the mind of the accused whether he is guilty or not, give him the benefit of that doubt. *Guiteau's Case*, 10 Fed. Rep. 161.

It is not necessary that the insanity be established by a preponderance of evidence. *Jacey v. People*, 116 Ill. 555; *Grubb v. State*, 117 Ind. 277; *State v. Crawford*, 11 Kan. 32; *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382; *Guetig v. State*, 66 Ind. 94, 82 Am. Rep. 99.

Or beyond a reasonable doubt. *Armstrong v. State*, 27 Fla. 386; *Smith v. Com.* 1 Duv. 224; *People v. McCann*, 18 N. Y. 58, 69 Am. Dec. 642.

So, in *Henson v. State*, 112 Ala. 41, which was a case in which a plea of self-defense was interposed, it was said that the accused should be acquitted if the jury upon all the evidence have a reasonable doubt whether he was legally capable of committing the crime, or, which is the same thing, whether he wilfully, deliberately, and unlawfully committed the act with malice aforethought.

And in the trial of General Sikkels in the district court at Washington for the murder of Philip Barton Key, Judge Crawford ruled that the burden of proving insanity was thrown on the government, and if the jury had a reasonable doubt of that fact they must acquit.

Where the jury in a criminal case believe beyond a reasonable doubt that the defendant committed the crime, and that at the time he knew that it was wrong and was mentally capable of choosing either to do or not to do it, and of governing his conduct in accordance of such choice, however, they should find him guilty, though they believe that he was not entirely and perfectly sane. *Hornish v. People*, 142 Ill. 620, 18 L. R. A. 237.

So, an instruction in a prosecution for homicide authorizing conviction only provided the jury believes from the evidence beyond a reasonable doubt that the blows were struck with malice aforethought, is not objectionable as requiring the jury to find the defendant guilty regardless of the question of his mental condition. *Upstone v. People*, 100 Ill. 169.

An instruction in a criminal action that the evidence as to insanity should be carefully considered for the reason that if the accused was in truth insane he ought not to be punished, is not subject to objection that the question was not whether the accused was in truth insane, but whether the jury entertained a reasonable doubt as to his sanity, as the charge was not as to the degree of evidence, 89 L. R. A.

In *Silvus v. State*, 22 Ohio St. 90, and *Weaver v. State*, 24 Ohio St. 584,—both cases where self-defense was relied upon by the accused for justification,—this court held that the defense should be shown by preponderating evidence. These cases relating to the burden and quantum of evidence required to establish a plea of self-defense are, of course, only material as tending to show the steadiness with which this court has held to the rule that a preponderance of the evidence is sufficient to sustain an affirmative defense in a criminal cause.

We come now to the question whether the

but referred merely to the duty of careful scrutiny. *Goodwin v. State*, 96 Ind. 550.

But an instruction on a prosecution for forgery conveying the idea that before the jury can acquit the defendant on the ground of his insanity they must entertain a reasonable doubt as to whether or not such affliction was the efficient cause of the act, and as to whether or not he would have done the act but for such affliction, is incorrect; as the jury might not be willing to find that insanity was the cause of the act and yet might be in doubt whether the act was caused by insanity or not. *Langdon v. People*, 133 Ill. 882.

In *People v. Barberi*, 47 N. Y. Supp. 168, however, the rule was laid down that when evidence tending to prove insanity is given the presumption of sanity is rebutted, and if a reasonable doubt is created as to the sanity of the accused the prosecution must remove that doubt by a preponderance of the evidence.

b. What constitutes reasonable doubt.

The rational doubt which would result in an acquittal in a criminal case is a doubt as to all or any one of the constituent elements essential to legal responsibility or punishable guilt. *Smith v. Com.* 1 Duv. 224.

The doubt to be raised in favor of the prisoner must be a serious, well founded, satisfactory doubt. *State v. Coleman*, 20 S. C. 441.

And it must be reasonable, and must arise from a careful, candid investigation of all the evidence in the case. *People v. Barberi*, 47 N. Y. Supp. 168.

A reasonable doubt is a fair doubt growing out of the testimony in the case. It is not a mere imaginary, capitious, or possible doubt, but a fair doubt based on reason and common sense; it is such a doubt as may leave the minds of the jury after a careful examination of all the evidence in the case in such a condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge. *People v. Finley*, 38 Mich. 482.

The jury is not to acquit the prisoner upon any fanciful ground that though they believe he was sane at the time yet there might be a rational doubt of such sanity. *Hodge v. State*, 26 Fla. 111; *Armstrong v. State*, 27 Fla. 386.

Mere probability of insanity cannot prevail over the presumption of sanity, so as to effect the acquittal of a person accused of crime on that ground. *Newcomb v. State*, 37 Miss. 333.

The defense should not be sustained on vague and shadowy hearsay or mere conjecture. *Walker v. People*, 1 N. Y. Crim. Rep. 22; *Boswell v. Com.* 20 Gratt. 860.

There should be clear and satisfactory evidence of insanity. *Walker v. People*, 1 N. Y. Crim. Rep. 7; *People v. Coleman*, 1 N. Y. Crim. Rep. 1.

And it has been held that it should be clear strong, and convincing. *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398.

And that it must preponderate. *State v. McIntosh*, 39 S. C. 97.

instructions given by the learned judge of the court of common pleas, prescribing the *quantum* of evidence required to establish the defense of insanity, imposed on the plaintiff in error a higher degree of proof than the settled doctrine of the state imposed. After the learned judge had stated to the jury the claim of the plaintiff in error respecting his mental condition at the time of the homicide, he proceeded to prescribe the measure of proof requisite to maintain such claim, as follows: "In the first place, the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime; and therefore the burden of establishing the defense of insanity of the accused affirmatively to the satisfaction of the jury rests upon the defendant. It is not required, however, that this defense be established beyond a reasonable

doubt; but it is sufficient if the jury is reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of commission of the act." This language extended the obligation resting on the accused to the extreme limits of the rule prescribed by the former decisions of this court, but we cannot say that it clearly went beyond them; and therefore, if it had halted there, error would not have intervened. The learned judge, however, after stating to the jury that the character and extent of mental aberration must be shown to exonerate the accused from criminal responsibility, returned to the subject of the *quantum* of evidence necessary to establish that mental state, and instructed the jury as follows: "It is not enough, I say to you, that the proof barely show that such a state of mind was possible; nor is it sufficient if it

A juror should not convict, however, unless he is so convinced by the evidence of the defendant's guilt that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to himself, to his own dearest personal interest, under circumstances in which there was no compulsion resting upon him to act at all. *Bradley v. State*, 81 Ind. 492.

If a doubt is raised in the minds of the jurors as to the sanity of the accused, it devolves upon the prosecution to remove that doubt by a preponderance of the evidence. *People v. Nino*, 149 N. Y. 317.

Where the defense of insanity is set up in a criminal prosecution, the burden rests with the defendant to submit sufficient evidence to at least produce in the minds of the jury a reasonable doubt of the quality of his guilt. *Faulkner v. Territory*, 6 N. M. 464.

And evidence in a criminal action in which the defendant was accused of killing his wife, that his conduct was at times peculiar, and that he was nervous, and especially when talking about trouble with his wife became greatly excited, is insufficient to overcome the presumption of sanity to the extent of raising a reasonable doubt so as to require the prosecution to prove it, where it appears that he pursued his daily avocation as men generally do, and was treated by the witnesses and others as sane, and that he entertained a feeling of malignancy towards his wife. *Lilly v. People*, 148 Ill. 467.

But if in the trial of a person for the murder of his wife the evidence of harmonious relations between him and his wife, with the testimony of experts that he had the disease of melancholia likely to be manifested by the commission of just such an act, and that he made no attempt to escape, and attempted to kill himself, and subsequently expressed a satisfaction with respect to his act raises in the mind of the jury a reasonable doubt of his accountability which the presumption of sanity and proof on the part of the state has not removed, he should be acquitted. *State v. Reidell*, 9 Houst. (Del.) 470.

So, that there may have been evidence in a criminal case which, taken by itself, was sufficient to raise a reasonable doubt as to the sanity of the defendant, does not justify an acquittal, as there may have been evidence tending to rebut the defense of insanity, a reasonable doubt upon which the jury should act being required to be one arising from a consideration of all the evidence in the case. *Jamison v. People*, 145 Ill. 857.

And an instruction in a criminal action in which insanity is interposed as a defense that the presumption of innocence is so far of greater strength than that of sanity that when evidence appears tending to prove insanity it compels the prosecution to show, from all the evidence, mental sound-

ness beyond a reasonable doubt, is objectionable as there may be evidence tending to prove insanity which is not sufficiently strong to raise a reasonable doubt of mental soundness; but it is not erroneous as against the accused, as it is favorable to him and he is not injured thereby. *Gueltig v. State*, 66 Ind. 94, 32 Am. Rep. 89.

So, in order to entitle a person accused of crime to an acquittal upon the ground of insanity he is required by evidence to establish a reasonable doubt as to his sanity, and an instruction to that effect, and a refusal to instruct that he is required only to raise a reasonable doubt, is not error. *State v. Mahn*, 25 Kan. 182.

And an instruction in a criminal prosecution that insanity interposed as a defense must be clearly proved, is not incorrect where the jury is also told that a person must be given the benefit of any doubt as to his sanity arising upon the evidence in the case. *Walker v. People*, 1 N. Y. Crim. Rep. 7, Affirmed in 88 N. Y. 81.

And an instruction that the accused is presumed to be sane until he convinces the jury by evidence that he is insane is not error, where the trial had been conducted upon the theory that the burden rests with the prosecution to maintain the sanity of the prisoner, and the jury had also been instructed that if they had a reasonable doubt from the evidence that the prisoner was guilty they should give him the benefit of the doubt. *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379.

So, an instruction in a prosecution for murder in which insanity is alleged as a defense, that before the prisoner can be exonerated on that plea the jury must be satisfied from the evidence that he was laboring under such a defect of reason as not to know the nature and quality of the act, or that he did not know to commit murder was wrong, is unimpeachable because of the use of the word "satisfied" where in other instructions the jury were told that a reasonable doubt of his guilt or of his sanity authorizes an acquittal. *Brown v. Com.* 14 Bush, 388.

And an instruction in a trial for homicide, that if the killing of the accused is established the law presumes it to have been murder, provided the jury believe beyond a reasonable doubt that no circumstances existed excusing or justifying the act or mitigating it, is not subject to the objection that it ignores the question of the insanity of the defendant, where the jury were elsewhere instructed as to insanity as a defense, as it recognizes that there might be an excuse for the act. *Upstone v. People*, 109 Ill. 169.

But an instruction in a trial for murder in which insanity is interposed as a defense, that if the accused had been subject to attacks of epilepsy, and epilepsy is a disease which tends to produce insan-

merely show it to have been probable. The proof must be such as to overcome the legal presumption of sanity; it must satisfy you that he was not sane. Again, I say to you that, if the proof satisfy you of his insanity at the time of the committing of the act, though such defenses are not uncommon in the law, yet it must be regarded by you as a full and complete humane defense when satisfactorily established. If not satisfactorily established, then it should not avail the prisoner at the bar as a pretext or means of escaping punishment imposed by law." The *quantum* of evidence to establish insanity made necessary by this instruction, is substantially greater than a preponderance. It is not sufficient, according to this instruction, that the fact of insanity be made probable; something more than that is required; the jury

ity, these facts are not sufficient to raise a reasonable doubt of his sanity at the time of the offense, is erroneous as tending to mislead the jury, and as interfering with the province of the jury to weigh the evidence. *Gueltig v. State*, 63 Ind. 278.

c. *Submission of the question to the jury.*

The insanity of a defendant in a criminal case need not be submitted to the jury as a separate issue of the absence of which they must be satisfied beyond a reasonable doubt; it is sufficient if they are required to be satisfied of the defendant's guilt beyond a reasonable doubt. *Hornish v. People*, 142 Ill. 620, 18 L. R. A. 237.

A reasonable doubt as to the sanity of a person on trial for murder is a reasonable doubt as to his guilt, and entitles him to an acquittal. *State v. Nixon*, 32 Kan. 205; *State v. Crawford*, 11 Kan. 32.

And if, upon the whole evidence in a prosecution for homicide, the jury have a reasonable doubt whether the accused was sane when he committed the act, they must be deemed also to have had a reasonable doubt whether he purposely and maliciously committed the deed, as without sanity the crime as defined by the statute cannot be committed. *Polk v. State*, 19 Ind. 172, 81 Am. Dec. 332.

And evidence bearing upon the question of insanity in a criminal prosecution should be considered, in connection with all the other evidence, in determining whether or not, upon a view of the whole case, there was reasonable doubt of the guilt of the accused. *Carr v. State*, 96 Ga. 254.

So, an instruction in a criminal prosecution that if the jury came to the conclusion beyond all reasonable doubt that the accused committed the crime, and that he was not insane, they should convict, but if any reasonable doubt arises upon the evidence and upon nothing else they should give the prisoner the benefit of that doubt and acquit him, casts the burden of establishing insanity beyond a reasonable doubt as an element of guilt upon the prosecution, and is sufficient the court not being bound to subdivide the instruction and charge separately as to each of the elements necessary to constitute the crime. *Walker v. People*, 88 N. Y. 81.

And refusal to instruct the jury in a criminal prosecution that if they entertain a reasonable doubt of the sanity of the accused at the time they should acquit him, is not error where the court had charged fully with reference to reasonable doubt with regard to the whole case made by the evidence. *Webb v. State*, 9 Tex. App. 490; *Westmoreland v. State*, 45 Ga. 225; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379.

So, refusal to charge that the defendant in a criminal prosecution is not obliged to prove his insanity to avail himself of that defense, but only to create a reasonable doubt upon that point, when

must be "satisfied" that it existed. To satisfy the mind, according to the common notion of mankind, is to free it from doubt, to set it at rest. This is the primary meaning of the word, according to all the lexicographers, when used in this connection. To accomplish this result—to "satisfy" a body of men of the truth of a disputed fact—requires much more than a preponderance of the evidence. Clear and convincing evidence must be adduced in its favor. Evidence of this potency is rarely attainable in cases where insanity is contested. There must be grounds to assert insanity, founded upon some peculiar conduct, natural or feigned, of the party, or the claim will not be made. There also must be conduct consistent with mental soundness, or the claim will be conceded. Where a long course of conduct

the burden of proving sanity falls upon the people, is not reversible error where the court had charged that if there was any reasonable doubt of his guilt and that he was not insane, arising upon the evidence in the case and nothing else, it would be their duty to give him the benefit of that doubt and acquit him. *Walker v. People*, 26 Hun. 67, Affirmed, 88 N. Y. 81.

And the failure of the court in a criminal prosecution to charge that insanity as a defense must be proved by a preponderance of the evidence, and that the burden of proof rests with the accused, and that the evidence bearing upon the question should be considered in connection with the other evidence in determining whether there was reasonable doubt of the guilt of the accused, is not error in the absence of a request to so charge, where the charge given upon the subject of reasonable doubt was sufficiently full and fair to give the accused the benefit of all the evidence relating to the alleged insanity for the purpose of casting doubt upon his guilt. *Carr v. State*, 96 Ga. 254.

And an instruction that the accused is to be presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt is not inconsistent with another instruction that every man is presumed to be sane and to intend the natural consequences of his acts. *Greenley v. State*, 60 Ind. 141.

VI. *Summary.*

While the rule has been differently expressed in different decisions in the same state in many instances, it would seem, judging from the latest expressions on the subject, that Delaware, Maine, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Texas, Virginia, West Virginia, and England may be deemed to have adopted the rule that insanity must be established to the satisfaction of the jury or by evidence which satisfies the jury.

Alabama, Arkansas, California, Georgia, Idaho, Iowa, Kentucky, Nevada, Ohio, Pennsylvania, South Carolina, and Utah seemed to have settled upon the rule that it must be established by a preponderance of proof.

And Connecticut, Florida, Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New York, Tennessee, Washington, and the United States seem to have settled upon the rule that a well-founded doubt of sanity warrants an acquittal, and that the prosecution must establish sanity beyond a reasonable doubt.

As to the rule in Louisiana and Oregon, see *supra*, I.

State courts are not bound by the views of the Supreme Court of the United States on the question of the measure of proof of insanity as a defense in a criminal prosecution. *People v. Allen*, 117 Cal. 81.

F. H. B.

is established, or a large number of mental or physical acts of a party are adduced, and parts of this conduct and some of the acts tend to establish mental aberration, while the others consist with mental soundness, the whole evidence might not satisfy a jury that the mind of the party was disordered to the extent of rendering him criminally irresponsible for his acts; and yet might preponderate upon that side sufficiently to engender a belief that such mental condition was probable,—that is, likely,—or supported by evidence sufficient to incline the mind to that belief, but which leaves some room for doubt. Webster.

Doubtless, insanity is a defense that may be feigned, and frequently is, where no other defense is available; but because artful criminals may adopt it as a last resort is not a sufficient reason to impose upon the unfortunate, in whose behalf this humane defense is honestly interposed, a higher degree of proof than intrinsically belongs to it. The remedy for this mischief is a searching analysis by counsel, court, and jury of the conduct of the party wherever there is reason to suspect that the insanity is feigned. The learned judge may have been misled as to the *quantum* requisite to establish the defense of insanity in a criminal case by a note found at the end of the case of *Clark v. State*, 12 Ohio, 488, 40 Am. Dec. 481, which purports to give the charge of Judge Birchard, who presided at the trial in the court of common pleas. The language imputed to Judge Birchard by that note was disapproved by the circuit court of the second circuit in a well-considered case reported by Judge Shauck, now a member of this court.

Sharkey v. State, 4 Ohio C. C. 101. By what authority that language is ascribed to Judge Birchard does not appear. If such language was employed by that learned judge it was at a period in our judicial history before the question of the burden of proof in such case had been finally settled. In the charge referred to Judge Birchard explicitly laid down the rule, still adhered to by this court, that the burden of proof rested on the accused to establish his insanity. Nothing appears in the case however, to show that the degree of proof necessary to sustain this burden was discussed by counsel or specially considered by this court. Since then, in the case of *Bond v. State*, 28 Ohio St. 349, this court held that a bare preponderance of the evidence was sufficient to establish this defense. This rule was adhered to in *Bergin v. State*, 81 Ohio St. 111. The original contention, as we have seen, respected the party upon whom the burden rested. This court adopted the view of this question most unfavorable to the accused, by casting upon him the burden of proving his insanity, but we do not think this burden should be further increased by requiring of him more than a preponderance of the evidence. As the instructions given to the jury by the learned judge who presided at the trial in the court of common pleas prescribed more than this, it was erroneous in this respect.

Other questions are raised by the record and discussed by counsel, but we think none of them contain any substantial error.

Judgment reversed.

Minshall, J., dissents.

MISSOURI SUPREME COURT (Division 1).

I. T. CLARKSON *et al.*, *Repts.*,

v.

Frank A. HATTON, *Appt.*

(..... Mo.)

1. The consent of the natural parents or guardian of a child to its adoption is not required by 1 Wag. Stat. p. 256, § 1.
2. "Children" and "heirs" of a life tenant to whom the remainder is given by Rev. Stat. 1855, p. 355, chap. 32, § 6, under a deed to a person and his "bodily heirs," do not include an adopted child of such life tenant, where there was no law authorizing an adoption of children at the time of the enactment of such statute, since the life tenant cannot destroy the vested right of the statutory heirs by an adoption.

(February 23, 1896.)

A PPEAL by defendant from a judgment of the Circuit Court for Mississippi County in favor of plaintiffs in an action brought to recover possession of real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. H. J. Cantwell, William N. Randolph, and James A. Boone for appellant.

Messrs. Russell & Deal, for respondents: This title was passed upon by division No. 1 of this court, and its opinion ought to have settled all controversy over the lands in dispute.

Clarkson v. Clarkson, 125 Mo. 387.

The so-called deeds of adoption were irregular and void, as the facts showed the child had a father living in the same county who had never consented to such adoption.

Luppie v. Winans, 87 N. J. Eq. 245.

An adopted child is not in fact an heir at law, but an heir by contract. An adopted child can by reason of the contract of the adopting parent inherit from him, but an adopted child is not an heir so far as to affect the rights of others.

Reinders v. Koppelman, 94 Mo. 344; *Keegan v. Geraghty*, 101 Ill. 26; Schouler, Dom. Rel. § 282.

The word "children" as commonly used does not include an adopted child.

Schofer v. Eneu, 54 Pa. 804.

NOTE.—As to the legal status of an adopted child, see *Warren v. Prescott* (Me.) 17 L. R. A. 435, and note; *Markover v. Krauss* (Ind.) 17 L. R. A. 806; *Fosburg v. Rogers* (Mo.) 19 L. R. A. 201; *Van Matre* 89 L. R. A.

v. Sankey (Ill.) 23 L. R. A. 666; *Murphy v. Portrum* (Tenn.) 30 L. R. A. 263; and *Hartwell v. Tefft* (R. I.) 34 L. R. A. 500.

Robinson, J., delivered the opinion of the court:

This is an action of ejectment to recover possession of certain land in Mississippi county. The petition was in the usual form. The defense set up in the answer was that defendant is in possession, as curator, of the estate of Roy Congers, a minor, who is averred to be the owner in fee of the land. A reply was filed, denying the new matter contained in the answer. The cause was tried before the court without a jury, and resulted in a judgment for plaintiff, from which defendant appeals. The action was instituted on February 25, 1895, and tried at the ensuing April term of the Mississippi county circuit court. It was admitted that Jabez Clarkson was the common source of title. On November 9, 1858, Jabez Clarkson conveyed the land in question by warranty deed, to his son, John Clarkson, and his "bodily heirs." John Clarkson was in possession of the land at the time said deed was executed, and continued to reside thereon until 1890, at which time he died, leaving his wife, Sarah Clarkson, surviving, who died in 1894, prior to the commencement of this suit. John Clarkson, had no children or their descendants living at the date of said deed, and none were born to him after that time. The plaintiffs are the only living brothers and sisters of John Clarkson. Not having an heir born of his body, John Clarkson and his wife, Sarah, on the 11th day of July, 1887, by their deed duly executed, acknowledged, and recorded, adopted Roy Congers, who survived them as their child and heir. In the recent case of *Clarkson v. Clarkson*, 125 Mo. 381, this court held that the deed from Jabez Clarkson to John Clarkson created an estate tail, which our statute, *eo instanti*, converted into a life estate in John Clarkson, with remainder in fee to his children. Black, P. J., who wrote the opinion after stating the facts, says: "On this state of facts the plaintiffs insist that the title passed to them. The question must be determined by § 5, chap. 32, of the Revised Statutes, 1855, the statute in force when the deed was executed. It provides that every conveyance or devise which would have created an estate tail under the statute of the thirteenth Edward First 'shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over, and right in, such premises, and no other, as a tenant for life thereof would have by law; and upon the death of such grantee or devisee, the said lands and tenements shall go, and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common, in fee; and if there be only one child, then to that one, in fee; and if any child be dead, the part which would have come to him or her shall go to his or her issue, and, if there be no issue, then to his or her heirs.' This statute disposed of the entire estate conveyed by the deed. It vested in John Clarkson a life estate and no more. As he had no children or their descendants living either at the date of the deed or at his death, the remainder vested, according to the last clause of the section of the statute just quoted, in his brothers and sisters and the heirs of those who were dead, he having no father or mother living at his death."

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The statute then and now under consideration reads: "That, from and after the passage of this act, where any conveyance or devise shall be made whereby the grantee or devisee shall become seised in law or equity of such estate, in any lands or tenements, as, under the statute of the thirteenth Edward the First (called the 'Statute of Entails'), would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over and right in such premises, and no other, as a tenant for life thereof would have by law; and upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common, in fee, and, if there be only one child, then to that one, in fee; and, if any child be dead, the part which would have come to him or her shall go to his or her issue; and if there be no issue, then to his or her heirs." Rev. Stat. 1855, p. 855, chap. 32, § 5.

The defendant contends that as to the land in question, under the statutory estate so created, the remainder after the death of John Clarkson vested in Roy Congers, the adopted child, as the only child of John Clarkson, under the word "children," used in the statute above noted, or the word "heirs," in the last clause of said section. The plaintiffs, however, claim, and the circuit court so held, following *Clarkson v. Clarkson*, 125 Mo. 381, that, as John Clarkson had no children living at the time of his death, the remainder vested in his brothers and sisters and their descendants. It is objected, further, that this deed of adoption is not legal and valid because it does not appear that the father of the adopted child consented to such adoption. The statute under which the deed of adoption was executed, provides: "If any person in this state shall desire to adopt any child, or children, as his or her heir or devisee, it shall be lawful for such person to do the same by deed, which deed shall be executed, acknowledged, and recorded in the county of the residence of the person executing the same, as in the case of conveyance of real estate." 1 Wagner, Stat. p. 256, § 1. No provision is made by the statute, in a case like the present, for the consent of the natural parents of the party sought to be adopted. It has been held by this court that neither the natural parents nor guardian of the child or children proposed to be adopted are required to join in the execution of the deed of adoption or consent thereto in order to entitle the child to inherit from the adopted parents. *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Re Clements*, 78 Mo. 352. The case of *Luppie v. Winans*, 37 N. J. Eq. 245, relied upon by plaintiffs in support of their position, has no application here. The statute of New Jersey expressly requires the consent of the parents to the act of adoption. Under the statutes of that state, the act of adoption divests the natural parents of all control over the child so adopted. We are of opinion, therefore, that the adoption of Roy Congers in this case was valid.

The next inquiry for our determination is: What are the rights of the adopted child?

Can the adopted child in this case take property expressly limited to the "heirs of the body of the parents by adoption?" It is argued by counsel for plaintiffs that the decision by this court in *Clarkson v. Clarkson*, 125 Mo. 881, is decisive of that question. In the concluding paragraph of that opinion the court says: "The defendant makes the point that the adopted child of John and Sarah Clarkson was a child within the meaning of the statute, . . . and hence the remainder passed to the adopted child. It is now sufficient to say no such question is presented by this record. The deed of adoption was excluded by the trial court on the objection of the plaintiffs who are the appellants. The defendant took no appeal, and is not, by the record, here complaining of any ruling of the trial court." The question whether the adopted child was within the provision of the statute was not in that case, and not before the court. The court simply held, as the record in the case showed, that John Clarkson left no children; and, not having a father or mother living at the time of his death the remainder vested in his brothers and sisters according to the last clause of the statute. The statute provides: "From the time of filing the deed with the recorder, the child or children adopted shall have the same right against the person or persons executing the same, for support and maintenance and for proper and humane treatment, as a child has, by law, against lawful parents; and such adopted child shall have, in all respects, and enjoy all such rights and privileges as against the persons executing the deed of adoption. This provision shall not extend to other parties, but is wholly confined to parties executing the deed of adoption." 1 Wagner, Stat. p. 256, § 8. Adoption was unknown to the common law, being repugnant to its principles and the institution upon which it was builded, but was recognized by the civil law from its earliest day, and exists in this country by the statutes of every state so far as we have had occasion to examine. The child becomes, in a legal sense, the child of the adopting parents, and at the same time remains the child of its natural parents, and is not deprived of its rights of inheritance from them unless expressly so provided by statute. *Wagner v. Varner*, 50 Iowa, 534. In *Moran v. Stewart*, 122 Mo. 295, a construction was put upon this statute in conformity with this view. Upon this subject the court said: "This and other sections of the statute concerning the adoption of children have been before this court, directly and indirectly, on several occasions. *Reinders v. Koppelman*, 68 Mo. 482, 80 Am. Rep. 802, 94 Mo. 388; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *Davis v. Hendricks*, 99 Mo. 478; *Fosburgh v. Rogers*, 114 Mo. 122, 19 L. R. A. 201. The conclusion to be drawn from these cases, so far as they bear upon the question in hand, is this: The husband or wife, or both, may adopt a child as his, her, or their heir, and the adopted child will inherit from the adopting parent or parents, the same as if born of such adopting parent or parents in lawful wedlock. For all the purposes of inheriting from the adopting parent the adopted child becomes, and is, the lawful child of such adopting parent." Such

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has been the generally accepted interpretation put upon the statute of adoption by the American courts.

By the act of adoption, Roy Congers became the child and heir, in a certain sense, of John and Sarah Clarkson; but it does not follow that such adopted child takes the statutory estate created under the Revised Statutes of 1855, the statute in force when the deed in question was executed. The phrase "bodily heirs" is a well-established technical term, and is defined in *Anderson, Law Dict.* 508, as "an heir begotten of the body; a lineal descendant." The words "children," "issue," and "heirs," are not synonymous terms. The rule of construction is that technical words or phrases which have acquired a peculiar and appropriate meaning in law shall be construed according to such peculiar and appropriate meaning unless it appears that the words were not used in their technical sense. When words and phrases have received a fixed legal interpretation by repeated decisions, such words and phrases when employed in deeds or other written instruments, are to receive such fixed legal interpretation as a long line of decisions attached to them. In consequence of the application of this rule to the construction of the deed from Jabez to John Clarkson, it was held, in *Clarkson v. Clarkson*, 125 Mo. 881, that John Clarkson only acquired a life estate. That the grantor therein named intended to use the term "bodily heirs" in its primary technical sense, there can be no doubt. In *Reinders v. Koppelman*, 94 Mo. 388, it was held, in construing the provisions of a will in which the testator gave his wife a life estate in all his property, and at her death one half the remainder to the nearest and lawful heirs of the testator and that of his wife, the testator and his wife each having brothers and sisters living at the date of the will, that an adopted child was not entitled to inherit under the provisions of the will, but that the remainder went to the brothers and sisters of the testator's wife. Upon this subject the court said: "In common parlance, we find that the terms, 'heir-at-law' and 'lawful heirs,' are used indiscriminately, as synonymous and convertible terms, and whenever either is used, they are invariably referred to the heirs upon whom descent is cast by law, and not upon an heir by adoption. The relation of an heir by adoption is an exceptional and unusual one, and does not come within the ordinary and usual meaning of the words, 'lawful heirs,' and those words ought not to be held *ex vi termini*, to include an adopted heir." In the concluding paragraph of the opinion, in speaking of the intention of the testator, the court remarked: "It is impossible to believe that he could have intended the child of a stranger manufactured into an heir by deed. The testator devised to his widow a life estate, the remainder to others; in that remainder she had no interest; she could neither convey it by deed nor devise it by will; she had no more power to convey it by a deed of adoption than by a deed in any other form; that which she could not do directly, she cannot be permitted to do indirectly." When the statute of 1855, now under consideration, was passed, there was no law

in this state authorizing the adoption of children, the adoption statutes not having passed until some years later. The language of the statute shows that the legislature intended to use the words "children" or "heirs" in their primary technical sense, as lineal descendants when applied to "children," and as heirs upon whom the law cast the estate immediately on the death of the ancestor when applied to heirs, and that a child or heir by adoption was not contemplated. This is unquestionably in line with the drift of modern judicial thought.

John Clarkson, having only a life estate in the premises in controversy, was powerless to convey the remainder by deed of adoption or by any other method known to law. If, then, he could not convey or in any wise dispose of the remainder, it would be illogical to say that, by the contractual rights conferred by the deed of adoption, he could convert a mere stranger into an heir, so as to work a result which was not in his power to effect by usual methods, and thereby change the descent and devolution of such remainder. It was not in the power of John Clarkson to take away the statutory estate so created, and vested in his brothers and sisters if he had no bodily heirs, and confer the same upon an adopted child. The right to inherit by virtue of a deed of adoption does not make the beneficiary a "bodily heir"—a child, in fact—of the adopting parent or parents. In *Schafer v. Eneu*, 54 Pa. 304, it was held that the adopted children are not children of the persons by whom they have been adopted, and that the act of the legislature in passing the adoption statute did not attempt the impossible, the court saying: "Giving an adopted son a right to inherit does not make him a son in fact, and he is so regarded in law, only to give the right to inherit." In the case of *Keegan v. Geraghty*, 101 Ill. 26, Sheldon, J., in an opinion of that court holding that an adopted child can take by descent only from the person adopting, and not from the lineal and collateral kindred of the adopting parent, uses this pertinent language: "We cannot admit this anomalous right, here claimed in a stranger in blood, to take by descent in exclusion of kindred, to be given by any doubtful implication or vague generality

of language. As against the adopted child the statute should be strictly construed, because it is in derogation of the general law of inheritance which is founded on natural relationship, and is a rule of succession according to nature which has prevailed from time immemorial." Although the above-cited cases may differ somewhat in detail from the case at bar, yet the principles upon which they turn apply to and are decisive of it. We are therefore of the opinion that, as to the land in controversy, Roy Congers is not to be deemed a child, within the meaning of the act of 1855, above cited, and that the remainder does not pass to such adopted child. The authorities cited by counsel for defendant in support of their contention bear upon the right of the adopted child to inherit from the adopting parents, and do not affect the question in this case.

In the view we have taken of the case involved in this record, the court committed no error in refusing defendant's first, second, and third declarations of law. But it is insisted that the court erred in refusing the seventh instruction asked in behalf of defendant, to the effect that the plaintiff was not entitled to recover rents and profits for any period preceding the commencement of this action. Under § 4638 of the Revised Statutes of 1889, plaintiff in ejectment is entitled to recover only rents and profits for a period previous to the commencement of an action, when it is shown on the trial that the defendant had knowledge of the plaintiff's claim prior to the commencement of the action. It is conceded that there was no evidence of such knowledge in this case. The law applicable to questions of this nature has been so often declared in favor of the contention of appellant that it is scarcely necessary to repeat it. See *Robidoux v. Casseleggi*, 81 Mo. 459, and cases cited.

For the refusal to give plaintiff's seventh instruction, the case is reversed and remanded, with directions that judgment be entered in accordance with the views herein expressed, computing rents and profits from February 25, 1895, the date of the institution of this suit.

Brace, P. J., and Williams, J., concur

NEBRASKA SUPREME COURT.

Minnie L. JAYNES, *Plff. in Err.*,

v.

OMAHA STREET RAILWAY COMPANY.

(.....Neb.....)

*1. Where land is surveyed and plat-
ted into an addition to a city, in pur-

* Headnotes by RAGAN, C.

NOTE.—As to additional burden of electric rail-
way in street, see *note to Western Railway of Ala.*
v. Alabama Grand Trunk R. Co. (Ala.) 17 L. R. A.
478; also *State, Kennelly, v. Jersey City* (N. J. L.) 26 L. R. A. 231; *State, Roebbling, v. Trenton*
Pass. R. Co. (N. J. L.) 33 L. R. A. 129.
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suance of the statute, the fee-simple title to
the streets and alleys of such addition thereby
vests in the public.

2. But the public holds the title to such
streets and alleys in trust for the use for which
they were dedicated.

3. Such a grant construed, and held that
it contemplated the right of the public to use
the streets for the purpose of passage by such
means as it might see fit to employ, but the

As to such railways as additional burdens on
country roads, see *Pennsylvania R. Co. v. Mont-*
gomery County Pass. R. Co. (Pa.) 27 L. R. A. 766,
Chicago & N. W. R. Co. v. Milwaukee, R. & K. E.
R. Co. (Wis.) 37 L. R. A. 856; *Zehren v. Milwaukee*
Electric R. & L. Co. (Wis.) — L. R. A. —.

grant did not contemplate that any person should exclusively and permanently appropriate any portion of a street to his own use, to the continued exclusion of the remainder of the public therefrom.

4. Whether the use made of a street is an additional burden upon the easement does not depend upon the motive power which moves the vehicles employed in such use, but depends upon whether the vehicle and appliances used in and necessary to effectuate the purpose permanently and exclusively occupy a portion of the street, to the continued exclusion of the rest of the public therefrom.

5. A corporation constructed in a street its railway tracks, and set poles at stated distances apart on either side of said tracks, near the margin of said streets. On these poles it placed wires, and used these poles and wires for the moving of its cars on said tracks by electricity. An abutting lotowner sued the railway company for damages, alleging in his petition that the continued existence in the street opposite his property of the poles and wires interfered with his ingress to and egress from his premises and depreciated them in value. Held, that the petition stated a cause of action.

6. What acts, omissions, facts, and circumstances are competent evidence of damages, to be considered by a jury, are questions of law for the court; but whether such acts, omissions, facts, or circumstances affect an owner's property, and damage it, and the amount of such damages, are for the jury.

7. It seems that by reason of article 1, § 21, of our Constitution, it is not absolutely essential that the poles and wires of an electric street-railway company should be held, as a matter of law, to be an additional burden upon the easement, in order to entitle the abutting lotowner to compensation for the depreciation to his real estate, caused by the permanent and continued presence in the street in front thereof of such poles and wires.

(February 2, 1898.)

ERROR to the District Court for Douglas County to review a judgment in favor of defendant in an action brought to recover damages for obstruction by defendant of a street in front of plaintiff's property. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Brome, Andrews, & Sheean and *H. C. Brome* for plaintiff in error.

Mr. John L. Webster, for defendant in error:

The construction or operation of a street railway along the streets cannot be made the foundation of an action for damages by an abutting property owner.

Taggart v. Newport Street R. Co. 16 R. I. 668, 7 L. R. A. 205; *Williams v. City Electric Street R. Co.* 41 Fed. Rep. 556; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380; *Koch v. North Ave. R. Co.* 75 Md. 222, 15 L. R. A. 377; *Texas & P. R. Co. v. Rosedale Street R. Co.* 64 Tex. 80, 53 Am. Rep. 739.

The construction and operation of a street railway is not casting any additional servitude upon the street, and a railway company is not liable to the abutting property owner for damages arising from the construction and operation of the road.

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Atty. Gen. v. Metropolitan R. Co. 125 Mass. 515, 28 Am. Rep. 264; *Fulton v. Short Route R. Transfer Co.* 85 Ky. 840; *Grand Rapids & I. R. Co. v. Heisel*, 88 Mich. 62, 31 Am. Rep. 806; *Briggs v. Lewiston & A. Horse R. Co.* 79 Me. 363; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461; *Elliott v. Fairhaven & W. R. Co.* 82 Conn. 579; *Oditzens' Coach Co. v. Camden Horse R. Co.* 33 N. J. Eq. 267, 36 Am. Rep. 542; *Carson v. Central R. Co.* 85 Cal. 325; *Newell v. Minneapolis L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303; *Kellinger v. Forty-second & G. Street Ferry R. Co.* 50 N. Y. 206; *Finch v. Riverside & A. R. Co.* 87 Cal. 597.

Ragan, C., filed the following opinion:

Minnie L. Jaynes brought this suit to the district court of Douglas county against the Omaha Street-Railway Company, hereinafter called the "Railway Company," a corporation organized under the laws of the state, and owning and operating an electric street railway in the streets of the city of Omaha, by permission of the city's authority. Jaynes in her petition alleged, among other things, that she was the owner of lot 8, in block 15, in R. V. Smith's addition to the city of Omaha; that said lot was a tract of land 248 feet in length east and west, and 66 feet in width north and south; that it was bounded on the east by Sixteenth street, and on the south by Clark street; that the railway company had constructed its railway over and upon and along the surface of said Sixteenth and Clark streets, in front of her property, and was operating its cars thereon, the motive power being electricity; that the railway company, for the purpose of so operating its cars, had erected poles on either side of said streets adjacent to her premises, and placed a wire upon said poles parallel to the railway track, and had strung wires across said streets on said poles; that, by reason of such construction and operation of said railway on said tracks adjacent to said premises, the value of the latter had been greatly depreciated; that the location of the poles and wires of the railway company in said streets interfered with Jaynes' ingress to and egress from her property, and thereby depreciated its value. There was a prayer for a judgment for damages. To this petition the railway company filed a general demurrer, based on its contention that the petition did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer, and dismissed the petition, and Jaynes brings that judgment here for review on error.

1. By §§ 104-106, art. 1, chap. 14, Comp. Stat. 1897, it is made the duty of every original owner or proprietor of any tract of land, who shall subdivide the same for the purpose of laying it out in an addition to a city, to cause a plat of such subdivision to be made, with reference to known or permanent monuments, and in such plat give the dimensions and the courses of all streets and alleys established thereby, and to execute and acknowledge this plat before some officer authorized to take acknowledgments of deeds, and, when so executed, to file such plat for record in the office of the register of deeds of the proper county.

The acknowledgment and record of such an instrument is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets and other public purposes. Assuming that Smith was the original owner of the lands out of which the lots of Jaynes were carved, and that he complied with the statute just quoted, and thereby dedicated these streets to the public, and thereby conveyed the fee-simple title of these streets to the city of Omaha; we have the question: For what purpose was this dedication or grant made? The particular purposes which were in the mind of the owner at the time he made this dedication or grant are not expressed therein; and the question therefore is, For what purpose does the law imply or presume the owner granted these streets to the public? Is the construction and operation of such an electric railway as the one here, on the surface of these streets, embraced in the purposes for which the original owner dedicated these streets to the public? Or, in the language of the lawbooks, is the construction and operation of this street railway an additional burden or servitude on the easement granted?

It is said by Booth in § 83 of his work on Street Railways, that the courts of last resort of the country, to which the question has been presented, have all decided that the construction and operation of such a street railway as the one in question here was not an additional servitude to those embraced in the original grant. The courts referred to by this author are Kentucky, Michigan, Maryland, New Jersey, Pennsylvania, Rhode Island, Utah, and the United States circuit court for the district of Arkansas. We shall briefly examine these cases.

The Kentucky case was decided in 1893, and is *Louisville Bagging Mfg. Co. v. Central Pass. R. Co.* 95 Ky. 50. It was an application for an injunction by the owner of a lot fronting on a street to enjoin the construction and maintenance of an electric street railway on two grounds: (1) That it would interfere with the lotowner's accustomed use of the street for backing vehicles up to his warehouse; (2) would be dangerous to those residing or doing business on the street. The *nisi prius* court denied the application for injunction, and its judgment was affirmed by the court of appeals; but the question as to whether the construction and operation of the street railway was an additional burden is not mentioned in the case, nor is the question as to whether the street-railway company would be liable to damages for the injury done to the lotowner's property by the construction and operation of the railway either argued or discussed in the opinion; and though the question as to whether electric street railways were additional burdens had, prior to that date, been presented to several courts of last resort, no case of any court is cited in the opinion.

The case from the United States circuit court for the district of Arkansas is *Williams v. City Electric Street R. Co.* 41 Fed. Rep. 556. In that case the United States circuit court held that the construction and operation of a street railway on the streets of a city was not

an additional burden simply because of the fact that the cars were moved by steam. That was the only point in the case. No such question as the one here was involved in the Arkansas case.

The Utah case referred to is *Ogden City R. Co. v. Ogden City*, 7 Utah, 207. This case was decided in 1891, and was an application for an injunction by the Ogden City Railway Company against Ogden city and another railway company, to enjoin Ogden city from carrying into effect an ordinance granting to this other railway company permission to lay a double-tracked street railway in a certain street of Ogden city,—the contention of the Ogden City Railway Company being that in 1888 Ogden city by ordinance had granted it permission to lay down a double-tracked street railway in said streets; that it had already constructed a single track, with turnouts, in that street; and that if the other railway company was granted permission to construct another double-track railway in the same street, the streets would be so obstructed by the four tracks as to interfere with other modes of travel; and that if the defendant street-railway company, in constructing its track, should use poles and wires, the plaintiff street railway's property would be greatly damaged thereby. The injunction was denied. The court said: "The allegations of fact are not sufficient to warrant an injunction on the ground that the construction of the defendant's railway would damage the abutting property by materially interfering with rights appurtenant thereto." We do not think this is an adjudication that the construction and operation of an electric street railway in the streets of a city is not an additional burden; and, though that question had prior to that time been before the courts of Rhode Island and New Jersey, the opinions in those cases are not referred to, nor is there an opinion of any other court mentioned.

The earliest case that we have been able to find in which the question under consideration was decided is *Taggart v. Newport Street R. Co.* 16 R. I. 668, 7 L. R. A. 205, decided in January, 1890. This was an application for an injunction by abutting property owners to enjoin the street-railway company from erecting poles and wires, as concomitants of their street railway, in front of the complainant's property. It appears that prior to the time the suit was brought the street-railway company had been using horses to move its cars, and were about to substitute electricity as a motive power. In the opinion the court enumerates the grounds upon which the injunction was asked as (1) that the street-railway company had not given certain notices required by the law of its incorporation; (2) that the use of electricity was illegal, as the statute creating the street-railway company authorized it to use as a motive power, "steam, horse, or other power as the councils of said city and towns may from time to time direct;" (3) that the erection of the poles was prohibited by the act incorporating the street-railway company, as that act provided that the street railway should be used, constructed, and operated so that "such corporation shall not encumber any portion of the streets occupied by such tracks." The court held that the company had given

the notice required by statute; that the use of electricity as a motive power was expressed within the law creating the corporation; and that the poles in the street were not an encumbrance, within the meaning of the act creating the corporation, taking Webster's definition of the word "encumber." The court denied the injunction, and said in the fifth point of the syllabus [19 Atl. 826]: "The change of the power by which a street railway is operated from horse-power to electricity, and the erection of poles necessary for its operation, does not impose an additional burden on the abutting property owners." The court reached this conclusion, that the street railway, with its poles and wires, was not an additional burden, by finding that the electric street railway company did not occupy the streets any more exclusively than it would if operated by horse power. There is no question that the law of the case was correctly laid down if the evidence, or the record on its face, sustains the finding of fact made by the court that the electric street railway no more exclusively occupies the street than an ordinary horse railway.

The Rhode Island case just noticed was quoted as an authority for the proposition that an electric street railway is not an additional burden by the supreme court of New Jersey in December, 1890, in *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380. In this case an abutting lotowner sought to enjoin a street-railway company from building its track in a street opposite his premises, and from erecting certain iron poles in the center of the street, to be used in the operation of its cars. The court denied the injunction, and held that the placing of the poles in the middle of the street, for the purpose of using electricity for street-car propulsion, did not impose a new servitude on the land in the street. But it would seem, from a reading of the opinion, that the complainant's application for an injunction was denied on the ground of the court's doubt as to whether the complainant's property had been or would be damaged by the erection of these poles in the center of the street opposite his property. The court said: "It is true there is a very small space in the middle of the street over which a wagon approaching the entrance cannot pass, but it may pass on either side. Besides, the distance of the pole from the entrance renders it very improbable, as it seems to me, that a wagon, in passing from the street to the entrance, would, if there was no pole there, pass over this space one time in fifty. Certain it is that, even if it be true that the pole diminishes the complainant's means of access to the entrance, the diminution is so insignificant as to lay no ground for relief in equity. A doubt as to whether the complainant's land in the street has been appropriated to a purpose for which the public have no right to use it will, at this stage of the cause, be fatal to his claim to an injunction. . . . It is impossible to emphasize too strongly the rule so often enforced in this court, that a preliminary injunction will not be allowed where either the complainant's right, which he seeks to have protected *in limine* by an interlocutory injunction, is in doubt, or where

the injury which may result from the invasion of that right is not irreparable."

The supreme court of Pennsylvania in January, 1891, in *Lockhart v. Craig Street R. Co.* 139 Pa. 419, referred to the Rhode Island case as being directly in point, and, if good law, controlling the case under consideration. The Pennsylvania case was an application for an injunction by abutting property owners to restrain the street-railway company from constructing and operating its road in a street in front of the complainants' property. The court denied the injunction, and stated the question to be whether the construction of the street railway, with its poles and wires, amounted to a taking of the property of the complainants without compensation. The court said: "The placing of the wires over the streets does not appear to be a taking of plaintiff's property. The streets are dedicated to the public use, and a citizen has certain special rights, as an abutting owner, but I cannot see how a wire run through the air above the streets can be said to be a taking, injury, or a destroying of his property. But another question arises in reference to the posts placed in the ground for the support of the wires by means of which the cars are moved. . . . And it may be now taken as settled that the owner's rights as to abutting property are subject to the paramount right of the public, and the rights of the public are not limited to a mere right of way, but extend to all beneficial legitimate street uses, such as the public may from time to time require. . . . The case of *Taggart v. Newport Street R. Co.* 16 R. I. 668, 7 L. R. A. 205, . . . is directly in point, and, if good law, covers the case in hand. My own impression is that the use of poles, wires, and other necessary appliances, such as are proposed to be used by defendants, is not, in any respect, a greater interference with the ownership of the adjoining property owner on a street than the use of streets for fire plugs, horse troughs," etc. "To my mind, the power in the Craig Street Railway Company to construct and maintain a railroad, on compliance with the terms of the act under which it was incorporated, is clear, and that these defendants have shown a legal right to proceed and construct the railway contemplated by them, unless the failure to provide means by which the plaintiff may have such damages as they may sustain, assessed and paid, or secured in advance, renders the act unconstitutional. Upon this question I am not free from doubt, but the decided inclination of my mind is that the act is not unconstitutional for that reason, because the uses of the streets for the purpose of applying motive power in the manner proposed is not such a new use as in cities should be treated as outside the proper purpose for which streets will be held to have been originally dedicated to the public use. *Taggart v. Newport Street R. Co.* before cited, is exactly in point. The case presented by plaintiffs is certainly not so clear from doubt that a chancellor should grant an injunction, summarily stopping a great public improvement before final hearing, more particularly if the position taken by plaintiffs is correct, and defendants have no legal right to take possession

of the streets, as they are about to do. A common-law action will compel them to pay all damages arising to plaintiffs, and thereafter equity would probably afford a complete remedy, by which the wrong done them could be fully corrected." It seems from this that the supreme court of Pennsylvania did not decide, at least in this case, that an abutting property owner was remediless if the construction of the street railway in front of his property damaged it, but denied the abutting property owner an injunction to restrain the erection of the improvement, leaving the question as to whether he was damaged, and, if so, how much, to the law courts.

In *Detroit City R. Co. v. Mills*, 85 Mich. 634, decided May, 1891, the street-railway company was erecting its poles and constructing its track in a street in front of a lotowner's property. The lotowner cut the poles down, and threatened to continue to do so as long as they were erected, and thereupon the railway company enjoined the lotowner from interfering with its construction of its railway. The *nisi prius* court made the injunction perpetual. The property owner appealed, and the supreme court affirmed the judgment. The question as to whether the proposed erection of the poles and wires and tracks on the street constituted an additional burden upon the easement seems to have been much discussed in the case. In the syllabus [48 N. W. 1007] the court said: "The use of the street for street railways, in such a way as not to interfere with the right of a lotowner, as one of the public to pass and repass thereon, or with the right of ingress or egress to and from his lot, does not impose a new burden and servitude, additional to what was implied by the dedication, which it is beyond the power of the city to authorize without additional compensation to the abutting lotowners." The court was composed of five judges. Two of these judges seem to have been of opinion that the street railway involved in the action, as it was proposed to be constructed, was not or would not be an additional burden upon the easement. Two of the judges dissented from that opinion, and the third concurred in affirming the judgment of the lower court, but said: "I am not prepared to say that the construction of a street-railroad track in a street is of itself no additional burden or servitude upon the street. I think it is, but to what extent depends upon all the facts and circumstances under which it is imposed."

The cases heretofore alluded to from Kentucky, New Jersey, and Pennsylvania are referred to in the majority opinion as authorities for the proposition that an electric street-railway track, with its wires and poles, is not an additional burden. But the most that can be said for the Michigan case is that whether such a street railway is or is not an additional burden is a question of fact, depending upon whether or not it is so operated and constructed as to interfere with the lotowner's right of ingress and egress to and from his property and his free use of the street.

The Maryland case referred to by Booth is *Koch v. North Ave. R. Co.* (decided Jan. 1892), 75 Md. 222, 15 L. R. A. 377. It was an application by abutting lotowners to enjoin a street-

railway company from constructing its road in a certain street in front of their property. The application was based upon four grounds: (1) That the defendant was not lawfully incorporated; (2) that it had no right to lay tracks of its own outside of tracks already laid in the street by street-railway companies; (3) that the city of Baltimore had no authority to authorize the railway to use electricity as a motive power; (4) that the road proposed to be built was an elevated road, within the meaning of the statute, which provided that no elevated road should be built in that street. The court overruled each of these contentions, and denied the injunction. The cases already alluded to from Rhode Island, New Jersey, Pennsylvania, and the Federal district of Arkansas are referred to in the opinion, and it is said of them that "they proceed on the principle that a street is a way set apart for public travel, and that the use of electricity for propelling street cars is but a new and improved motive power, in no manner inconsistent with the uses and purposes for which streets were opened and dedicated as ways for public travel." And the court decides that the use of electricity as a motive power for street cars does not impose a new servitude upon the streets, so as to entitle the abutting owner to compensation. But the question as to whether poles and wires placed in a street in front of an abutting owner's premises constituted an additional servitude, entitling him to compensation, was neither presented to nor decided by the court.

In *San Antonio Rapid Transit Street R. Co. v. Limburger* [88 Tex. 79] 80 S. W. 533, "the supreme court of Texas held that the use of a street for an electric railway does not impose an additional burden or servitude to that implied by the dedication." That was an action by an abutting property owner against a street-railway company to recover damages which he alleged his property had sustained by the construction of a street-railway track between the curb of the street and another railway track in the street. The cases hereinbefore referred to were cited by the supreme court of Texas as authorities for the conclusion reached by it. But it is to be noticed that in the Texas case there is not one word on the subject of poles and wires. It does not appear whether or not this street-railway company used any poles and wires for the operation of its road. So far as the opinion discloses, the whole complaint of the abutting property owner was the presence in the street in front of his property of the tracks and the cars thereon. These are all the cases which I have been able to find which hold (if they do) that an electric street railway, with its concomitants of poles and wires, is not an additional burden, and, if the abutting owner's property is damaged by the use of the streets for such poles and wires, that he has no remedy for such damages.

The leading case is the Rhode Island case, and the conclusion reached there was predicated upon the court's finding that the electric street railway did not occupy any more exclusively any portion of the street than an ordinary horse railway would. If all the other cases follow the Rhode Island case, and if it can be said that these cases are authority for

the proposition contended for here, that an electric street railway, with its wires and poles, is not an additional burden, then it is worth while to observe that the principle upon which the cases rest is the one mentioned by the Rhode Island court, namely, not an exclusive and continued occupation of a part of a street to the exclusion of the rest of the public. That principle is sound. But in the case at bar there is no room for the conclusion that the street-railway company, by the poles and wires which it has placed in the street, does not exclusively occupy a portion of that street to the exclusion of the rest of the public.

Looking at the original platting of Jaynes' property, and the dedication made by the then owner of the lots of a part of it for a street, we think the true construction of the grant made is this: That the grantor intended that the street should be used for the purpose of enabling the public to pass and repass thereon; that it might pass on foot, on horseback, or in vehicles, and that whether the motive power of the vehicles should be steam, electricity, horse power, compressed air, or any other power. The grant contemplated the right of the public to temporarily use any part and all of these streets for the purpose of passing over them in any manner that it might choose, and by such means as it might see fit to employ. But the grant did not contemplate that any person or corporation might exclusively and permanently appropriate any part of these streets to its use, to the continued exclusion of the rest of the public.

In the case at bar the railway company, with its poles and wires, has exclusively appropriated a portion of these streets to its own use, to the exclusion of the rest of the public. If the railway company were moving its cars on the surface of these streets by electric power, without so permanently and exclusively occupying any portion of the street, we do not think the mere fact that the motive power used was electricity would take the use out of the purpose contemplated by the original grant. The use made of these streets by the railway company is not one in common with that of the public generally. Its poles and wires remain, and must remain, and exclusively occupy, particular portions of the street, and continuously exclude the public from such portions. Whether a use made of a street is an additional burden upon the easement we do not think depends upon the motive power which moves the vehicle employed. It depends upon the question whether the vehicle and appliances used in and necessary to effectuate that purpose permanently and exclusively occupy all or a portion of the street, to the continued exclusion of the rest of the public. If they do not, then it is not an additional burden; if they do, it is.

It has been almost universally held, we think, that an ordinary street railway, whose cars were moved by horses, was not an additional burden. See, among others, the following authorities: *Atty. Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Citizens' Coach Co. v. Camden Horse R. Co.* 83 N. J. Eq. 267, 86 Am. Rep. 542; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461; *Texas & P. R. Co. v. Rosedale Street R.* 39 L. R. A.

Co. 64 Tex. 80, 58 Am. Rep. 739; Elliott v. Fair Haven & W. R. Co. 82 Conn. 579. These decisions rest upon the principle that the street was originally dedicated to the public for the purposes of travel thereon; that a car is a vehicle, the same as a coach or a wagon; and that the track of a street-railway company is laid upon a level with the surface of the street, and in such manner as not to obstruct the street, and prevent people from freely passing and repassing thereon. In other words, the horse car and its track is not a continued exclusive appropriation of any part of the street, to the continued exclusion of the rest of the public from that part of the street.

The city of Shawneetown, Illinois, built a levee in a street of that city for the purpose of protecting it against the overflow waters of the Ohio river. The levee was some 10 feet high, but so constructed that the top thereof could be used as the street had been. An abutting lotowner sued the city for damages, claiming that his lot had been depreciated in value by the presence in front of it of this levee, as it hindered his free ingress and egress to and from his property, and the supreme court of Illinois in *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321, held that the levee was an additional burden, and the city liable.

The city authorities of East St. Louis, Illinois, authorized a bridge company, which owned a bridge across the Mississippi river at that point, to construct an approach to this bridge in a public street. An abutting lotowner sued the city for damages, claiming that the approach to the bridge interfered with his free ingress and egress to and from his property, and depreciated it in value; and the supreme court of Illinois in *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619, held that the approach to the bridge was an additional burden, and the city liable for damages which its presence caused the abutting lotowner.

The city of New York prior to May, 1773, caused one of its engineers to survey and lay out into lots certain territory. Upon the plat the engineer left a space for streets. The conveyance made of these surveyed lots to the grantors of one Story contained a covenant that the grantees in such deed would "build and erect," at his own expense, certain streets, among others the streets on which Story's property fronted. The deed also declared that the streets marked on the survey or plat "shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for the inhabitants of the said city, and all others passing and returning through or by the same, in such manner as the other streets of the same city now are or lawfully ought to be." Story became the owner of one of the lots so surveyed and marked out on said plat. The New York Elevated Railroad Company was about to construct in this street, under proper municipal and legislative authority, a trestle work 15 feet high. On this they were intending to lay tracks, and on these tracks operate passenger cars. Story sought to enjoin the railroad company from such use of the street until he should be awarded the damages which his property would sustain thereby. The case went to the court of appeals of New York, and is reported in *Story v.*

New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146. It was insisted by counsel for the railroad company that the construction and operation of the railroad as contemplated was within the purpose of the original grant or dedication of the land for the street, but the court of appeals held that the proposed railroad would impose an additional burden upon the easement; and the principle upon which it based its decision is that the trestle work would amount to a permanent and exclusive occupation of a portion of the street, to the continued exclusion of the public from such portion. To the same effect see *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268.

It is quite generally held that an ordinary steam railroad in a city street or country highway constitutes an additional burden; and this is because the track of a steam railroad is of such a nature, and so constructed, that it exclusively and continuously occupies a portion of the street or highway, to the continuous exclusion of the rest of the public from such part of said street or highway. See, among others, *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 489, 16 Am. Rep. 624, and cases there cited.

Railroad cars are as much vehicles for the transportation of passengers, enabling the public to pass and repass from one part of the city or country to another, as are horse cars or carriages and buggies; but the rails of an ordinary railroad are laid upon ties, and these rest upon an elevation, and the roadbed is of such a nature and construction that it obstructs the street or highway in which it is placed, and debars the rest of the public from the use of that part of the street or highway occupied by its track.

It is also very generally held that telegraph and telephone poles in city streets or rural highways constitute additional burdens, entitling the abutting property owner to compensation. See, among others, the following cases so holding: *Board of Trade Teleph. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Chesapeake & P. Teleph. Co. v. Mackenzie*, 74 Md. 38; *American Teleph. & Telegr. Co. v. Smith*, 71 Md. 535, 7 L. R. A. 250; *Western U. Telegr. Co. v. Williams*, 86 Va. 696, 8 L. R. A. 429; *Eels v. American Teleph. & Telegr. Co.* 143 N. Y. 183, 25 L. R. A. 640.

The principle upon which all these cases rest is the sound one, that the highway or street is dedicated to the public for the purpose of enabling the public to pass and repass thereon, and that the erection of the poles in the streets by the telephone or telegraph companies is a permanent and exclusive occupation of the streets by such companies, to the continued exclusion of the remainder of the public, and in that sense the poles are a continued obstruction in the streets. The supreme court of Pennsylvania in *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.* 167 Pa. 63, 27 L. R. A. 766, held that an electric street railway, such as the one involved in this case, built in a public highway outside of the city, was an additional burden, entitling the adjacent landowner to damages.

We think that the poles and wires of the electric railway company are an additional servitude, or constitute an additional burden, 39 L. R. A.

upon the streets in which they are placed, and that the abutting lotowners of such streets are entitled to whatever damages their property has sustained by reason thereof.

2. Thus far we have considered this case with reference to the question as to whether the original dedication made of the street contemplated that the city might use or authorize the use of the streets for the purpose of placing poles and wires therein in connection with the operation of a railway. But our Constitution (art. 1, § 21) provides that the property of no person shall be taken or damaged for public use without just compensation. The writer is of opinion that if it be assumed that the original owner of this street, in dedicating it to the public, contemplated that it might be used for the erection of poles and wires therein, in connection with the operation of a passenger street railway, nevertheless if the city in applying the street to that use, or authorizing it to be so applied, damages the property of the adjacent owner, he is, by virtue of the Constitution, entitled to damages. This court, and nearly all other courts in which the state Constitution is like ours, has held that an abutting lotowner is entitled to compensation if his lot is depreciated in value by reason of the changing of the grade of the street in front of it. Now, when the land owner plats it into an addition to a city, and leaves a space for a street, he not only dedicates that space to the public for the purpose of a street, but he knows, or must know, that the municipality may work such street, keep it in repair, pave it, grade it, curb it, and may change the grade. And, where the courts have awarded damages to abutting lotowners because of a change in the grade of a street, it has not been upon the principle that such a change of grade was not contemplated at the time the grant was made, but it has been because of the constitutional inhibition that the public for its use shall not damage the citizens' property without compensation. Such is *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412. Most of the old Constitutions contained a provision that private property should not be taken for public use without just compensation, and it was quite generally held by the courts that this provision of the Constitution did not entitle an abutting lotowner to compensation for damages which his property had sustained by reason of a change of grade in the street. These cases rest upon the principle that a change of grade of a street was within the purview of the original grant of the land for the street. Suppose that A, owning a block in a city, shall deed one half of it to that city for any public purpose; by such a grant the city may devote that to any city purpose it may choose, and A could not be heard to say that the purpose to which the city had devoted the grant was not within it. But nevertheless, if the city, in the use it makes of the granted property, shall injure the remainder of A's property, it would be liable for the damages, because, in accepting the grant, it did so subject to the constitutional provision; and, though it might devote it to any public purpose it chose, yet if, in so doing, it damages A's property, or any other citizen's property, it must make good such

damages. It seems to me, therefore, that, in order to enable the plaintiff in error in this case to recover damages from the street-railway company, it is not absolutely essential that the poles and wires of the street-railway company should be held, as a matter of law, to be an additional burden upon the easement.

3. The petition in this case alleges that the permanent existence in the street opposite this property of the poles and wires of the railway company interferes with the plaintiff's ingress and egress to and from her property, and have depreciated its value. Are these facts evidence competent to go to the jury for the determination of the question as to whether the plaintiff's property has been damaged, within the meaning of the Constitution just quoted?

In *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550, the railroad company constructed its tracks in an alley with the consent of the city authorities. The owner of the abutting lot sued the company for damages. The court, in speaking of the constitutional provision in reference to damage to property for public use, said: "The constitutional provision, therefore, is that private property shall not be taken or injuriously affected without just compensation therefor. The evident object of the amendment was to afford relief in certain cases where, under our former Constitution, none could be given. It was to grant relief in cases where there was no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property, in excess of that sustained by the public at large. To this extent the property owner is entitled to recover. It is not necessary, to entitle a party to recover, that there should be a direct physical injury to his property, if he has sustained damages in respect to the property itself, whereby its value has been permanently impaired and diminished."

In *Omaha v. Kramer*, 25 Neb. 489, it is said: "The words 'or damaged,' in § 21, art. 1, of the Constitution, include all damages resulting from the exercise of the right of eminent domain which diminish the market value of private property."

In *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364, the railway company took no part of Hazels' property, and no part of the street in front of his lot was occupied by the railway company's track, and yet the court held that, if Hazels' property was damaged because of the location of the tracks, he was entitled to recover.

In *Omaha & N. P. R. Co. v. Janecek*, 30 Neb. 276, Janecek sued the railroad company for damages which he alleged he had sustained by reason of the depreciation in value of his real estate as the result of the construction and operation of the railroad in front of his premises. Janecek owned block 16, and also a small tract of land lying immediately south thereof. His residence was on the west end of this small tract of land. West of block 16 and the small tract of land was Atlantic street, and west of this was block 15. The railroad

company constructed its road through this latter block. No part of the railroad was on any part of Janecek's property, nor was any part of the railroad's property in the street on which his (Janecek's) property abutted. The court, speaking through Norval, J., said: "The plaintiff's right to recover is based upon § 21, art. 1, Constitution of this state, which provides that 'the property of no person shall be taken or damaged for public use without just compensation therefor.' It has become the settled law of this state that, under this provision of our Constitution, it is not necessary that any part of an individual's property should be actually taken for public use in order to entitle him to compensation. If the property has been depreciated in value by reason of the public improvement, which the owner has specially sustained, and which is not common to the public at large, a recovery may be had." To the same effect is *Pekin v. Winkler*, 77 Ill. 56; *Slack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Rigney v. Chicago*, 102 Ill. 64. In this last case Rigney recovered damages from the city of Chicago because it had permitted the construction of a viaduct over the intersection of Kinzie and Halsted streets, 200 feet west of Rigney's property. Rigney claimed that the construction of this viaduct cut off his communication with Halsted street, except by means of a pair of stairs at the intersection, and that because of this impairment of communication his real estate had been damaged. The supreme court said: "'Property,' in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which the word is used in the Constitution, as to the taking or damaging of private property for the public use. But the word is often used to indicate the subject of the property or the thing owned. . . . That restriction of the remedy of the owners of private property to cases of actual physical injury to the property was under the Constitution of 1848 [art. 13, § 11], which simply provided that private property should not 'be taken or applied to public use' without just compensation, etc. The Constitution of 1870 [art. 2, § 13], however, provides that 'private property shall not be taken or damaged for public use without just compensation,'—thus affording redress in cases not provided for by the Constitution of 1848, and embracing every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, by which the owner sustains some special pecuniary damages in excess of that sustained by the public generally, which by the common law would, in the absence of any constitutional or statutory provision, give a right of action." Applying the principles enunciated in the foregoing cases to the facts of the case at bar, we are of opinion that, if Jaynes' property is depreciated in value by reason of the exclusive use of a part of the streets in front thereof by the railway company's poles and wires, and the continued presence in such streets of said poles and wires, she is entitled to compensation for

such damages. As an abutting property owner, she has the right to free ingress and egress to and from this property and to and from the street; a right to an unobstructed view of the property from the street, and an unobstructed view of the street from the property; and if poles and wires of the railway company in the street in front of this property permanently and continuously infringe these rights, and she is damaged thereby, she is entitled to compensation therefor. If a railway company, without responsibility to the abutting lotowner, may build and maintain in the street one track, it may construct and maintain any number. If it may with impunity place and maintain in the street in front of the lotowner's property poles 50 feet apart, it may place them 5 feet apart, or closer, until the premises, with its poles and wires in front of it, will resemble the pictures one sees of the staked corral of the South African Zulu. Such a staking in of the premises would, of course, impair their value, and yet the difference in the case supposed and the one under consideration is one of degree only. This difference does not affect the owner's right of action, but goes only to the *quantum* of his damages.

What acts, omissions, facts, or circumstances are competent evidence of damages to be considered by a jury are questions of law for the court; but whether such acts, omissions, facts and circumstances affect an owner's property and damage it, and the amount of such damages, are for the jury.

The judgment of the District Court is reversed, and the cause remanded, with instructions to overrule the demurrer of the street-railway company, and permit it to answer.

Irvine, C., not sitting.

Ryan, C., concurring:

I desire to place my concurrence in the result in this case on grounds rather more limited than those above given. In this case a general demurrer was sustained to the petition, upon which, the plaintiff having elected to stand, there was a judgment for the defendant. The demurrer, for present purposes, must be assumed to have admitted such facts as were well pleaded, and it therefore is necessary that the averments of the petition should be stated with more than ordinary fullness. The defendant was described as a corporation engaged in the maintenance, construction, and operation of street railways in the city of Omaha, and was described as the successor of another street-railway company in rights and liabilities with respect to the street railway along plaintiff's premises, hereinafter more particularly described. The condition of the streets affected, and their appropriation and use by the predecessor of the defendant, as well as by the defendant itself, were described in the petition in this language: "That said lot [owned by plaintiff] is a strip of ground two hundred and forty feet in length east and west, and sixty feet in width north and south, bounded on the east by Sixteenth street, on the south by Clark street, in the city of Omaha; that said Sixteenth street east of said premises, and Clark street south of said premises, at the time of the happening of the griev-

89 L. R. A.

ances hereinafter complained of, were, and for a long time prior thereto had been, public streets of said city of Omaha, but not occupied, used, or obstructed by steam, electric, or horse railways in any manner whatever; that on or about the 1st day of September, 1889, a corporation known as the 'Omaha Motor Railway Company,' constructed a line of street railway over and upon Clark street, immediately south of said premises, and over and upon Sixteenth street, immediately east of said premises, and commenced the operation of said line of railway over and upon said streets adjacent to said premises, the motive power used upon said street railway at the time of the construction thereof being electricity, poles, for the purpose of supporting overhead wires being set in the ground along said streets, and adjacent to said premises, and overhead wires being attached thereto along said streets adjoining said premises. Plaintiff further says that ever since the construction of said street railway the same has been operated as an electric street railway, cars and motors passing over the line of said railway immediately adjacent to said premises, and over Clark street immediately south of said premises, and Sixteenth street immediately east of said premises, at intervals of about five minutes. Plaintiff further says that by reason of the location, construction, and operation of said line of street railway over and upon Clark street immediately south of said premises, and over and upon Sixteenth street immediately east of said premises and adjacent thereto, said premises have been greatly depreciated, the location of the tracks, poles, and wires of said street railway upon said Clark and Sixteenth streets, as hereinafter described, greatly interfering with the egress from, and ingress to, said premises from said streets, and obstructing the view from said premises looking towards said streets, the passage of trains over said street railway upon said streets in front of and adjacent to said premises also greatly interfering with the ingress to, and egress from, said premises, rendering the same difficult and dangerous, and the noise and vibration incident to the use of said tracks by said defendant company greatly interfering with the comfort and convenience of persons occupying said premises, said premises having been lessened and depreciated in value on account of the construction and operation of said street railway in the sum of twenty thousand dollars." The facts upon which the plaintiff predicates his right of recovery are the taking possession of, and the using for a street railway operated by electricity of, two streets adjacent to his property. The first class of the element of damages claimed refer to the effect of locating the tracks, poles, and wires as obstructions to ingress and egress and, of the view from the premises of plaintiff looking towards the street. The other elements are the passage of trains over the track, interfering with, and rendering dangerous, egress from, and ingress to, plaintiff's premises, and the noise and vibration incident to the use of the tracks, which interfere with the comfort and convenience of persons occupying said premises. In respect to the last two, it may be said that it is now the settled doc-

trine in this country that an ordinary street railway, upon which cars are moved by horse power, is not an additional burden. *Citizens' Coach Co. v. Camden Horse R. Co.* 38 N. J. Eq. 287, 36 Am. Rep. 542; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 464; *Carson v. Central R. Co.* 35 Cal. 325; *Texas & P. R. Co. v. Rosedale Street R. Co.* 64 Tex. 80, 58 Am. Rep. 739; *Elliott v. Fair Haven & W. R. Co.* 82 Conn. 579; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485; *Merrick v. Intramontaine R. Co.* 118 N. C. 1081.

For the occupation and use of the street for ordinary street-railway purposes, it must, I think, be conceded that the defendant was not liable to plaintiff in damages upon the authority of these cases; hence I omit the allegations as to the occupation and use of the street by a track, for it is common to all street railways, whether operated by horse power or electricity. I shall now consider the respect in which the petition charges that the defendant's use of the street differed from that of an ordinary street railway operated by horse power, and in what respects this different user has caused damages to be suffered by the plaintiff. These factors we have already grouped under the first class of elements of damages, and they are the locating of poles and wires which obstruct ingress and egress, and interfere with view from plaintiff's premises across the street. The manner in which real property may be injuriously affected, without being physically disturbed or entered upon, is well illustrated by the following adjudicated cases: The city of Shawneetown, Illinois, built a levee in a street of that city for the purpose of protecting it against the overflow waters of the Ohio river. The levee was about 10 feet high, but was so constructed that its upper surface could be used as the street had been before the construction of said levee. An abutting lotowner sued the city for damages, claiming that his lot had been depreciated in value by the presence in front of it of this levee, for the reason that it hindered his free ingress and egress to and from his property, and the supreme court of Illinois held the city liable. *Shawneetown*

v. Mason, 82 Ill. 387, 25 Am. Rep. 321. The construction of the approaches to a bridge in such a manner as to obstruct the ingress and egress of an owner to and from his property was held to be such an injury as entitled such owner to maintain an action for damages. *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619. In *Merrick v. Intramontaine R. Co.* 118 N. C. 1081, it was said by Faircloth, Ch. J., delivering the opinion of the supreme court of North Carolina: "If the street railway should be so constructed,—for instance, if it should shut out or shut off the abutter with embankments, and thus materially impair his rights,—this would seem to be an additional burden, and subject the company to damages." These adjudicated cases serve to illustrate the fact that in plaintiff's petition the averments that the location of the poles and wires of the street railway upon Clark and Sixteenth streets, in such a way as to interfere with plaintiff's ingress and egress, and his view from his premises towards said streets, in connection with the allegation that thereby his real property had suffered depreciation in value, sufficiently stated a cause of action, in view of § 21, art. 1, of the Constitution of this state, which is as follows: "The property of no person shall be taken or damaged for public use without just compensation therefor." As further illustrating the applicability and purpose of this constitutional provision, see also *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550; *Omaha v. Kramer*, 25 Neb. 489; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364; and *Omaha & N. P. R. Co. v. Janacek*, 30 Neb. 276.

I have considered this case as it was presented by the averments of the petition, which the demurrer admitted to be true, and, tested by the requirements of liberal construction laid down in *Roberts v. Sampson*, 50 Neb. 745, there was stated a cause of action. If there exist facts which should serve to change or modify our views, these facts, I think should be pleaded by the defendant, for we cannot assume their existence. For the reasons above stated I concur in the conclusion. The judgment of the district court should be reversed.

NEW HAMPSHIRE SUPREME COURT.

John T. AMEY
v.
A. M. WINCHESTER.
William P. BUCKLEY
v.
SAME.

(.....N. H.....)

The loss of the hats of persons attending

NOTE.—On the question, Who are guests of innkeepers? some authorities are found in *notes to Cookery v. Nagle* (Ga.) 6 L. R. A. 438, and *Glenn v. Jackson* (Ala.) 12 L. R. A. 382. 39 L. R. A.

a club banquet on the invitation and at the expense of the club, which had a contract to pay a specified sum for each plate furnished, where they left their hats on the rack as they entered the dining room of a hotel and they were taken without the negligence or fault of the innkeeper or his employees, does not render him liable, although such persons had registered and been assigned a room in the inn.

(March 13, 1896.)

ACTIONS to hold defendant, an innkeeper, responsible for the loss of hats taken from the rack at the door of the dining room. *Judgment for defendant.*

Defendant, an innkeeper, on the evening of January 8, 1895, provided in his dining room

a banquet for a club which agreed to pay a specified sum for each plate furnished. Plaintiffs were not members of the club but were invited by it to be present at the banquet as guests. They went to the hotel and registered and were assigned a room which they occupied. Upon going into the banqueting room they left their hats upon a rack provided for guests at the door. Before the banquet was closed they repaired to their rooms where they remained some time and upon returning found the banquet ended, the doors closed, and their hats missing. They remained in the hotel until morning when they demanded their hats of defendant and upon his refusal to produce them, this action was brought.

Messrs. Drew, Jordan, & Buckley for plaintiffs.

Mr. Isaac L. Heath, for defendant:

The plaintiffs were not guests of the hotel, — in so far as they were acting at the time the loss occurred, though they had registered and been assigned a room, they were no more the guests of the hotel than if the loss had happened at the banquet hall in Pembroke Block adjoining.

Carter v. Hobbs, 12 Mich. 52.

Plaintiffs were not guests as to the banquet where the loss occurred, and defendant cannot be held as bailee, as the case finds there was no negligence on his part.

Ingaldees v. Wood, 36 Barb. 452; *Mowers v. Fethers*, 61 N. Y. 34, 19 Am. Rep. 244.

The plaintiffs retained the exclusive control of the property lost. They did not put it in the care of the defendant, nor did they request him to take charge of it. However it might have been had they placed the hats upon the rack in question during a hotel meal for which they paid, the placing them there while at this banquet for the payment of which they were not liable, was not putting them in the care of the defendant as an innkeeper, any more than had they gone into the barber shop and hung them up while being shaved.

Albin v. Presby, 8 N. H. 408, 29 Am. Dec. 679; *Fuller v. Coats*, 18 Ohio St. 343.

The loss occurred by reason of the want of ordinary care on the part of the plaintiffs. Going out from the banquet, having completed their repast, they left their hats, with some hundred others, for two hours in the middle of the night, while they went to their room; during this time the banquet ended and the participants departed, taking their hats and coats from the rack in question.

Negligence on the part of the guest, or want of ordinary care, exonerates the innkeeper from liability for loss.

Chamberlain v. Masterson, 26 Ala. 371; *Profilet v. Hall*, 14 La. Ann. 580; *Fowler v. Dorton*, 24 Barb. 384; *Shultz v. Wall*, 134 Pa. 262, 8 L. R. A. 97; *Sibley v. Aldrich*, 33 N. H. 533, 66 Am. Dec. 745; *Eudley v. Upshaw*, 27 Tex. 547, 86 Am. Dec. 654; *Fuller v. Coats*, 18 Ohio St. 343.

Messrs. Ladd & Fletcher also for defendant.

Blodgett, J., delivered the opinion of the court:

To subject the defendant to liability as inn-

keeper, it must appear, not only that the plaintiffs' goods were lost at his inn, but that he was acting in the capacity of innkeeper when the goods were lost, and that the plaintiffs were his guests; or, in other words, that the plaintiffs were at the inn for purposes which the common law recognizes as the purposes for which inns are kept, namely, the accommodation and entertainment of travelers and way-faring men, and not for those who may be there for some special purpose not connected with passage or travel. *Calye's Case*, 8 Coke, 32a, and note, 1 Smith, Lead. Cas. *181; *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762; *Fitch v. Casler*, 17 Hun, 126; *Gastenhofer v. Clair*, 10 Daly, 265, 266; 11 Am. & Eng. Enc. Law, pp. 20, 21; *McDaniels v. Robinson* (Vt.) 62 Am. Dec. 590, note.

Upon the facts as reported, we think the rigorous rule that makes the landlord of an inn responsible for the goods of his guests under almost all circumstances, and without proof of negligence or fault on his part or of those in his employ, cannot be extended so as to protect the plaintiffs, for, as to the banquet where the loss occurred, and which they attended on the invitation and at the expense of the club, the plaintiffs are justly to be regarded as its guests, and not of the defendant, as innkeeper or otherwise, who simply provided the banquet as caterer under a contract with the club, without any lien or claim for compensation against its guests, and with no right or power to exclude anybody from participating in its festivities whom the club might properly invite. Neither by contract nor by operation of law was the defendant acting in the character of innkeeper as to the club, and still less as to its guests, who would have had no right whatever to attend except upon its invitation. Both the club and its guests came, not as ordinary travelers to an inn, but as to a banquet, for the purpose of participating in and enjoying its festivities. And likewise as to both the fact that the defendant chanced to be keeping an inn, and served the banquet there, makes his liability no greater than that of any other person not an innkeeper, who might have taken and executed the contract, either at the inn or elsewhere. One may be an innkeeper without being a club caterer, or he may be a club caterer without being an innkeeper, or he may be both; but, if he is, the two employments are so far separate and distinct in respect of duties and liabilities as not to make him responsible in the one capacity for liabilities incurred in the other. See *Minor v. Staples*, 71 Me. 316, 36 Am. Rep. 318. Nor does the fact that the plaintiffs had registered, and been assigned a room in the inn, affect the legal status of either party. As to the banquet where the loss occurred, "which was not furnished to the guests of the house, and was not one of the meals provided for them," the plaintiffs' registration and assignment put them in no different position, in a legal sense, than they would have occupied if they had registered and obtained a room elsewhere, or if the defendant had served the banquet at some place separate from and disconnected with his inn. Not having lost their property at the defendant's inn in the character of guests, but in the execution of a purpose distinct from their

accommodation as guests, the plaintiffs' actions are not maintainable. Authorities *supra*. Other grounds of defense need not be considered.

Judgment for the defendant.

Carpenter, J., did not sit. The others concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Lazar STERNBERG *et al.*

v.

David WOLFF *et al.*

(.....N. J.)

1. An injunction against the plaintiff may be imposed as a condition of a similar injunction in his favor against the defendant limiting their power to make promissory notes or checks for a corporation of which they are directors and officers and the affairs of which have come to a deadlock by dissensions between two factions, each of which owns one half of the capital stock.

2. A receiver of a trading corporation may be appointed, pending litigation, over the management and conduct of its business, when its affairs have come to a deadlock because of dissensions between two families each of which owns one half of the capital stock.

(Collins, J., dissents.)

(January 29, 1898.)

CCROSS-APPEALS from an order of the Chancery Court in a suit to enjoin defendant Wolff from exercising authority as treasurer of a trading corporation; the defendants appealing from so much of the order as allowed the injunction, and complainants appealing from so much as imposed a like injunction on the other members of the concern. *Orders vacated.*

The facts are stated in the opinion.

Mr. Robert H. Carter, for complainants:

The order enjoining Mr. Sternberg was irregular, improper, and illegal, and should be reversed.

Before this injunction, involving as it does moral turpitude in the executive of this company, should have issued, he should have been allowed to have put in his defense, when there was no occasion whatever for immediate intervention and not the slightest suggestion that the company or its stockholders would suffer by affording him that ordinary but essential privilege.

High, *Inj.* § 1579; *Citizens' Coach Co. v. Camden Horse R. Co.* 29 N. J. Eq. 299.

The order for the injunction against Sternberg was broader than prayed for in the cross bill.

When a complainant desires so heroic a remedy he must not only show by plain proof

a sufficient case of urgency, but he must, in his bill or petition, specifically pray for the exact injunction he desires.

African M. E. Church v. Conover, 27 N. J. Eq. 157; *Savory v. Dyer*, 1 Ambl. 70; *Munro v. Wivenhoe & B. R. Co.* 4 De G. J. & S. 723; *Burdett v. Hay*, 9 Jur. N. S. 1260, 4 De G. J. & S. 40; *Story*, Eq. Pl. § 48; 1 Dan. Ch. Pl. & Pr. 6th Am. ed. *388.

It was not based on proofs of acts either committed or anticipated, but allowed simply because it would do no harm.

Kerr, *Inj.* *30; *Coffin v. Coffin*, Jac. 72; High, *Inj.* § 655; *Crockett v. Crockett*, 2 Ohio St. 187.

Nor can this injunction be maintained on the ground that it was a term or condition of the allowance of Sternberg's injunction against Wolff.

The ordinary condition precedent to the granting of preliminary injunctions is the requirement that the complainant give bonds to answer in damages.

Chappell v. Davidson, 8 De G. M. & G. 2; Kerr, *Inj.* p. 625; *Chetwood v. Brittan*, 2 N. J. Eq. 438; *Murray v. Elston*, 28 N. J. Eq. 127.

The injunction against Wolff was proper and should be continued.

The acts complained of are all *ultra vires* his duties as treasurer, and there can be no question, inasmuch as his wife expressly ratifies all his acts, and adopts them as her own. But that it would have been futile to have undertaken to secure corporate action in the premises, as the presence of both Wolffs and the vote of one of them would have been essential.

Under such circumstances one or more stockholders may interfere to protect his property.

Cook, Stock & Stockholders, §§ 645, 741; *Hawes v. Contra Costa Water Co.* (*Hawes v. Oakland*), 104 U. S. 450, 26 L. ed. 827; *Fougeray v. Cord*, 50 N. J. Eq. 185, affirmed on this point, *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 758; 4 *Thomp. Corp.* §§ 4578, 4504; 1 *Morawetz*, *Priv. Corp.* §§ 242, 253, 254, 282, 525; *Brown v. Vanduyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250.

Mr. Louis Hood also for complainants.
Messrs. Riker & Riker and Charles D. Thompson for defendants.

Depue, J., delivered the opinion of the court:

On the 25th of July, 1893, Sternberg, Wolff,

NOTE.—As to the power to appoint a receiver when no other relief is sought, see note to *Supreme Sitting, O. of I. H. v. Baker* (Ind.) 20 L. R. A. 210; also *Whitney v. Hanover Nat. Bank* (Miss.) 23 L. R. A. 531; *State, Merriam, v. Ross* (Mo.) 23 L. R. A. 89 L. R. A.

544; *Columbian Athletic Club v. State, McMahan* (Ind.) 28 L. R. A. 727; *State, Independent Dist. Teleg. Co., v. Silver Bow County Second Jud. Dist. Ct.* (Mont.) 27 L. R. A. 532.

and Misch became incorporated under the general corporation act, under the name of L. Sternberg & Co., with a capital stock of \$100,000, divided into 1,000 shares, the par value of which was \$100 each. The object for which this company was incorporated was to carry on a general merchandise business. At a meeting of the stockholders, on the 26th of August, 1897, Sternberg was the owner of 499 shares; Rosa Sternberg, his wife, of 1 share; David Wolff, 1 share; and Rosa Wolff, his wife, 499 shares,—the situation being that one half of the capital stock was held by Sternberg and his wife, and the other half by Wolff and his wife. At this meeting the by-laws were amended so that the board of directors should consist of four members, and the whole number of directors should be necessary to a quorum, and the four persons above named were elected directors. Lazar Sternberg was elected president, David Wolff being secretary and treasurer. Among the by-laws was the provision that Lazar Sternberg and David Wolff and Henry Kern, the general superintendent, should not be subject to discharge or reduction of salary by any officer of the company or by the board of directors without the consent in writing of the majority in interest of the stockholders; that other employees might be discharged either by Lazar Sternberg or David Wolff, and new employees should be employed only with the concurrence of both Lazar Sternberg and David Wolff, unless otherwise ordered by the board of directors. It is unnecessary to go into particulars. It is sufficient to say that after the meeting last referred to, Sternberg and his wife, as the one party, were the owners of one half of the capital stock of the company, and Wolff and his wife the owners of the other half. Difficulties and dissensions arose between these four persons, in which Sternberg and his wife, the one half in number of the board of directors, were engaged on the one side, and Wolff and his wife, the other half of the board of directors, were engaged on the other side. By reason of these dissensions, the management of the business by the board of directors was in a deadlock, although the company was largely engaged in the conduct of the business for which it was incorporated. In consequence of the disputes between these parties, in October, 1897, Sternberg and his wife filed a bill in the court of chancery against Wolff, to restrain him, among other things, from exercising the duties of treasurer, and from discharging employees or interfering with the regular business of the company for his own personal ends, with a further prayer that, if necessary, a receiver might be appointed to take charge of said company, and manage the same, pending the decision of this suit. No answer had been filed by Wolff when the hearing on this application was had before the vice chancellor; but Wolff, in his affidavit, states that he believes that the safety of the business demands the appointment of a receiver at least during the pendency of the litigation, and until an adjustment of the interests of the stockholders can be arrived at. Rosa Wolff was not a party to the bill, but she made an affidavit stating that she was the owner of half of the company's stock, and claiming that it

was necessary for the protection of her interests that a receiver should be appointed for the corporation at least during the pendency of this litigation, and until the rights and powers of the officers and stockholders of the company shall have been adjusted and fixed under the order of the court.

This matter coming on for hearing before the vice chancellor on bill, affidavits, and counter affidavits, the vice chancellor advised an order dated November 6, 1897, denying the application for a receiver, but ordering that pending this suit an injunction do issue, enjoining David Wolff, the defendant herein, from drawing any promissory notes or checks of the company or on behalf thereof, except for ascertained debts due by the said company, or from drawing any check to the order of himself, except for salary due him after deducting all charges against him for rent and goods, the disputed items of \$206 and \$140 for banquet and stable account, respectively, not to be included in the ascertainment of said charges against him, the same being reserved until the final hearing of the case, and from discharging employees, except for cause, and that by the permission of the court, or from employing any new employees without the permission of the court, and from making or procuring to be made any list of the customers of said company, and from continuing to act as treasurer of the said company unless within ten days from the date hereof he should file a bond in the penal sum of \$20,000 conditioned for the faithful performance of his duties as treasurer of the defendant corporation; and that the complainant Lazar Sternberg be likewise enjoined from drawing any promissory notes or checks of the company, or on behalf thereof, except for ascertained debts due by the said company, or from drawing any check to the order of himself except for salary due him after deducting all charges against him for rent and goods; and from discharging employees except for cause, by the permission of the court, or from employing any new employees without the permission of the court, and from making or procuring to be made any list of the customers of said company, and from inducing the employees of the company to fail to pay proper respect to the defendant and other officers of the company, and from inducing them to refuse obedience to their orders.

The vice chancellor in granting the injunction against Sternberg seems to have gone upon the ground that the mutuality of the injunction was necessary to protect the interests of all the stockholders in the affairs of the company *pendente lite*. It is within the power of the court of chancery, in granting to a suitor an injunction to impose terms; and I have no doubt that the terms imposed in this case were such as it was in the power of the court to impose, enjoining a defendant on the terms that an injunction relating to the same subject-matter should go against the complainant. The business of the company, at the time these orders were made, in manufacturing and selling clothing, was very large, the company having their main place of business in the city of Newark, and eleven branches located elsewhere in the state; and it is undeniable that

the pendency of these injunction orders seriously interferes with the business of the company; and, in the judgment of this court, it is wholly impracticable for the court of chancery to take upon itself the control of the details of the business of this company in conformity with this injunction, as well as quite impossible that the business of the company should be profitably carried on without those who are engaged in the management of the business being allowed to manage and conduct the same upon business methods rather than by the methods proposed by these injunction orders. But it is apparent from the facts that appear in the bill, and affidavits that some relief pending this litigation should be afforded in these proceedings. The two parties to the controversy—Sternberg and his wife on the one side, and Wolf and his wife on the other side—are the owners each of one half of the capital stock. These four individuals are directors of the company, and by the by-laws the whole number is necessary to make a quorum for the transaction of business. The dissensions between these two parties—Sternberg and his wife on one side, and Wolf and his wife on the other side—have brought the affairs of this company to a deadlock, so far as any corporate action by the board of directors is concerned. It may be assumed that the court of chancery has no jurisdiction to dissolve a solvent corporation, and distribute its assets, on the ground that the business of the corporation is improperly conducted by its board of directors, even though such mismanagement be with the concurrence of a majority of the stockholders; but the jurisdiction of the court of chancery to control the business of a company, especially a trading company, pending a litigation over the management and conduct of its business, must necessarily exist; and we think, pending a litigation such as that which is inaugurated by the proceedings in this case, a receiver may be appointed. Corporations such as the one now before us are mere trading companies with a corporate organization, for the convenience of conducting the business for which they were incorporated. Such a corporation has not the qualities of corporations created for public purposes. No reason appears why in the matter of the control and conduct of its business the corporation and its officers should not be within the control of the court of chancery to an extent corresponding with the control of that court over the business of a mere partnership.

The cases seem to establish the power of the court in virtue of its general jurisdiction to preserve the subject of litigation *pendente lite*, though it may relate to the affairs of a trading company in form organized as a corporation. The two cases cited by the vice chancellor in his second opinion are to that effect. *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 303. In the first case the complications in the affairs of the company arose out of a division in the board of directors, which made it absolutely impossible that the affairs of the company could be conducted with advantage. Vice Chancellor Mallins in that case says: "With regard to private partnerships, nothing is of more frequent occurrence than the quarrels of

partners. If partners quarrel, oust each other from the management, or so conduct themselves that the partnership cannot go on with advantage, it is every day's practice for the court to interfere by injunction, and appoint a receiver if necessary. With regard to public companies, I apprehend the same principle is applicable. If a state of things exists in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there is frequently in the case of private partnerships, it is clearly within the rule of this court to interfere, and it will do so." The court in that case intervened by injunction and receiver simply to protect the property of the company, to continue, however, no longer than until a governing body was duly appointed. In the latter case the dissension was also in the board of directors one set of which closed the office doors of the company's building, and the other set, with the aid of some laborers, broke open the doors with crowbars, and forced the office open. The prayer of the bill was for the appointment of a receiver until the proper board of directors was constituted. The vice chancellor placed the affairs of the company in the hands of a receiver *pendente lite* until a new governing body was appointed. The vice chancellor's opinion states the principle to be that the court will not interfere with the internal affairs of joint stock companies unless they are in a condition in which there is no properly constituted governing body, or there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested. In such a case the court will interfere, but only for a limited time and to as small an extent as possible. Chancellor Runyon, in *Einstein v. Rosenfeld*, 88 N. J. Eq. 809, after citing the two cases already cited, did not dissent from the ruling of the vice chancellor in those cases. He denied the appointment of a receiver on the ground that the business of the company was being carried on, and that there was no need of immediate interference on the part of the court for the protection of the property or business interests of the company. In *Archer v. American Waterworks Co.*, 50 N. J. Eq. 33, the present chancellor, after referring to the three cases above cited, said that "if the present directors of the company . . . continue their dissensions, so that the affairs of the company are not speedily attended to, upon a proper application I will care for the property, pending determination of the suit, through the instrumentality of a receiver. Such action will be supported by precedents and authority. . . . My interference, however, by injunction and receiver will be limited to the imperative requirements of the present emergency." In an earlier case Vice Chancellor Van Fleet said: "The power of this court to appoint a receiver of a corporation, either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, I think must be regarded as settled; but I think it is equally well settled that this power is subject to certain limitations, namely,

it must always be exercised with great caution, and only for such time and to such an extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stockholders." *Edison v. Edison United Phonograph Co.* 52 N. J. Eq. 620, 625, 626. In *Fougeray v. Cord*, 50 N. J. Eq. 185, 756, this court did not deny the power of the court of chancery to appoint a receiver *pendente lite* for the management of the affairs of an incorporated company organized for the purpose of trade. The ruling of this court was that "the disturbance of corporate functions incident to a receivership are extreme powers and may not be decreed by a court of equity when the specific acts complained of are capable of redress and complete restitution and those apprehended fall within the ordinary jurisdiction by injunction." The order of the court of chancery appointing a receiver in that case was set aside by this court, not on the ground of a want of power in the court of chancery to resort to the proposed mode of relief, but on the ground that, in the judgment of this court, that power was in that instance improperly exercised.

That some redress should have been afforded under the bill filed in this case is apparent from the facts disclosed in the bill and affidavits. That the vice chancellor granted injunctions which so completely interfered with the affairs of the company as to make the

conduct of its business by its officers in ordinary business methods impossible, and assumed the administration of its business affairs to such an extent as to be utterly impracticable, affords a convincing argument for such relief as is practicable through the intervention of the court of chancery under the circumstances. Such relief, we think, could be afforded only by the appointment of a receiver *pendente lite*.

On both appeals *the injunction orders should be vacated, and the record should be remitted to the Court of Chancery, to be proceeded with in accordance with these views.*

Collins, J., dissenting (Filed January 31, 1898):

While I agree with the majority of this court that the situation disclosed by the affidavits called for the appointment of a receiver on the application of either party, I also think that pending such appointment it was justifiable, under the affidavits, to order an injunction forbidding David Wolff to further act as treasurer of the corporation until he should give bonds, and restraining him from making such drafts and notes as were interdicted. Such an order might justly have been made conditional upon submission by Lazar Sternberg to like interdiction. A modified injunction of this tenor seems still unobjectionable, and may be necessary.

OHIO SUPREME COURT.

Thomas C. KELLEY, *Plff. in Err.*,

v.

OHIO OIL COMPANY.

(.....Ohio.....)

- *1. **Petroleum oil is a mineral**, and while it is in the earth it forms a part of the realty, and when it reaches a well, and is produced on the surface, it becomes personal property, and belongs to the owner of the well.
2. **Whether such oil percolates through the rock**, or exists in pools or deposits, it forms a part of that tract of real estate in which it tarries for the time being; and when it leaves one tract, and enters another, it becomes a part of the realty of the latter, and thereby the owner of the former loses all right to the oil while it remains away from his land.
3. **The drilling of wells by each owner of adjoining oil lands**, along and near the division line, so that each may obtain the amount of oil contained in his lands, is known as "protecting lines," and such protection affords a certain and ample remedy to prevent one operator from obtaining more than his share of oil.

(December 14, 1897.)

*Headnotes by BURKET, Ch. J.

NOTE.—As to ownership of petroleum oil, see *Williamson v. Jones* (W. Va.) 25 L. R. A. 222, and note; also *Williamson v. Jones* (W. Va.) 38 L. R. A. 694; *Murray v. Allard* (Tenn.) 39 L. R. A. 249; and *Wilson v. Hughes* (W. Va.) 39 L. R. A. 292.
39 L. R. A.

ERROR to the Circuit Court for Hancock County to review a judgment in favor of defendant in an action brought to enjoin the drilling of certain oil wells. *Affirmed.*

Statement by **Burket, Ch. J.**:

The plaintiff in error was plaintiff below. The cause came on for hearing in the circuit court on appeal, upon the following petition and supplemental petition: "The defendant is a corporation found and organized under the laws of Ohio. One John F. Hastings, of Findlay, in said county, is owner in fee, seised and possessed of 165 acres of valuable mineral oil land in Findlay, Ohio, and more particularly designated as the west half of the northwest quarter of section No. 1, and the east half of the northeast quarter of section No. 2, in township one north, range ten east; and that plaintiff has a contract and agreement with said Hastings whereby plaintiff has the right to operate said lands for oil, and take the oil from said land, yielding to said Hastings a portion or royalty of the oil so produced, the balance to be retained by plaintiff as his own property; and in virtue of said contract plaintiff is now at work on said land, has two wells completed, and a rig up and ready to begin the drilling of a third well thereon. That said Hastings's land is joined on the east and west by lands now in the possession and control for oil purposes of the defendant, on which they now have producing oil wells; and the east 80

acres of said Hastings's farm is joined on the south by mineral oil lands owned in fee by the said defendant, and on which also the defendant has producing oil wells. That underlying the land of said Hastings, and the lands so adjoining the same on the south and west and east, as aforesaid, is a formation of porous sand or Trenton rock, so called, which is permeated with valuable mineral oil. That the nature of said mineral oil deposit is such that when, in the process of operating, an oil well is drilled from the surface down into and through said oil-bearing rock, and the usual pumping appliances attached to and employed on said well to extract oil therein, the oil will be drawn to said opening from a long distance through said porous rock, and all the oil within a radius of from 200 to 250 feet surrounding such well will be drawn to and extracted by means of such well, so that in order to drain and exhaust all the oil in the land it is only necessary to drill the wells from 400 to 500 feet apart. The defendants, well knowing the premises, and designing wilfully and unlawfully to extract the mineral oil from, in, and under the said Hastings land, by means of surface operations on the land so owned and controlled by them, in fraud and violation of the plaintiff's right, and from motives of un-mixed malice, have located a line of oil wells along the entire east line of said farm, and upon and along the said south line of the east 80 acres of said farm, which wells are so located just 25 feet from the line of Hastings's land, and just 400 feet apart, all of which wells so located the defendants threaten and intend to drill at once, with the design and to the unlawful intent and purpose aforesaid. That, in view of the well-known tendency of said wells to drain a large extent of territory immediately surrounding them, it is the custom and almost universal practice of oil operators when operating adjoining lands, to locate their wells at least 200 feet from the line of lands, in order that, so far as reasonably practicable, each operator's well shall draw its supply from his own land, and not unnecessarily disturb or detract from the oil mineral wealth of the adjoining lands. That the defendants' holdings on the east consist of about 160 acres in a body, and on the south a very large tract, to wit, several hundred acres, and there is in the defendants' operating said land for oil no sort of necessity or excuse for the defendants to locate their said wells so unusually near the Hastings line, as there are no wells at all on the Hastings east or south line, except the wells operated by the defendant, which are more than 200 feet from the defendant's line, and by plaintiff's contract with Hastings, which is of record well known to the defendant, no well is to be drilled by the plaintiff within 200 feet of the exterior line of the farm, unless it becomes necessary in order to protect the line; so that the only motive of the defendant in so locating its said wells was to injure the plaintiff, and to get the oil which would be available to him in his operation of said farm. If the defendants are permitted to extract the plaintiff's oil in the manner as aforesaid, the plaintiff will suffer irreparable injury, and will have no adequate legal remedy, for the reason that it will be impossible to determine the exact proportion of

89 L. R. A.

the product belonging to the plaintiff. Wherefore the plaintiff prays that a temporary restraining order issue, enjoining the defendant from drilling and operating any oil well at any point within 200 feet of the line of said Hastings farm, unless it should become necessary to approach nearer in order to protect the line and that on the final hearing that said injunction be made perpetual."

"And now comes the plaintiff, by leave of this court, and for a supplemental petition and in addition to the allegations of the original petition, alleges that, since the dissolution of the temporary injunction granted in this action, the defendants have proceeded and located and drilled, and are now operating for oil, or about to begin operating twelve oil wells, nine of which are at the points stated in the petition, and three of which are on the Reimund farm, adjoining the Hastings farm on the west,—all of which wells are so completed and operating by means of pumping appliances, and all which wells are so operating about 25 feet from the lines of said farm. That all of said wells are oil-producing wells of greater or less capacity, and that by means thereof the defendants are daily extracting large and valuable quantities of mineral oil, a large part of which mineral oil is so drawn and extracted from the deposits thereof in the land of said Hastings, and which oil the plaintiff has, by his contract with said Hastings, the right to take and use and enjoy. The said wells draw their supply so indiscriminately from the mines and lands of said Hastings and of the defendant that it is impossible to distinguish that of the defendant from that of the plaintiff, but all of said oil is so being taken by the said defendant and converted to its own use. Wherefore, in addition to the prayer of the petition, the plaintiff prays that the defendant be required to account to the plaintiff for the oil so taken; that the amount thereof be ascertained; and that the plaintiff may have a decree and judgment against the defendant therefor, and for all proper relief."

The circuit court was of opinion that the petition and supplemental petition failed to state a cause of action against the oil company and therefore refused to hear any evidence, and found from the pleadings in favor of the defendant, to which plaintiff excepted.

Mr. George H. Phelps, for plaintiff in error:

It is manifestly wrong for the owner of adjoining land to secure the oil which is the property of his neighbor.

Equity will not suffer a wrong without a remedy.

1 Pom. Eq. Jur. § 428.

Mineral oil is as fixed and stable in the porous rock to which it is indigenous as coal or any solid mineral, and has no natural tendency to escape until it is disturbed by artificial means peculiarly adapted to securing and utilizing it, and it would never go across the line of the land of its owner unless deprived of lateral support sufficient, in nature, to maintain it *in situ*.

Ohio State Geological Sur. of 1890, p. 84.

This right to lateral support is as sacred as

any other right incident to the land, and as much under the protection of the law.

Ballard, Ohio Law of Real Prop. § 359; *Burgner v. Humphrey*, 41 Ohio St. 352; *Tiffin v. McCormack*, 34 Ohio St. 644, 32 Am. Rep. 408; *Farrand v. Marshall*, 21 Barb. 409.

The fact that such property is in its nature more susceptible to injury by the oil operations of the adjoining land increases rather than diminishes the degree of care and caution required of the adjoining proprietor in the use of his land for such special purpose, and a bad custom or habit of crowding lines cannot avail as an excuse for such obvious wrong to the adjoining proprietor.

Horner v. Watson, 79 Pa. 242, 21 Am. Rep. 55; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 60.

The right of man to take water is a usufructory, as contradistinguished from a property, right.

Lembeck v. Nye, 47 Ohio St. 386, 8 L. R. A. 576.

Petroleum or rock oil is a mineral substance in solution; in place it is a mine underlying the land having in a state of nature, unmolested by mining operations, no migratory tendency whatever, and operations designed solely for securing such mineral are essentially and distinctly mining operations, and such oil when brought to the surface is a recognized commercial commodity.

16 Am. & Eng. Enc. Law, p. 221, and note.

Plaintiff and defendant must be regarded as the owners and operators of adjoining mines.

Theirs is not an ordinary use of the land, but a special and unusual one, and their correlative rights and duties in respect to such use are peculiarly those of adjoining mine owners, and not those of adjoining landowners in the general and ordinary sense in which those terms are used and known in the law.

Collins v. Charters Valley Gas Co. 181 Pa. 143, 6 L. R. A. 280; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 58; Angell, Water-courses, 7th ed. § 189; 17 Am. & Eng. Enc. Law, p. 178; *Gill v. Weston*, 110 Pa. 313.

The only injury to which an adjoining owner of landed property is compelled to submit is that which is fairly incident to the use of the adjoining property for the purpose of the ordinary usual uses to which landed property is applied.

Letts v. Kessler, 54 Ohio St. 73.

The owner of land shall so use his own as not unnecessarily to injure the property rights of the adjoining owner.

Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; *Burgner v. Humphrey*, 41 Ohio St. 340; Ballard, Ohio Law of Real Prop. §§ 340-352; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41; *Letts v. Kessler*, 54 Ohio St. 73.

Defendant in the exercise of its right to mine the adjoining lands for oil shall respect the plaintiff's equal right on the Hastings land, and while in its mining operations it may employ all the usual known and practical means for securing the oil deposits in its own mine, it must at the same time employ the same means to prevent encroachment upon and injury to the mineral rights of the plaintiff.

If the course of conduct above prescribed is 89 L. R. A.

carefully and faithfully observed then any incidental injury resulting to either party by the operations of the other would, under the law, be *damnum absque injuria*.

Bassett v. Salisbury Mfg. Co. 43 N. H. 569, 82 Am. Dec. 179, cited in 27 Am. & Eng. Enc. Law, p. 428.

Fraud is ever assuming new forms but happily equitable principles are so capable of varied application that our courts are able to furnish relief against cheats of the newest invention.

Yeoman v. Lasley, 40 Ohio St. 200; 1 Pom. Eq. Jur. § 111; *Rhodes v. Cleveland*, 10 Ohio, 160, 86 Am. Dec. 82.

The owner of land cannot make use of his property if by so doing he must necessarily injure the property of his neighbor.

Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279, cited in *Tiffin v. McCormack*, 34 Ohio St. 644, 32 Am. Rep. 408.

That the line of wells drilled and now being operated by the defendant effect to injure and were intended by the defendant to injure and impair the mineral right of the plaintiff abundantly appears and is conceded by the record, and in addition to that courts will take judicial notice of the effect of such wells.

Wettengel v. Gormley, 160 Pa. 559; *Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528; Ohio State Geological Rep. 1890, pp. 67, 68, 84; 12 Am. & Eng. Enc. Law, pp. 178, 195, 196.

That said wells are unnecessarily so located and drilled is equally obvious in this record.

Gill v. Weston, 110 Pa. 313; 17 Am. & Eng. Enc. Law, p. 178, and note.

It is the duty of a person working near the boundary lines of his mine to take every precaution to avoid encroachment upon adjoining mines, and if he takes ore from an adjoining mine he will be liable for trespass and equity will protect such mining property by injunction.

Williams v. Pomeroy Coal Co. 37 Ohio St. 583; High, Inj. §§ 468, 472; 15 Am. & Eng. Enc. Law, p. 881 and notes; 5 Am. & Eng. Enc. Law, pp. 70-75; Wood, Nuisances, § 119; 2 Shearm. & Redf. Neg. § 717; 1 Pom. Eq. Jur. §§ 111, 112, subs. 7, 8.

There is a plain distinction between the solid and fluid minerals as respects the line and right to mine near the boundary.

Wettengel v. Gormley, 160 Pa. 559; *Ohio Oil Co. v. Kelley*, 9 Ohio C. C. 519.

Whatever else may be said of the acts of the defendant in opening and operating mines so near to the plaintiff as to even have a tendency to take his oil, such act constitutes a private nuisance restraint whereof is a familiar subject for the injunctive remedy.

Williams v. Pomeroy Coal Co. 37 Ohio St. 589.

It is the ordinary case of a tortious confusion of goods, and the defendant is bound to account for the entire product.

Hart v. Ten Eyck, 2 Johns. Ch. 62; *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627; *Pulcifer v. Page*, 32 Me. 404, 54 Am. Dec. 582.

Messrs. John Poe and James O. Troup for defendant in error.

Burket, Ch. J., delivered the opinion of the court:

The question is not as to the motive—fraud

or malice—which may have induced the oil company to drill the wells sought to be enjoined. The only question of practical importance is, 'Had the oil company the legal right to drill the wells? When a person has the legal right to do a certain act, the motive with which it is done is immaterial. The right to acquire, enjoy, and own property carries with it the right to use it as the owner pleases, so long as such use does not interfere with the legal rights of others. To drill an oil well near the line of one's land cannot interfere with the legal rights of the owner of the adjoining lands, so long as all operations are confined to the lands upon which the well is drilled. Whatever gets into the well belongs to the owner of the well, no matter where it came from. In such cases the well and its contents belong to the owner or lessee of the land, and no one can tell to a certainty from whence the oil, gas, or water which enters the well came, and no legal right as to the same can be established or enforced by an adjoining landowner. The right to drill and produce oil on one's own land is absolute, and cannot be supervised or controlled by a court or an adjoining landowner. So long as the operations are legal, their reasonableness cannot be drawn in question. As was pointed out in *Letts v. Kessler*, 54 Ohio St. 73, it is intolerable that the owner of real property, before making improvements on his own lands, should be compelled to submit to what his neighbor or a court of equity might regard as a reasonable use of his property. Petroleum oil is a mineral, and while in the earth it is part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract until it reaches a well, and is raised to the sur-

face, and then for the first time it becomes the subject of distinct ownership, separate from the realty, and becomes personal property,—the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is the property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty, and converts it into personalty. While it is generally supposed that oil is drained into wells for a distance of several hundred feet, the matter is somewhat uncertain, and no right of sufficient weight can be founded upon such uncertain supposition to overcome the well-known right which every man has to use his property as he pleases, so long as he does not interfere with the legal rights of others. Protection of lines of adjoining lands by the drilling of wells on both sides of such lines affords an ample and sufficient remedy for the supposed grievances complained of in the petition and supplemental petition, without resort to either an injunction or an accounting. The cases of *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, and *Collins v. Chartiers Valley Gas Co.* 131 Pa. 143, 2 L. R. A. 280, and other like cases, in which some harmful substance was sent, conveyed, or caused to go from the premises of one to the premises of another, have no application here, because in this case nothing reached the plaintiff's lands from the premises of the defendant, and the only complaint is that the oil company so used its own premises as to secure and appropriate to its own use that which came into its lands by percolation, or by flowing through unknown natural underground channels. This it had a right to do. While the drilled oil well is artificial, the pores and channels through which the oil reached the bottom of the well are natural.

Judgment affirmed.

OREGON SUPREME COURT.

Laura A. HARRIS, *Rept.*,
v.
Sherwood BURR *et al.*, *Appts.*

(.....Or.....)

The right of women to vote at a school meeting for a director of a district, as provided by Sess. Laws 1891, p. 130, is not precluded by Const. art. 2, § 2, limiting the right to vote "at all elections authorized by law" to male citizens, as this is construed with the constitutional provision giving the legislature power to provide a system of common schools.

(February 14, 1898.)

A PPEAL by defendants from a judgment of the Circuit Court for Lane County in favor of plaintiff in an action brought to re-

cover damages for refusing to permit plaintiff to vote at an election for school director. *Affirmed.*

The facts are stated in the opinion.

Mr. E. R. Skipworth, for appellants:

If plaintiff was not a "legal voter," she could not sustain damages, in contemplation of law, by the refusal of the judges of the election to receive and count her ballot.

Participation in the elective franchise is not a natural right, but a privilege conferred by law.

Cooley, Const. Lim. p. 752; *Opinion of the Justices*, 62 Me. 596; *Rohrbacher v. Jackson*, 51 Miss. 735; *Van Valkenburg v. Brown*, 43 Cal. 43, 13 Am. Rep. 136; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627; *Bloomer v. Todd*, 3 Wash. Terr. 599, 1 L. R. A. 111.

The Constitution declares that in all elections not otherwise provided for every white male citizen of the United States, of the age of twenty-one years, shall be entitled to vote at all elections "authorized" by law.

NOTE.—As to the right of women to vote, see *Coffin v. Thompson* (Mich.) 21 L. R. A. 662, and *note*; also *Re Gage* (N. Y.) 25 L. R. A. 781.
39 L. R. A.

When the legislature of this state passed § 2599, it had no power to declare who should be legal voters at a school election other than as provided in art. 2, § 2, of the Constitution, and, the qualifications of voters being determined and limited by said § 2, the legislature cannot enlarge or abridge those qualifications; and therefore said act of February 20, 1891, is repugnant to the Constitution of this state, and is therefore void.

White v. Multnomah County Comrs. 18 Or. 319; *State, Carter, v. Stevens*, 29 Or. 464; *Bloomer v. Todd*, 3 Wash. Terr. 599, 1 L. R. A. 111; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627; *Cooley, Const. Lim. p. 756*; *Green v. Shumway*, 39 N. Y. 418; *Brown v. Grover*, 6 Bush, 1; *Lyman v. Martin*, 2 Utah, 136; *State, Allison, v. Blake*, 57 N. J. L. 6, 25 L. R. A. 480.

The act of February 20, 1891, provides qualifications for voters at school elections not included in § 2, art. 2, and also extends the elective franchise to female citizens who are not included in § 2, and therefore said act is null and void.

Cooley, Const. Lim. p. 756; *Page v. Allen*, 58 Pa. 333, 98 Am. Dec. 273; *Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 187, 6 L. ed. 68; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Bloomer v. Todd*, 3 Wash. Terr. 599, 1 L. R. A. 111; *Re Inspectors of Election*, 25 N. Y. Supp. 1068; *Re Cancellation from Registry*, 5 Misc. 375; *State v. Adams*, 2 Stew. (Ala.) 231; *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754; *State, Cornish, v. Tuttle*, 53 Wis. 45; *People, Van Bokkelen, v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465; *State, Knowlton, v. Williams*, 5 Wis. 308, 68 Am. Dec. 65; 6 Am. & Eng. Enc. Law, p. 268; *State, Kimball, v. Hendee*, 57 N. J. L. 307; *State, Chamberlain, v. Cranbury Bd. of Edu.* 57 N. J. L. 605; *Landis v. Ashworth*, 57 N. J. L. 509; *Chase v. Miller*, 41 Pa. 403; *Bourland v. Hildreth*, 26 Cal. 161; *People, Twitchell, v. Blodgett*, 13 Mich. 127; *People, Ahrens, v. English*, 189 Ill. 622, 15 L. R. A. 181; *White v. Multnomah County Comrs.* 18 Or. 319, 57 Am. Rep. 20; *State, Carter, v. Stevens*, 29 Or. 464; *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52; *Lyman v. Martin*, 2 Utah, 136; *St. Joseph & D. C. R. Co. v. Buchanan County Ct.* 89 Mo. 485.

To uphold the contention of respondent's counsel the court would have to ignore the plain provisions of art. 2, § 2, and rest its decisions on a single word ("manner") in § 7, art. 6.

1 Story, Const. § 454; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 187, 6 L. ed. 68; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Cooley, Const. Lim. p. 752*; *Bloomer v. Todd*, 3 Wash. Terr. 599, 1 L. R. A. 111; *Van Valkenberg v. Brown*, 48 Cal. 43, 13 Am. Rep. 136; *Blair v. Ridgely*, 41 Mo. 68, 97 Am. Dec. 248; *Spencer v. Board of Registration*, 1 MacArth. 169, 29 Am. Rep. 582; *Daggett v. Hudson*, 43 Ohio St. 548, 14 Am. Rep. 843, note; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627.

A school-district election is held in pursuance of law, and in contemplation of art. 2, § 2.

White v. Multnomah County Comrs. 18 Or. 319 L. R. A.

319, 57 Am. Rep. 20; *State, Carter, v. Stevens*, 29 Or. 464; *Cooley, Const. Lim. pp. 37, 38, 756*; *People, Ahrens, v. English*, 189 Ill. 622, 15 L. R. A. 181; *State, Kimball, v. Hendee*, 57 N. J. L. 307; *Landis v. Ashworth*, 57 N. J. L. 509; *State, Chamberlain, v. Cranbury Bd. of Edu.* 57 N. J. L. 605; *Green v. Shumway*, 39 N. Y. 418.

The definition of the word "manner" as given in 14 Am. & Eng. Enc. Law, p. 251, is, "literally handling a thing."

In *Wells v. Bain*, 75 Pa. 39, 15 Am. Rep. 563, the court said: "The word 'manner' is one of large signification, but one thing is clear,—it cannot exceed the subject it qualifies or belongs to."

The principle here is the qualification of voters at all elections, and the manner, the mere handling, or the mere method of conducting the election and the regulation of those matters (not the qualification of voters) is within the legislative authority.

Const. art. 2, §§ 6-8; *Cooley, Const. Lim. p. 756*; *People, Ahrens, v. English*, 189 Ill. 622, 15 L. R. A. 181; *Fifth Ave. Bank v. Colgate*, 22 Jones & S. 196; 14 Am. & Eng. Enc. Law, p. 252, note 1.

The phrase, "manner of voting," literally interpreted, applies simply to the act of voting, which is provided for in the Constitution.

Kentucky Union R. Co. v. Bourbon County, 85 Ky. 98; *Vollmer's Succession*, 40 La. Ann. 593; *Phillips v. Middlesex County Comrs.* 122 Mass. 258.

The laws conferring or relating to suffrage are strictly construed.

Bailey v. Fiske, 34 Me. 77; *Monroe v. Collins*, 17 Ohio St. 665; *Cooley, Const. Lim. p. 487*; *People v. Dean*, 14 Mich. 406; *White v. Multnomah County Comrs.* 18 Or. 319, 57 Am. Rep. 20; *State, Carter, v. Stevens*, 29 Or. 464; *Bloomer v. Todd*, 3 Wash. Terr. 599, 1 L. R. A. 111; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627.

The legislature had, under the Constitution, the power to establish a common-school system, but there is not even an implication in any of the provisions of the Constitution relating to that subject conferring on the legislature power to extend suffrage to women, nor to impose upon male citizens any different qualifications at a school election than already imposed by the Constitution.

Const. art. 2, § 2; *White v. Multnomah County Comrs.* 18 Or. 319, 57 Am. Rep. 20; *State, Carter, v. Stevens*, 29 Or. 464; *State v. Adams*, 2 Stew. (Ala.) 239; *Re Cancellation from Registry*, 5 Misc. 375; *Re Inspectors of Election*, 25 N. Y. Supp. 1068; *State, Allison, v. Blake*, 57 N. J. L. 6, 25 L. R. A. 480; *Landis v. Ashworth*, 57 N. J. L. 509; *People, Ahrens, v. English*, 189 Ill. 622, 15 L. R. A. 181; *Chase v. Miller*, 41 Pa. 403; *Bourland v. Hildreth*, 26 Cal. 161; *People, Twitchell, v. Blodgett*, 13 Mich. 127; 6 Am. & Eng. Enc. Law, p. 268.

Mr. George B. Dorris, for respondent:

When a state law is attacked it is presumable valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the state we are able to discover that it is prohibited.

The right to vote in the United States comes from the states.

Minor v. Happersett, 88 U. S. 21 Wall. 165, 174, 22 L. ed. 627, 630; *United States v. Cruikshank*, 92 U. S. 542, 556, 23 L. ed. 588, 592.

Article 2, § 2, of the Constitution only applies to state, county, and precinct officers, provided for in the Constitution, and such other state, county, and precinct officers that may be authorized, under art. 6, § 7, of the Constitution since its adoption.

School directors are not mentioned in the Constitution, and are not constitutional officers.

Re Gage, 141 N. Y. 112, 25 L. R. A. 781; *State, Crosby, v. Cones*, 15 Neb. 444; *Wheeler v. Brady*, 15 Kan. 26; *Plummer v. Yost*, 144 Ill. 63, 19 L. R. A. 110; *Belles v. Burr*, 76 Mich. 6; *Opinion of Justices*, 115 Mass. 602; *Buckner v. Gordon*, 81 Ky. 665; *Cooley, Const. Lim.* p. 173; *People, Twitchell, v. Blodgett*, 13 Mich. 127; *Oregon Const.* art. 1, § 38.

In passing upon the constitutionality of a law, an intent to violate the Constitution is not to be presumed in any case, and every doubt is to be solved, and every intendment given in favor of the constitutionality of the statute.

Deane v. Willamette Bridge Co. 22 Or. 167, 15 L. R. A. 614; *Cook v. Port of Portland*, 20 Or. 530, 13 L. R. A. 538; *Cline v. Greenwood*, 10 Or. 230; *People, Twitchell, v. Blodgett*, 13 Mich. 127.

"Citizen" means "membership of a nation." In that sense women are citizens and have always been considered citizens of the United States, as much before as since the adoption of the 14th Amendment.

Minor v. Happersett, 88 U. S. 21 Wall. 162, 174, 22 L. ed. 627, 630.

Wolverton, J., delivered the opinion of the court:

The sole question presented by this cause is whether women are entitled to vote at a school meeting for director of the district in which such meeting is held. The plaintiff was awarded damages in the court below for having been denied the privilege of voting, from which judgment defendants appeal.

The law under which the right is claimed is as follows: "Sec. 1. In all school districts in this state with a population of 1,000 and upwards, any citizen of this state shall be entitled to vote at a school meeting who is twenty-one years of age, and has resided in the district thirty days immediately preceding the meeting and has property in the district upon which he or she pays a tax." *Sess. Laws 1891*, p. 130. The contention of counsel for defendants is that the law is violative of § 2 of art. 2 of the state Constitution, which reads as follows: "In all elections not otherwise provided for by this Constitution, every white male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months immediately preceding such election, and every white male of foreign birth of the age of twenty-one years and upwards, who shall have resided in this state during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election, conformably § 9 L. R. A.

to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law." In this connection we direct attention to § 8 of art. 8 on "Education and School Lands," as we shall give a brief history of territorial and state legislation touching the organization and promotion of the common-school system. The section referred to is as follows: "The legislative assembly shall provide by law for the establishment of a uniform and general system of common schools." The act of Congress authorizing the territorial government of Oregon, approved August 14, 1848, provided, among other things, "that every white male inhabitant above the age of twenty-one years, who shall have been a resident of said territory at the time of the passage of this act, and shall possess the qualifications hereinafter prescribed, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly; provided, that the right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one years," etc. Under the power thus delegated, the territorial legislation provided by law "that all white male inhabitants over the age of twenty-one years, who shall have resided within this territory for six months next preceding an election, shall be entitled to vote at any election for delegate to Congress, and for territorial, county, and precinct officers: provided, that they shall be citizens of the United States, or shall have declared their intentions, on oath, to become such, and shall have resided six months in the territory, and fifteen days in the county where they offer to vote, next preceding the day of election." *Or. Stat. 1855*, p. 6. On January 31, 1855, an act was passed providing for the election of county superintendents of common schools, for the division of the inhabited portions of the several counties into convenient school districts, the organization of new ones, for the election of directors and clerks to hold until the next annual meeting, and for the election of their successors at such time. It provided that the superintendents should be elected by the legal voters of the respective counties at the annual elections which under general law were to be held in the several election precincts in the territory on the 1st Monday in June of each year, and at the same time defined and prescribed the qualification of voters at school meetings as the laws of Congress permitted as follows: "Every inhabitant over the age of twenty-one years who shall have resided in any school district for one month immediately preceding any district meeting, and who shall have paid or be liable to pay any tax except road tax in said district, shall be a legal voter at any school meeting, and no other persons shall be allowed to vote." *Or. Stat. 1855*, pp. 458, 463. So far as we are now informed, this act was operative when the state Constitution was adopted in 1857. At its session of 1862 the state legislature revised the common-school system, and repealed the territorial act of January, 1855. The new act provided, as did the old, that the county superintendents should be elected by

the legal voters of the several counties of the state, and such provision remains unchanged to the present time. The qualifications of voters at school meetings, however, were modified, and thus defined: No person shall be a voter at school meetings who is under twenty-one years of age, was not a resident of the district one month preceding such meeting, and unless he has paid other tax than road tax in the county in which the district is located; women who are widows, and have children and taxable property in the district, may vote, by proxy or in person, at such meetings, if they choose." Or. Gen. Laws 1862, p. 641. In 1872, the legislature again enacted that women who are widows and have children to educate, and taxable property in the district, and who have resided in the district thirty days, as aforesaid, shall be entitled to vote." Deady & Lane's (Or.) Comp. Laws, p. 511. In 1878 it was enacted that "any citizen of this state shall be entitled to vote at a school meeting who is twenty-one years of age, and has resided in the district thirty days immediately preceding the meeting, and who has property in the district upon which he or she pays a tax." Sess. Laws 1878, p. 67. This is the identical provision made applicable in 1891 to school districts having a population of 1,000 and upwards. As it pertained to all other districts, the law of 1878 was amended in 1889 by the addition of the words, "or has children of school age to educate." We have not adverted to all the modifications and changes in the law touching the subject, but the foregoing will suffice to indicate what manner of treatment it has continuously and uniformly received at the hands of the legislature.

Recurring to defendants' contention, it is argued that, notwithstanding these legislative enactments, the primary and fundamental law must govern, and that § 2, art. 2, of the Constitution is absolutely controlling in the premises. That the language of this section is so far-reaching and comprehensive as to include all elections provided for by law under any intendment of the Constitution looking throughout its whole scope and purview. The language employed does not make the purpose entirely clear. Reading the portions of the section about which the controversy arises in juxtaposition, we have: "In all elections not otherwise provided for by this Constitution, every white male citizen . . . shall be entitled to vote at all elections authorized by law." It is not thought that the latter clause enlarges or circumscribes the significance of the first, and the reasonable interpretation of the section is that every white male citizen, etc., shall be entitled to vote at all elections not otherwise regulated by the Constitution. In support of this proposition *State, Allison, v. Blake*, 57 N. J. L. 6, 25 L. R. A. 480, a strong case, and well reasoned, is cited with others of like results. The constitutional provision there considered is as follows: "Every male citizen of the United States . . . shall be entitled to vote for all officers that now are, or hereafter may be, elective by the people." The office about which the contention centered was that of road commissioner in a district of a subdivided township, and it was held that the Constitution applied to all officers, whether directly provided for therein or created by law,

the incumbents of which are made elective by the people. Anticipating somewhat the position of the respondent, and in refutation thereof, the case of *State, Kimball, v. Hendee*, 57 N. J. L. 307, is also cited, wherein this language is used by Dixon, J., speaking for the court: "In *State, Elkin, v. Deshler*, 25 N. J. L. 177, it was adjudged that trustees of school districts were officers, within this constitutional provision. But it is said this adjudication has ceased to be authoritative, because, since it was rendered, an amendment of the Constitution has imposed on the legislature the express duty of providing for the maintenance and support of a thorough and efficient system of free public schools. I am quite unable to see how the imposition of this duty affects the question whether school trustees are officers, or whether if they are made elective by the people, any other than constitutional voters may vote for them. This duty of the legislature must be performed in accordance with all other constitutional provisions." These authorities illustrate quite clearly the defendants' position.

Upon the other hand, the contention of counsel for plaintiff is, in effect, that the authority granted by the Constitution to the legislative assembly to "provide by law for the establishment of a uniform and general system of common schools" is a thing quite apart from the fundamental provisions touching suffrage and elections, in so far as it respects school districts which comprise the primary unit of the school system and its officers. That is to say that, while the elective franchise thus defined and established is applicable in elections to fill all constitutional offices and those provided for by law, yet that by the special grant of authority to the legislature to devise a uniform and general system of common schools it has been empowered, not only to call into requisition the school district as the fundamental unit of the system, but to prescribe what officers should be chosen to promote and maintain its existence, together with their powers and duties, term of office, and how and by whom they should be chosen. And it is urged that the contemporaneous and subsequent exposition of the Constitution by the legislative assembly as exemplified by its acts has much to do with strengthening the position. The following authorities are cited in support thereof: *Belles v. Burr*, 76 Mich. 1; *Re Gage*, 141 N. Y. 112, 25 L. R. A. 781; *Plummer v. Post*, 144 Ill. 69, 19 L. R. A. 110; *Opinion of the Justices*, 115 Mass. 602; *State, Crosby, v. Cones*, 15 Neb. 444; *Wheeler v. Brady*, 15 Kan. 26. The Michigan case is much to the purpose from an historical analogy as well as from the similarity of those features of the constitutional provisions bearing upon the question under consideration. The provision of the Michigan Constitution relating to suffrage and elections in force at the time the decision was rendered was adopted in 1850, and is as follows: "In all elections every male citizen, every male inhabitant, . . . shall be an elector, and entitled to vote; but no citizen or inhabitant shall be an elector or entitled to vote at any election unless he shall be above the age of twenty-one years, and has resided in this state three months, and in the township or ward in which he offers to vote ten days, next preceding each

election." Article 7, § 1. Section 4, art. 18, provides that "the legislature shall, within five years from the adoption of this Constitution, provide for and establish a system of primary schools, whereby a school shall be kept, without charge for tuition, at least three months in each year, in every school district in the state." A former Constitution, adopted in 1885, contained provisions not essentially different except the words "a system of common schools" were used instead of "a system of primary schools." Under the older Constitution the legislature of 1888 confined the right of suffrage at school meetings to males residing in the district, and who were liable to pay a school tax, making no distinction between aliens and citizens. In 1846 the privilege was extended somewhat, and the amendment then adopted was stricken out in 1847. Thereafter the law remained as in 1888 until 1855, and was in force at the time of the adoption of the Constitution under which the decision was rendered. In 1855 qualified voters at school meetings were defined to be "all taxable persons residing in the district of the age of twenty-one years, and who have resided therein for the period of three months next preceding the time of voting." This law was amended in 1867, and again in 1881. But in the history of such constitutional provisions and the legislation under them the qualifications of an elector at school meetings have never been identical with those of an elector under the Constitution. "In view of this fact," says Morse, J., "it must have been the intention of the framers of the Constitution of 1850, when they provided that the legislature should establish a school system, following the Constitution of 1885 in that respect, that under such provision the legislature should have full power to fix and determine the qualifications of voters under such system, and this without regard to the qualifications prescribed by the Constitution for electors at other elections." Language of similar import, by Finch, J., characterizes the New York case. Speaking of the contention of counsel for appellant that school officers were not constitutional officers, because the practical interpretation of that instrument has long and invariably been to the contrary, he says: "That is true, and only true, of the officer of the school district, as the fundamental unit of the school system. The trustees of such a district are the authorized business managers of the school within its boundaries, and the legislature has always assumed, and been permitted to assume, the right to determine who might vote for such trustees, and what qualifications should or should not be requisite and necessary. To that class of school officers intrusted with the government and control of the simple school district, by itself alone, and within its own boundaries, the constitutional provisions have never been applied." The Illinois case is of similar tenor, distinguishing the case of *People, Ahrens, v. English*, 149 Ill. 622, 15 L. R. A. 181, wherein it was held that women had no right under the Constitution to vote for county superintendent of schools, he being an officer recognized by the Constitution, and within the purview of the provisions relating to suffrage and elections. The cases from Massachusetts, Nebraska, and Kansas are also in point. Several of these

cases bear a striking analogy to the one at bar. Under the territorial law of 1855 every inhabitant above the age of twenty-one without regard to sex, residing in the school district one month, and who paid, or was liable to pay, a tax except road tax, was declared to be a legal voter at school meetings. By the same act, which prescribed the qualifications of voters at school meetings, it was ordained that a county superintendent of common schools should be elected by the legal voters, as elsewhere defined, of the respective counties. While such was the law, the Constitution was adopted and the state admitted into the Union, the Constitution itself by special provision continuing all laws of the territory consistent therewith in force until altered or repealed. In 1869 the state legislature, by an act relating to common schools, revised the entire scope of the school system theretofore existing, and by special mention repealed the territorial laws above referred to. This act provided for the election of a county school superintendent by the legal voters of the several counties of the state, but provided that widows having children and taxable property in the district might vote by written proxy or in person at school meetings. Since that time the legislature has frequently acted upon the subject, and the present law is the outgrowth of numerous amendments. But at all times during the various changes, and as the law now stands, the qualifications prescribed for voters at school meetings have been and are broad enough to permit of women exercising the privilege, while the legislature has constantly and uniformly required that a county superintendent shall be elected by the legal voters of the several counties. The office of county superintendent of common schools was created under § 7, art. 6, of the Constitution, and is recognized and treated as a county office. *State, Carter, v. Stevens*, 29 Or. 464. And there can be no question but that the term "legal voters," as applied to the election of that officer, is such as the Constitution has defined under § 2, art. 2. So that the state legislature has at all times, following in the wake of the territorial legislature, discriminated between legal voters who are qualified to vote for officers recognized or created under the Constitution and voters at school meetings. Thus we have a direct legislative interpretation of the fundamental law, not only approximately contemporaneous with the adoption of that instrument, but by its every subsequent act whenever it has legislated upon the subject. If we ascribe to the constitutional convention cognizance of the laws of Congress and the territorial regulations thereunder touching the common-school system, as we must, because of the learning and sagacity of its members, there is strong reason for believing that they legislated fundamentally with reference to the conditions as they found them, especially as we find the legislature of 1862, so near the time of the adoption of the Constitution, and composed of some of the same members, revising the school system, and to that end specially repealing acts at least supposed by them to have been carried over, and continued operative, by the very terms of the Constitution itself. These considerations lead to the conclusion that the power

ascribed to the legislature under the Constitution to provide for the establishment of a uniform and general system of common schools carries with it plenary power to establish the unit of that system, denominated a school district, to determine what officers shall administer its affairs, who and what manner of persons shall be eligible to office, and how and by whom they should be chosen. The elective franchise conferred by § 2, art. 2, does not, nor was it intended to fix and define the qualification of voters at school meetings, but was designed only to govern in all general and special elections not otherwise provided for by the Constitution, and applies to the election of all officers known to the Constitution, as well as to such as may be provided for thereunder aside from those provided for under the special power of the legislature to establish a uniform and general system of common schools. There is strong logic in defendants' contention, and yet it is believed there is sufficient ground for distinguishing the New Jersey constitu-

tional provisions from our own. If, however, we are mistaken in this, then there is a sharp conflict in the authorities, and we feel bound to adopt the legislative construction which was placed upon this feature of the Constitution from its inception, and has ever since been maintained. "That women are successful educators," says Maxwell, J., in *State, Crosby, v. Cones*, 15 Neb. 444, "is fully shown by experience." And in *Opinion of the Justices*, reported in 115 Mass. 602, *supra*, it is said that "the common law of England, which was our law upon the subject, permitted a woman to fill any local office of an administrative character, the duties attached to which were such that a woman was competent to perform them." So that there existed high authority for the inauguration of the exact system of common schools that we now have under the Constitution as interpreted by the legislature in the adoption of laws for its promotion.

Affirmed.

RHODE ISLAND SUPREME COURT.

Maria SULLIVAN

v.

Stephen WATERMAN.

(.... 20 R. I.)

1. **A man who hires lodging rooms in a dwelling house is liable to the owner for injuries to the good name of the house and the damage to the owner's custom and business, if he brings dissolute and immoral persons to such rooms and applies the rooms to the purposes of assignation or to create a nuisance therein.**
2. **An allegation that acts constitute a nuisance is not necessary** where the acts, as stated, amount to a nuisance in fact and in law.
3. **A declaration for a private nuisance need not allege special damage,** but a general claim for damages will sustain a recovery of such actual damages as are the natural and proximate consequence of the wrong.

(January 24, 1898.)

ON DEMURRER by defendant to the complaint in an action to recover damages for defendant's alleged unlawful use of rooms which he had hired in plaintiff's house. *Over-ruled.*

The facts are stated in the opinion.

Messrs. Wilson & Jenckes and William J. Brown, for defendant, in support of demurrer:

There is no allegation that the acts complained of constituted a nuisance, either public or private; nor are there any sufficient allegations to entitle the plaintiff to maintain an action of this character.

None of the acts alleged and complained of constitute of themselves a public nuisance. Moreover, even if they did constitute such a nuisance still this plaintiff does not state any

cause of action, for she has not alleged that she has suffered any actual, specific damage therefrom, and without such actual, specific damage an action of this kind cannot be maintained.

Wesson v. Washburn Iron Foundry Co. 18 Allen, 95, 90 Am. Dec. 181; *Milbau v. Sharp*, 27 N. Y. 612, 84 Am. Dec. 314; *Grigsby v. Clear Lake Waterworks Co.* 40 Cal. 396; *Benjamin v. Storr*, L. R. 9 C. P. 400; *Fritz v. Hobson*, L. R. 14 Ch. Div. 542.

The declaration does not set forth any acts that are in themselves unlawful.

Where the act complained of is not of itself unlawful, there is no right of action unless there is some actual damage.

2 Jaggard, Torts, 779; Wood, Nuisances, § 104.

There is no allegation of any actual specific injury.

Baxter v. Winooski Turnp. Co. 22 Vt. 114, 52 Am. Dec. 84.

Mr. C. M. Salisbury, for plaintiff, *contra.*

Tillinghast, J., delivered the opinion of the court:

The plaintiff complains, in an action of trespass on the case, that the defendant, who hired certain rooms in her house, so misbehaved himself while in the occupancy of said rooms as to injure the plaintiff in her business, and in the good name, credit, and reputation of her house. The declaration sets out, in substance, that the plaintiff is, and for a long time before the grievances complained of was, the owner of a certain dwelling house, in which she lives, in the city of Providence, and where she was engaged in keeping a lodging house for hire and profit; that the defendant hired certain rooms of her in said house for the purpose of using the same in a reasonable and proper manner, and was at the time when the grievances complained of were committed in the possession thereof; that, contriving and intend-

NOTE.—As to saloon as a nuisance, see *Haggart v. Stehlin* (Ind.) 22 L. R. A. 577.

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ing to hurt and injure the good name and credit of said house, the defendant grossly misbehaved himself therein, in this: that upon the 10th day of May, 1897, in the night-time, and upon divers other nights between that time and the date of plaintiff's writ, he brought or caused to come to his said rooms certain dissolute and immoral women, without the knowledge and against the will of the plaintiff, and kept said women there till a late hour in the night, in consequence whereof certain good people who had intended to take rooms in said house for hire did not take them, whereby the plaintiff suffered loss and damage. The declaration also sets out that on the 20th day of May, 1897, in the night-time, and upon divers other nights, the defendant allowed one John Doe to use said rooms so hired as aforesaid for the purpose of bringing or causing to come into said rooms certain other dissolute and immoral women, without the knowledge and against the will of the plaintiff, and said women to keep in said rooms till a late hour of the night, thereby intending and contriving to injure, and actually injuring, the plaintiff as aforesaid. The declaration further charges the bringing of other dissolute and immoral persons, both male and female, to said rooms, both in the day-time and in the night-time, there to revel, drink, and carouse, and to commit other immoral acts, whereby plaintiff was injured and damaged as aforesaid. To this declaration the defendant has demurred on the ground that it does not set forth any unlawful or wrongful act of the defendant upon which an action for damages can be founded. In support of this demurrer he contends that there is no allegation that the acts complained of constituted a nuisance, either public or private, and further that, even if the acts complained of did constitute a nuisance, still the declaration does not state a cause of action, because the plaintiff does not allege that she has suffered any "actual specific" damage therefrom.

We think the declaration states a cause of action. It cannot be seriously argued that a man who hires rooms in a dwelling house, to be used as lodging rooms, has any right to apply them to the purposes of assignation, or to create a nuisance therein. And that a wrong which arises from the unreasonable or unlawful use by a person of his own premises, or from his own improper, indecent, or unlawful personal conduct, working an obstruction of or injury to the right of another, is a nuisance, is clear, both upon sound principles of reason and judicial authority. See *Wood, Nuisances*, § 1, and cases cited. "A nuisance," says Smith in his *Manual of the Common Law*, "is something done which has the effect of prejudicially and unwarrantably affecting the enjoyment of the rights of another person." See also *Aldrich v. Howard*, 8 R. I. 246. Of course, it must arise from some unlawful act; for that which is lawful can never be a nuisance. Some legal right must be violated, and some material annoyance, injury, and damage must be sustained, thereby. But, where there is a material injury,

damage is implied, when it results from the violation of a legal right. *Wood, Nuisances*, § 5, and cases cited. The declaration in the case at bar shows the violation of a legal right. The plaintiff had the right to the good name and fame which her house had acquired in the community, and to the income and profit which such a reputation aided in producing. They are elements of value in the prosecution of her business, and she is as much entitled to be protected in the enjoyment thereof as she is in the enjoyment of any other property. The good name of a boarding house, or lodging house, like the good name of an hotel or other place of entertainment, is of vital importance to the success of the proprietor; and anyone who wrongfully injures such good name is guilty of a tortious act, which the law will redress in damages. The declaration shows that the defendant by his misconduct has injured the good name of the plaintiff's house, and that by reason thereof she has been damaged by the loss of custom and business. In other words, it shows the commission of a wrong resulting in injury and damage; and, this being so, it states a case for redress,—there being, in contemplation of law, no wrong without a remedy. It is true, as argued by defendant's counsel, that the declaration does not, in terms, allege that the acts complained of constituted a nuisance; but we do not think that this is necessary, so long as said acts, as stated, amount to a nuisance in fact and in law; and to allege in the declaration therefore, that they constituted a nuisance, would simply be to state a conclusion of law. The ordinary forms for declarations in actions of this sort simply set out the acts complained of, without averring that they constitute a nuisance. See *Chitty*, Pl. ed. 1821, 429 *et seq.*; *Oliver, Precedents*, 8d ed. 878.

We do not think the declaration is demurrable because it does not allege that the plaintiff has suffered special damage from the acts complained of. The nuisance alleged was evidently a private one, and, so far as appears, the plaintiff was the only one who was injured thereby; and we see no reason why, under a general claim for damages, she is not entitled to recover, as a recompense for her injury, such actual damages as are the natural and proximate consequence of the wrong committed. See *Sedgwick, Damages*, 6th ed. pp. 732, 733. If the defendant deems it essential to his defense that he should be more particularly informed of the matters for which he is to be put on trial, the court, on motion, would probably order such information to be furnished. *Tourgee v. Rose*, 19 R. I. 432. The cases cited by defendant's counsel relate to public nuisances, and in such cases it is necessary for a person suing for a private injury therefrom to allege and prove special damage. *Benjamin v. Storr*, L. R. 9 C. P. 400; *Cooley, Torts*, 2d ed. pp. 736, 737, and cases cited.

Demurrer overruled, and case remitted to the common pleas division for further proceedings.

KENTUCKY COURT OF APPEALS.

Sanders SPURLOCK, *Appt.*,

v.

Daniel NOE *et al.*

(.....Ky.....)

**A judgment against an insane person,
and a sale of real estate in satisfaction thereof,**NOTE.—*Insanity as affecting judgments.***I. Validity and effect of judgments against insane persons.****a. Generally.****b. As to purchasers.****II. What degree of insanity affects.****III. Enforcement.****IV. Collateral attack.****V. When relieved against.****VI. Relief, how obtained.****VII. Effect of inquisition.****I. Validity and effect of judgments against insane persons.****a. Generally.**

A judgment is not rendered absolutely void by the fact that the judgment debtor was insane at the time of its rendition. *Pollock v. Horn*, 13 Wash. 626; *Withrow v. Smithson*, 37 W. Va. 757, 19 L. R. A. 762; *White v. Hinton*, 3 Wyo. 753, 17 L. R. A. 86. It is still a lien on land. *Withrow v. Smithson*, 37 W. Va. 757, 19 L. R. A. 762.

A lunatic may be sued for a debt which he contracted when of sound mind, and a judgment therefor obtained against him. *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *Ex parte Leighton*, 14 Mass. 207.

And judgments at law, and decrees in equity, may be properly entered against persons who are *non compos mentis*, when they are properly represented. *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614.

A person to whom a debt is due from a lunatic is entitled to have it evidenced by a judgment against his debtor or such debtor's committee and the common law should either give judgment thereon, or else transfer the cause for proper proceedings in equity. *McNees v. Thompson*, 5 Bush, 686.

And the mere fact that a party defendant is *non compos mentis* during any of the preliminary proceedings in an action, or when judgment is rendered, constitutes no defense where the liability is one for which he is legally bound. *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614.

And the rule was the same at common law. *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614.

And a judgment in attachment against a lunatic is regular where a guardian *ad litem* was duly appointed, and he accepted the trust, whether he acted or not. *Foster v. Jones*, 23 Ga. 168.

A judgment or decree against an insane person who is properly brought before the court is valid and binding, and neither void nor voidable. *Maloney v. Dewey*, 127 Ill. 395; *Speck v. Pullman Palace Car Co.* 121 Ill. 83; *Weber v. Wetling*, 18 N. J. Eq. 441; *Crippen v. Culver*, 13 Barb. 428.

And is as binding upon him and his property interests as a similar judgment would be upon a sane person, where a guardian *ad litem* had been appointed for him and had properly represented him. *Bensieck v. Cook*, 110 Mo. 173.

So, a judgment recovered against a lunatic after the appointment of a committee of his person and estate, without first obtaining leave from a court of equity to institute the suit, is neither void nor 39 L. R. A.

will not be set aside long after on the ground of his insanity, if he was going at large and attending to his own affairs without objection up to the time of the sale, and upon appointment of a committee for him two years later no steps were taken to set aside the judgment, although he had no other property.

(November 19, 1897.)

erroneous, and the party acting under it is not a trespasser. *Crippen v. Culver*, 13 Barb. 428.

And a judgment is not rendered void or voidable by the fact that the defendant became insane during the pendency of the suit and after the court had acquired jurisdiction of the person by citation, appearance, and answer, where the defendant was represented by counsel and no suggestion of insanity was made. *Fleming v. Seeligson*, 57 Tex. 524.

And the subsequent insanity of a defendant will not render a judgment against him void where jurisdiction was obtained by the publication of the notice as prescribed by law. *Weber v. Wetling*, 18 N. J. Eq. 441.

So, a judgment rendered against a person who is subsequently found to be of unsound mind may be revived by action against the judgment debtor and his committee. *McNees v. Thompson*, 5 Bush, 686.

And the judgment in a suit against a lunatic is properly rendered against the lunatic himself, and not against his guardian. *Walker v. Clay*, 21 Ala. 797.

So, where no guardian has been appointed for an adult *non compos*, suit for necessities must be prosecuted against him, and his estate must pay any judgment that may be recovered. *Ex parte Northington*, 37 Ala. 496, 79 Am. Dec. 67.

It is no ground for setting aside a proceeding at law that the defendant was a lunatic or otherwise incompetent to manage his own affairs at the time the action was brought, or that he has become so since; and the plaintiff can safely proceed to judgment without the appointment of a guardian or attorney. *Robertson v. Lain*, 19 Wend. 649.

And a judgment thus obtained, though irregular, is not void. *Dunn v. Dunn*, 114 Cal. 210; *Foster v. Jones*, 23 Ga. 168; *Allison v. Taylor*, 6 Dana, 87, 32 Am. Dec. 68; *White v. Hinton*, 3 Wyo. 753, 17 L. R. A. 86; *Sternbergh v. Schoolcraft*, 2 Barb. 153.

And this is the rule though it was obtained by one who had knowledge of the insanity without the interposition of a guardian. *Johnson v. Pomeroy*, 31 Ohio St. 247.

Jurisdiction of an insane defendant is acquired by a court by the service of its summons, and the failure to appoint a guardian *ad litem* when the general guardian fails to appear and defend does not render the judgment therein either void or voidable; it is at most only erroneous. *McAllister v. Lancaster County Bank*, 15 Neb. 285.

And a judgment is as valid and binding as any other judgment, until set aside or reversed. *Maloney v. Dewey*, 127 Ill. 395.

And a judgment against a lunatic cannot be set aside upon the ground of absence of jurisdiction of the person of defendant because at the time he and his property were in the charge of the committee duly appointed by the court of chancery. The judgment is not void, or even erroneous, and cannot be reversed on error, as the justice had full jurisdiction of the person of defendant, subject only to the interference of the court of chancery. *Sternbergh v. Schoolcraft*, 2 Barb. 153.

So, that the defendant is insane is no objection to signing judgments on a warrant of attorney. *Pigot v. Killick*, 4 Dowl. P. C. 287, 1 H. & W. 518.

APPPEAL by defendant from a judgment of the Circuit Court for Harlan County setting aside a judgment and sale of land to enforce it on the ground that the judgment defendant was insane. *Reversed.*

The facts are stated in the opinion.

Messrs. Howard & Clay, for appellant:

A judgment or any proceedings against a person of unsound mind is not void, but voidable; but as to what degree of insanity renders

proceedings against a person of unsound mind voidable there does not seem to be any fixed rule.

Facts showing that he believed in witches, and would fight them up the chimney and say he was keeping them off, are not evidence of insanity.

Lewis v. Arbuckle, 85 Iowa, 835, 16 L. R. A. 677.

Any opinion of the witnesses, not coupled

And the subsequent insanity of a person who has given a power of attorney to confess judgment will not affect the right to enter judgment thereon, as a power thus conferred by a sane man and placed in the hands of a creditor, is not revocable. *Spencer v. Reynolds*, 9 Pa. Co. Ct. 249.

A bond and warrant of attorney executed by a person subsequently found by inquisition to have been at the time of unsound mind and incapable of governing himself or managing his affairs, and a judgment entered thereon by confession, may be set aside, however, upon terms, in the discretion of the court; but they are not absolutely void, and will not be set aside unconditionally where it appears that for several years prior to the execution of the bond and warrant the alleged lunatic had been permitted by his friends to exchange lands and buy and sell property and give notes, bonds, and mortgages. *Person v. Warren*, 14 Barb. 488.

And if a waiver of inquisition is a part of a judgment rendered upon a note with warrant of attorney to confess judgment, then the defendant, though a lunatic, is bound by it, and his committee cannot question its validity in a subsequent action; but if it was not a part of the judgment the defendant, if he was so destitute of reason and understanding as to be incapable of assenting to it, is not bound, and the committee are not estopped from denying the validity of a purchaser's title under it. *Hope v. Everhart*, 70 Pa. 231.

But a sale of land under a judgment on a *f. fa.* passes title where the judgment was rendered on a bond with a warrant to confess judgment containing a waiver of inquisition and condemnation, which was filed, and judgment confessed thereon by the attorney who filed the declaration, appearing for the defendant in the ordinary way by virtue of the warrant, all of the proceedings appearing in the docket, and the waiver being a part of the record, and is not subject to collateral attack on the ground that the judgment debtor was paralytic and helpless and unable to write. *Hageman v. Salisbury*, 74 Pa. 280.

In *Hageman v. Salisbury*, 74 Pa. 280, *supra*, *Hope v. Everhart*, 70 Pa. 231, *infra*, V., was distinguished upon the ground that that case wholly lacked the superadded appearance of an attorney for the defendant, and his confession of judgment therefor expressly waiving the inquisition and condemnation.

So, a judgment for taxes rendered against an insane person on personal service without appearance in person or by attorney or guardian *ad litem* is voidable only, and not void, where the court had jurisdiction of the person and subject-matter. *Heard v. Sack*, 81 Mo. 610.

And a judgment against the surety of a forthcoming bond in an attachment proceeding without notice to such surety is not void because of his insanity at the time of its rendition, where he was not insane at the time the bond was given, no notice being necessary in case of such a judgment against a sane man. *Pollock v. Horn*, 13 Wash. 626.

So, a fine levied by an idiot is not voidable though his idocy is apparent, and though after the fine levied he was found by inquisition to be an idiot from birth, the indentures executed by him being 89 L. R. A.

sufficient to direct the uses of the fine. *Manfield's Case*, 12 Coke, 124.

Before a lunatic can be personally affected by a judgment upon a contract made by him, however, it is necessary that process should be prayed for and issued against him and be served upon him, and such a judgment is invalid where process was prayed for and issued against and service made upon his guardian only. *Scott v. Winningham*, 79 Ga. 492.

b. As to purchasers.

Title to land sold passes upon a judgment and execution and sale thereunder, though the judgment debtor was a lunatic at the time of its rendition. *Tomlinson v. Devore*, 1 Gill, 345.

A sheriff's deed is not void because of the insanity of the judgment debtor when the judgment under which the execution was issued was rendered; it is voidable only. *Thomas v. Hunsucker*, 108 N. C. 720.

And in a proper case the purchaser will be protected. *Foster v. Jones*, 23 Ga. 163.

A purchaser at an execution sale under a judgment rendered against a person subsequently found to have been insane at the time of its rendition, by proceedings then pending, will be held to obtain title where there is no evidence of complicity between him and the sheriff, or that he was a party to any scheme to defraud the judgment debtor, and he is not shown to have had any intimate knowledge of her or to have taken advantage of her situation, and it was not shown that her insanity was notorious. *Rau v. Katz*, 26 La. Ann. 463.

Public policy forbids that a judgment shall be questioned on account of the insanity of the judgment debtor and the failure to procure the appointment of a guardian as against an innocent purchaser who has acquired rights under it. *Dunn v. Dunn*, 114 Cal. 210.

So, a sale of the land of an insane person on execution issued on a confessed judgment against him will not be set aside where the purchaser was not a party to the judgment, and had no knowledge of the insanity of the judgment debtor. *Crawford v. Thomson*, 161 Ill. 161.

And a mortgage and judgment of foreclosure, and a sale thereunder of the mortgaged premises, will not be annulled at the suit of the heirs at law of the mortgagor upon the ground that she was insane and incompetent to transact business or to understand the nature of her act at the time, where the purchaser had no knowledge of such insanity and purchased in good faith and for a valuable consideration. *Dunn v. Dunn*, 114 Cal. 210.

And a judgment in partition is not invalidated so as to affect the title of a purchaser thereunder by the fact that one of the parties in interest was insane and resided in a foreign country, and that a tutor had been there appointed, who appointed an attorney in fact to represent him in the state, as the tutor may exercise his office by agent. *Vick v. Volz*, 47 La. Ann. 42.

So, a stranger who in good faith purchases property sold under a judgment for taxes is not affected by the fact that the person upon whom such taxes were imposed was at that time, and at the time of

with a statement of facts showing upon what that opinion is based, is entitled to very little or no weight.

Shirley v. Taylor, 5 B. Mon. 99; *Jones v. Perkins*, 5 B. Mon. 223.

Messrs. J. Smith Hays, N. B. Hays, and S. B. Dishman for appellees.

Guffy, J., delivered the opinion of the court:

It appears from the allegations in the peti-

service on him and the rendition of the judgment and making of the sale, of unsound mind and incapable of transacting business, and that the judgment for taxes was subsequently reversed on that ground. *Heard v. Sack*, 81 Mo. 610.

And a mortgagor cannot take advantage of his own insanity at the time of making the mortgage, and the rendition of a conditional judgment founded thereon, on a writ of entry brought by him against the assignee of the mortgage who is in possession by virtue of an execution issued on such judgment while the judgment remains unreversed. *Lamprey v. Nudd*, 29 N. H. 290.

A sale of the land of a lunatic on execution issued on a confessed judgment against him, wherein the judgment creditor became the purchaser, however, is properly vacated and set aside where they knew he was insane and unfit to transact ordinary business when they secured the confession. *Crawford v. Thomson*, 161 Ill. 161.

But knowledge upon the part of a purchaser under a judgment entered upon a note containing a warrant to confess judgment and waiver of inquisition, of facts showing that the judgment debtor was insane and incapable of executing a valid waiver, must be clearly established by the evidence before his title is declared void. *Hope v. Everhart*, 70 Pa. 231.

II. What degree of insanity affects.

Capacity to understand and comprehend the effect and result of legal proceedings is the test laid down in the principal case, and this seems to accord with the current of authority.

Thus, a court will not proceed to render judgment against a man or his estate where it is clear and certain that he has no capacity to take care of himself or to employ some other person to do it for him. *Leach v. Marsh*, 47 Me. 548, 74 Am. Dec. 508.

Unsoundness of mind amounting to incapacity to do or understand business is a good cause for setting aside a default and opening a judgment rendered thereon. *McClain v. Davis*, 77 Ind. 419.

So, an elderly woman sixty-seven years of age, having but little knowledge of the world or of business, who could neither read nor write, should be relieved from a judgment obtained against her upon default in an action for foreclosure of a mortgage, where she did not understand the summons when it was read to her, or know what it meant, or understand that she had any interest in the matter, when she had a good and valid defense. *Adams v. Citizens' State Bank*, 70 Ind. 89.

And the committee of a lunatic is entitled to relief against a judgment taken by default upon a promissory note executed by his ward under Ind. practice act, § 99, where the maker of the note was of unsound mind, incapable of understanding the obligations of the contract when he executed it, and the consideration thereof had entirely failed. *McClain v. Davis*, 77 Ind. 419.

And a judgment taken by a creditor against a debtor for goods fairly sold, of which the debtor had the benefit, though he then had sufficient capacity to understand the transaction, at a subsequent time when he had not sufficient capacity by

tion in this action that Elizabeth Noe, W. T. Hall, and Robert Napier claimed debts against Nathan Noe, and procured a sale of a large and valuable tract of land in Harlan county, being the place where the said Noe lived in his lifetime, giving a description of the land. It is further alleged that the land was sold, and that defendant Sanders Spurlock (now appellant) became the purchaser at the price of \$780. It is further charged that at the time of said sale and judgment Nathan Noe was a

reason of insanity to understand his rights and duties as a party to the action, and no guardian was appointed for him, making no allowance for a payment which had been made, cannot be enforced against his estate. *Litchfield's Appeal*, 28 Conn. 127 73 Am. Dec. 662.

To annul a judgment upon the ground of the insanity of the judgment debtor, however, the evidence should be as conclusive of insanity as is required to justify a decree of interdiction. *Covas v. Bertoulin*, 44 La. Ann. 688.

And the fact that a person is intensely eccentric, and that at times his utterances on the subject of religion are extravagant and unreasonable and he is subject to delusions and hallucinations, will not affect the validity of the judgment against him where the hallucinations and delusions were not permanent, and that was not shown to be the prevailing condition of his mind. *Covas v. Bertoulin*, 44 La. Ann. 683.

And the opening of a judgment and an order granting a new trial is not warranted by the fact that the party against whom it was rendered was in feeble health, and some of the witnesses expressed the opinion that her mind was affected by it, where it is clear that she had sufficient capacity to transact business, and that though she could not attend court she retained experienced, competent, and faithful counsel to represent her, and had the assistance of her son, who advised with the counsel, and the suit appears to have been diligently, earnestly, and zealously prosecuted. *Wyne v. Newman*, 75 Va. 816.

But melancholy under which a person labors will excuse inattention to his affairs and authorize relief against judgments obtained against him during such a state of mind, though he may not be so absolutely insane as to avoid his contracts. *Tabb v. Gist*, 6 Cal. (Va.) 279.

So, a judgment in a partition suit will not be set aside on account of the lunacy of a party, where it was only partial and with respect to particular matters and did not affect his capacity to transact business. *Speck v. Pullman Palace Car Co.* 121 Ill. 33.

A judgment in an action for slander may be properly enjoined, however, where at the time of speaking the defamatory words, and when the judgment was obtained, the judgment debtor was insane and in a state of partial derangement on the subject to which the defamatory words related. *Horne v. Marshall*, 5 Munf. 466.

And a man of information and intelligence on general subjects, comprehending the general relations of things, but who was wholly irrational and uncontrollable and irresponsible as to any business transactions connected with the right of the civil government to impose taxes upon its subjects and the obligation of the citizen to submit thereto, deeming it sinful to pay tribute to temporal powers, is entitled to protection against a judgment for taxes assessed against him. *Heard v. Sack*, 81 Mo. 610.

So, judgment will not be permitted to be entered upon a warrant of attorney to secure the retransfer, upon demand, of stock loaned, after which the

lunatic, and incapable of attending to any kind of business, and did not owe the debts for which said land was sold; and that said land is worth \$8,000; and that said Spurlock has had the sole use and occupation of said land, and the rents thereof, for — years. It is also alleged that nearly all of the plaintiffs at the time of said sale were infants, and that their father was destitute of mind, and that he made no defense against said debts, or the sale of the land, and did not know that

such a suit was going on, and that immediately after the sale Nathan Noe was adjudged to be a lunatic, and carried to the lunatic asylum, where he remained two or three years, was pronounced incurable, and sent back to Harlan county, and died. Several amended petitions were filed, and on motion some portions thereof were stricken out. The real issue finally presented was that Nathan Noe was of unsound mind at the time of the rendition of the judgment, and that he did not owe

person giving the warrant becomes and continues to be insane, where the formal demand for the retransfer was made upon him, as such a demand must be made upon a person capable of understanding it. *Capper v. Dando*, 4 Nev. & M. 335, 2 Ad. & El. 458, 1 H. & W. 11.

III. Enforcement.

Judgments obtained against a person who becomes a lunatic, previous to his lunacy, are prior liens upon his estate, but all other debts attach equally and have equal claim to payment. *Wright's Appeal*, 8 Pa. 57.

The liens of creditors having judgments against a lunatic's estate rendered while he was sane are not affected by proceedings in lunacy, though perhaps a question may be raised as to the proper procedure for the enforcement of his lien. *Re Eckstein*, 1 Clark (Pa.) 224, 1 Pars. Sel. Eq. Cas. 59.

And a preference may be secured by a proceeding in aid of execution on a judgment against an insane person commenced before the inquest of insanity, where the estate of the insane judgment debtor is insolvent. *Johnson v. Pomeroy*, 81 Ohio St. 247.

And a lien or preference obtained by a creditor by judgment against an insane person or proceedings in aid of execution thereunder before the inquest of insanity must be respected by the guardian to the same extent that such preference secured in the lifetime of an insolvent debtor must be respected by his representatives. *Johnson v. Pomeroy*, 81 Ohio St. 247.

So, the property of a lunatic is not exempt from the operation of the execution issued upon a judgment not fraudulently or wrongfully obtained, though it was rendered subsequent to the judicial establishment of his insanity. *Pollock v. Horn*, 13 Wash. 626.

And where a judgment is obtained against a lunatic, and an execution issued and levied upon his property before the institution of proceedings in lunacy in a court of chancery, the judgment and execution will not be set aside upon summary application by the committee, although they are overreached by the finding of the jury upon the commission of lunacy. *Re Hopper*, 5 Paige, 490.

A proceeding in aid of execution cannot be resisted by the guardian of the judgment debtor, and a decree preferring the creditor prosecuting it cannot be prevented by showing that his ward was insane before the commencement of the proceeding, and that his estate was insolvent. *Johnson v. Pomeroy*, 81 Ohio St. 247.

So, at common law a defendant could not be discharged from arrest or imprisonment under body execution issued on a judgment in a civil suit on the ground that he was insane at the time of the arrest, or became so afterwards. *Bush v. Pettibone*, 4 N. Y. 300.

A person who was *non compos mentis*, and for whom a guardian had been appointed, is still liable to be sued in a civil action, and to be committed in execution. *Ex parte Leighton*, 14 Mass. 207.

And the order of discharge of a judgment debtor

confined under body execution issued on a judgment against him under the New York act to organize the state lunatic asylum authorizing the first judge of the county to discharge a prisoner confined on civil process and send him to the asylum, must contain a direction that he be thus sent, or it will be void, rendering the sheriff liable as for an escape. *Bush v. Pettibone*, 4 N. Y. 300.

And a prisoner confined under body execution on a judgment against him, who is sent to an asylum for insane persons under the New York statute authorizing the discharge of a prisoner confined on civil process, may, on being restored to sanity, be again arrested by his creditor. *Bush v. Pettibone*, 4 N. Y. 300.

So, knowledge on the part of a sheriff having an execution in his hands that suit had been instituted against the execution debtor to have her interdicted, does not warrant him in staying a sale of the property seized. If parties in interest desire to stop the sale they should enjoin it. *Rau v. Katz*, 26 La. Ann. 463.

And a judgment should not be rendered against him for effecting a sale under a judgment rendered against a person who was subsequently found by inquisition to have been insane at the time of its rendition by proceedings then pending, as he was acting only under the directions of a court of competent jurisdiction in carrying out its decrees. *Rau v. Katz*, 26 La. Ann. 463.

A creditor of a person who becomes a lunatic and is so found by inquisition, however, cannot obtain a lien upon his estate and a preference over other creditors by a judgment obtained after inquisition found. *Wright's Appeal*, 8 Pa. 57.

The court in which a suit is pending brought by a creditor to reach the assets of his debtor, pending which the debtor is adjudged an habitual lunatic in proceedings previously commenced in another court, and a committee is appointed of his estate, cannot properly proceed to final judgment. *Niblo v. Harrison*, 9 Bosw. 668.

And debts contracted by a lunatic or habitual drunkard after the appointment of a committee and without his consent cannot be paid out of the estate, although established by a judgment at law against the lunatic or drunkard. *Re Heller*, 3 Paige, 199.

So, an attachment issued on a judgment will be dissolved where the defendant therein had been reported as a lunatic without lucid intervals by inquisition covering the date of the judgment. *Harmstead v. Kingsley*, 3 W. N. C. 64.

And a judgment against one who was subsequently found to be of unsound mind cannot be thereafter satisfied by execution. *McNees v. Thompson*, 5 Bush, 686.

A creditor of a person found to be a lunatic by due course of law cannot issue and levy an execution on his personal property in the hands of his committee appointed by the court. *Re Eckstein*, 1 Clark (Pa.) 224, 1 Pars. Sel. Eq. Cas. 59.

It is improper for a creditor to levy an execution upon a judgment obtained by him upon the property of a lunatic without permission of the chancellor or vice chancellor having jurisdiction of the proceedings in lunacy. *Re Hopper*, 5 Paige, 490.

the debts sued for, and was a lunatic at the time of the confirmation of sale and conveyance of the land to Spurlock. All the material averments of the petition were denied by Spurlock. It appears from the pleadings, and there is some testimony conducing to show, that John D. Noe, son of Nathan Noe, purchased the land at the commissioner's sale at the price named. It is further contended by plaintiffs that the purchase was made by an agreement with appellant Spurlock to the ef-

fect that he (Spurlock) was to have the land; all of which, however, is denied by Spurlock. The value of the land is estimated by witnesses all the way from \$1,000 to \$4,000. There is no proof conducing to show that the debts on which the judgment was rendered were not just and due. A considerable amount of testimony was introduced in the case. It further appears that Nathan Noe left thirteen children, ten of whom united in the petition for a recovery of the land, or rather for a setting

And motion for leave to issue execution on a judgment against a lunatic rendered before his lunacy will be refused by the supreme court where there is no property which he can see ought to be sold under an execution issued from such court, but leave will be granted to the plaintiff to proceed on the judgment for its payment by action in the superior court of the proper county, that court alone having power to deal with the subject under the North Carolina statute. *Adams v. Thomas*, 83 N. C. 521.

And leave to sue the committee of a lunatic *nunc pro tunc* will not be ordered in an action pending which a committee is appointed for him and in which judgment is subsequently rendered. A proper remedy in such case is to institute an independent action by leave of the court against the lunatic and against his committee. *Re Delahunty*, 28 Abb. N. C. 245.

A judgment creditor under a judgment rendered against an insane person will not be allowed to touch either the person or the estate of the judgment debtor, but will be obliged to apply to the committee or to the court of chancery for the payment of his debt, and as a general rule he will then be required to establish justice on his demand without reference to the judgment and without any allowance of costs. *Robertson v. Lain*, 19 Wend. 650.

The sole remedy of a creditor against the personal estate of a lunatic found such by inquisition, to obtain payment of his debt, is by application to the court, which will require the committee to raise the necessary funds from the lunatic's estate for that purpose. *Re Eckstein*, 1 Clark (Pa.) 224, 1 Pars. Sel. Eq. Cas. 59; *Brasher v. Cortlandt*, 2 Johns. Ch. 400.

But the plaintiff in a proceeding in the nature of an action at law, pending which the defendant is adjudged an habitual drunkard and a committee appointed of his estate by another court, may be permitted to proceed to judgment, upon which he may apply to the court having jurisdiction of the estate to require payment by the committee. *Niblow v. Harrison*, 9 Bosw. 668.

And an action may be brought against a lunatic under the Pennsylvania statute for the purpose of establishing the amount of the debt which the committee is directed to defend, but it must stop there and collection cannot be enforced. *Wright's Appeal*, 8 Pa. 57.

And an action brought by a creditor against a debtor, pending which the debtor is adjudged an habitual drunkard and a committee appointed of his estate by proceedings previously commenced in another court, will not be dismissed, but proceedings therein will be stayed until the reformation of the defendant and the discharge of his committee, if such event should occur, so as to permit the plaintiff to retain the advantage obtained. *Niblo v. Harrison*, 9 Bosw. 668.

One who proceeds with the enforcement of a judgment obtained against an insane person with knowledge that proceedings have been instituted by or on behalf of the defendant to be relieved therefrom, however, takes the chance that if a judgment is reversed or set aside he will be com-

pelled to restore his adversary to the situation he was in before erroneous judgment was rendered. *Dickerson v. Davis*, 111 Ind. 433.

IV. Collateral attack.

A judgment sought to be set aside on the ground that the judgment debtor was of unsound mind must be assailed directly as it is not vulnerable to collateral attack. *Boyer v. Berryman*, 123 Ind. 451; *Lamprey v. Nudd*, 29 N. H. 299; *Noel v. Modern Woodmen of America*, 61 Ill. App. 597; *Brittain v. Mull*, 99 N. C. 483; *Dunn v. Dunn*, 114 Cal. 210.

It is conclusive as to any point directly in issue. *Lamprey v. Nudd*, 29 N. H. 299.

And a judgment against one *non compos mentis* is binding upon him and those in privity with him so long as it stands unreversed or is not set aside in some direct proceeding instituted for that purpose. *Ewing v. Wilson*, 63 Tex. 88.

And if the court had jurisdiction it can be vacated on the ground of the insanity of the judgment debtor only by some direct proceeding at law either in the court in which it was recovered or in some other court having appellate jurisdiction. *Wynne v. Newman*, 75 Va. 816; *Lamprey v. Nudd*, 29 N. H. 299.

Thus, a title derived from a purchase under a judgment against one who was *non compos mentis* cannot be attacked in an action of trespass to try title until such judgment is reversed or set aside by some direct proceeding instituted for that purpose. *Ewing v. Wilson*, 63 Tex. 88.

So, a judgment rendered against an insane person without the interposition of a guardian cannot be impeached by a subsequently appointed guardian of the insane judgment debtor in an action in aid of execution without alleging fraud or unfairness upon the part of the judgment creditor though he had knowledge of the insanity. *Johnson v. Pomeroy*, 81 Ohio St. 247.

And a decree against a person who had been adjudged insane, founded upon an agreement made by his counsel, is voidable only and not subject to collateral attack, and is binding upon parties and privies until vacated or set aside by a direct proceeding. *Denni v. Elliott*, 60 Tex. 337.

So, the validity of a decree of a circuit court of the United States cannot be attacked in a state court upon the ground that a party was insane at the time he was served with process and the decree was rendered. *Maloney v. Dewey*, 127 Ill. 386.

And a suit brought against a lunatic and prosecuted bona fide to judgment under Pennsylvania act of assembly, is conclusive as to the amount and merit of the plaintiff's demand. *Re Eckstein*, 1 Clark (Pa.) 224, 1 Pars. Sel. Eq. Cas. 59.

And the committee of a lunatic cannot, in an action of ejectment, collaterally impeach the judgment under which the land in question was sold though the finding of lunacy overreaches the judgment and the transaction on which it was based, where it was entered on a warrant to confess judgment on his note, which warrant contained a waiver of inquisition, which waiver was made a part of the judgment. *Weaver v. Brenner*, 21 Pittsb. L. J. N. S. 439.

In *Weaver v. Brenner*, 21 Pittsb. L. J. N. S. 439,

aside of the judgment and sale, and praying that the land be adjudged to them. It appears also that Spurlock, having heard of some dispute about the land, obtained a deed from three of the children of said Nathan Noe, for which, he said, he paid \$10 apiece to two of them. Appellant's contention is that John D. Noe bought the land without any arrangement with him, and that he afterwards purchased the same from John D. Noe, and by appropriate orders of the Harlem circuit court same was conveyed to him by the commissioner of the court. There is some evidence conducing

to show that the sale was made in 1881, and the deed made to Spurlock in 1882, and that afterwards Nathan Noe was, by the county court of Harlem, adjudged to be a lunatic, and sent to the lunatic asylum; and that in 1884 he was returned as incurable and harmless, and one of his sons was appointed as committee, and took charge of him, and drew \$75 per year for his support, until the time of his death, which period is not well established, but some records introduced tend to show that he probably died in 1889. The court, upon final hearing, adjudged in favor of the plaintiffs

supra, Hope v. Everhart, 70 Pa. 231, *infra*, V., was distinguished upon the ground that in that case the waiver was contained in the note, and was not therefore a part of the judgment entered.

So, a judgment determining the question whether the lunacy of the defendant when the note on which suit was brought was executed, formed a defense to it, though erroneous, is not void, and cannot be impeached when made the foundation of a subsequent suit. Sternberg v. Schoolcraft, 2 Barb. 153.

And a judgment in an attachment suit cannot be collaterally attacked in an action to set aside the sale therein and to have the judgment under which it was made declared null and void on the ground of the insanity of the judgment debtor. Pollock v. Horn, 13 Wash. 623.

Nor is the original judgment assailable on account of the insanity of the judgment debtor on the trial of a *scire facias* to revive it, and the record of proceedings in lunacy had after the entry of the judgment is inadmissible either under the plea of *null tiel* record or as evidence of incompetency to execute the note on which judgment was entered. Henry v. Brothers, 48 Pa. 70.

And refusal to open the original judgment upon a *scire facias* to revive a judgment to which the defendant pleaded his own lunacy is not the subject of a writ of error. Henry v. Brothers, 48 Pa. 70.

So a common recovery is by judgment, and such judgment is valid until reversed, and cannot be collaterally impeached. Wood v. Bayard, 63 Pa. 320.

If a man *non compos mentis* levies a fine, or suffers recovery, or acknowledges a suit or recognition, neither his heir nor his executor shall have them, for these are matters of record. Beverley's Case, 4 Coke, 123b.

But the making of a deed to bar an entail is a matter *in pais*, and does not stand on the same footing as the entering of judgments in a court of record, and evidence is admissible to show that the grantor was *non compos mentis*, or that, being of a weak mind, he was imposed upon for the purpose of avoiding such deed. Wood v. Bayard, 63 Pa. 320.

The general rule that judgments of courts of general jurisdiction are not subject to collateral attack, however, does not apply to an action for divorce brought against a wife who had been taken by her husband to a different state and confined in an asylum therein, and when so absent was sued by him and judgment obtained on constructive service from which there was no appeal or writ to modify and vacate, and no new trial could be had. Newcomb v. Newcomb, 13 Bush, 544, 26 Am. Rep. 222.

V. When relieved against.

Judgments rendered against a lunatic may be examined and their fairness ascertained, and the equitable rights of the lunatic will be protected. Demelt v. Leonard, 19 How. Pr. 142.

And such a judgment or decree, though not void, 89 L. R. A.

may be opened up within the time limited by statute to admit of a valid defense. White v. Hinton, 3 Wyo. 753, 17 L. R. A. 66.

And the rule that in a foreclosure suit the chancellor will decree a sale of the whole premises when the defendants stand by and do not suggest that the mortgaged premises greatly exceed in value the amount of the mortgage debt does not apply where any of the defendants are *non compos mentis*, in which case every protection will be extended to them of which a sane adult could avail himself. Eslava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 265.

So, a judgment entered against a defendant while proceedings on a writ de lunatico inquirendo were pending, on which a few days after the entry of the judgment it was found that the defendant was *non compos mentis*, will be opened so as to let in a defense, and execution thereon will be set aside, but the judgment will be permitted to stand as security until further proceedings. Ash v. Conyers, 2 Miles (Pa.) 94.

And a judgment entered upon a warrant of attorney on a note given at a time when the maker was subsequently found to have been insane by a commission in lunacy may be opened to let in a defense, although the judgment plaintiff was not a party to the proceeding in lunacy. Glass v. Hilberg, 1 Pa. Dist. R. 621.

And a judgment by default after due service of process upon a note which had been obtained by fraud and without consideration by the original payee may be set aside and the default opened as against a good-faith purchaser of the note, and the guardian or administrator will be let in to defend upon the showing that the ward was of unsound mind when the note was made and the judgment taken. Dickerson v. Davis, 111 Ind. 433.

And an innkeeper who has harbored an infant and furnished him supplies against the law and contrary to the directions of his guardian, who obtains judgment bonds from him before and after he arrives at the age of maturity, which are overreached by an inquisition finding him incompetent to contract on account of habitual drunkenness, will not be allowed to retain the fruits of his improper conduct, and judgments entered thereon will be set aside and canceled. L'Amoureux v. Crosby, 2 Paige, 422, 22 Am. Dec. 655.

So the legal representatives of a lunatic have the right to institute proceedings to set aside a confession and judgment thereon against him under § 15, chap. 86, Ill. Stat., with relation to lunatics, providing that every contract made with an idiot, lunatic, or distracted person before he or she has been adjudged an idiot, lunatic, or distracted person may be avoided. Crawford v. Thomson, 161 Ill. 181.

And the fact that the holder of a note made by an insane person was an indorsee for value without notice does not affect the right to relief from a judgment rendered thereon, under Ind. Rev. Stat. 1881, § 386, providing that a party may be relieved on a judgment taken against him through his mis-

to the extent of $\frac{1}{3}$ of the land conveyed to Spurlock, holding, in effect, that he was entitled to his purchase money, with interest, and pay for valuable improvements to the extent they increased the vendible value of the land, and to be held accountable for reasonable rents, and referred same to the master commissioner to take proof and report as to these items, and from that judgment Spurlock has appealed.

We deem it unnecessary to determine as to the question of the statute of limitation pleaded and relied upon by appellant, or to determine

as to whether the proper parties were all before the court. It will be seen from the record that the judgment was rendered in 1881, and sale confirmed in 1892, before the inquest as to the sanity of Noe, and that at least from 1884 one of his sons was his committee, having him in charge, and drawing \$75 per annum from the state for his support, on the assumption that he was a pauper lunatic. There is proof conducing to show that at and before the rendition of the judgment and sale of the land Nathan Noe was in bad health, afflicted with the palsy, and that he was of unsound

take, inadvertence, surprise, or excusable neglect. *Dickerson v. Davison*, 111 Ind. 438.

Nor is the committee of a lunatic estopped by a judgment rendered upon a note containing a warrant of attorney to confess judgment and a waiver of inquisition, from denying the validity of the title of a purchaser thereunder, where the waiver of inquisition was not contained in the warrant or made part of it and was the act of the defendant himself, when he was incapable of executing a valid waiver and the purchaser was aware of his incapacity. *Hope v. Everhart*, 70 Pa. 281.

And the right of an administrator of an insane person to have a default set aside and a judgment against such insane person opened, is not affected by the fact that such insane person's guardian redeemed his ward's land from an execution sale had under such judgment, such redemption having been made to save the property of the ward. *Dickerson v. Davis*, 111 Ind. 438.

That the defendant was a lunatic, however, is no ground for relief against a judgment at law unless it appears that he was not represented. *Henderson v. Mitchell*, Bail. Eq. 113, 21 Am. Dec. 526.

And a judgment will not be vacated and set aside and a new trial granted upon the ground that the judgment debtor was insane, unless it is made to appear to the court that a different result would probably be reached if a new trial should be granted, or that injustice has been done on the original trial. *Brambill's Case*, 6 Ct. Cl. 238.

And an action cannot be maintained by the committee of a lunatic for the return of property taken from him on execution under a judgment against him, and for damages consequent upon the taking and detention thereof, or for the money value of such property after the appointment of a committee, where the demand was just and no defense thereto is established. *Crippen v. Culver*, 13 Barb. 428.

Nor can an action to set aside a judgment upon the ground that the judgment debtor was of unsound mind and incapable of transacting his own business at the time the judgment was rendered be maintained under Ind. Rev. Stat. 1881, § 306, providing for relief against judgments taken through mistake, inadvertence, surprise, or excusable neglect, unless it appears that the complainant had a valid and meritorious defense to the cause of action upon which the judgment complained of was rendered. *Woods v. Brown*, 93 Ind. 164, 47 Am. Rep. 369.

So, that no guardian had been appointed for a *non compos mentis* cannot be alleged as error in a proceeding to reverse a judgment rendered against him, as there is no legal obligation resting upon the court or upon the plaintiff to ascertain the facts and have such a guardian appointed. *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614.

And an action by a guardian under Ind. Rev. Stat. 1894, § 309, 1881, § 306, to be relieved from a judgment alleged to have been taken against a former guardian of his ward through excusable neglect, and to secure the opportunity to present

a defense to the action upon the ground that the ward was not served with summons to appear in the action and did not authorize an appearance by attorneys therein, cannot be maintained where such ward was insane and under guardianship at the time the action was commenced, and was therefore neither a proper nor necessary party thereto. *Jones v. Crowell*, 143 Ind. 218.

And a decree divesting all right and title of a party to certain real estate will not be vacated and set aside in an action for such relief upon the ground that the agreement upon which it was based was entered into by him at a time when he was so far insane as to incapacitate him from contracting, and that his mental incapacity existed at the time the decree was made, where the jury did not find that he was insane at the time of the decree. *Brown v. Rentfro*, 57 Tex. 327.

So, the plaintiff in an action to foreclose a mortgage executed by a husband and wife in which the wife appeared and answered in her own right on behalf of her husband who was then insane, who takes issue on such answer and voluntarily goes to trial thereon without objecting to the appearance of the wife on behalf of her husband, cannot raise such objection by motion in arrest of judgment. *Yount v. Turnpaugh*, 33 Ind. 46.

And a decree of foreclosure against the guardian of an insane person upon whom service was made will not be set aside under Ind. Rev. Stat. 1894, § 399, upon the ground of excusable neglect, where the record shows that an attorney appeared for him, though the act of the latter was unauthorized, unless it appears, not only that such attorney had no authority, but also that there was a meritorious defense, and that the rights of bona fide purchasers or other innocent third parties have not intervened. *Jones v. Crowell*, 143 Ind. 218.

And a judgment in partition in which some of the parties were lunatics will not be set aside upon the ground that the summons was not served upon the lunatics and their committee under Ky. Civil Code, § 53, providing that if a defendant be of unsound mind the summons shall be served on him and on his committee if residing in the county, where the committee filed an answer for all, which is authorized by analogy by Ky. Civil Code, § 490, authorizing the committee in the name of the lunatic and his own to sue for and obtain judgment for the sale of property owned jointly by the lunatic and other if it be indivisible. *Finzer v. Nevin*, 13 Ky. L. Rep. 773.

VI. Relief, how obtained.

A writ of error or an appeal is the proper remedy where the record of a judgment shows that the judgment debtor was insane at the time it was rendered. *Allison v. Taylor*, 6 Dana, 87, 32 Am. Dec. 68; *Re Hopper*, 5 Paige, 491; *Lamprey v. Nudd*, 29 N. H. 299.

And the appropriate remedy where judgment has been taken against an insane person of whom the court acquires jurisdiction by the service of its summons, but fails to appoint a guardian *ad litem* when the general guardian fails to appear, is by

mind, and, in the judgment of sundry witnesses, not capable of transacting business. It further appears that he was going at large, and attended, without restraint, to his own affairs, up to and after the confirmation of the sale, and that no steps were taken to place his affairs in the hands of a committee, or have him adjudged a lunatic, until after the con-

firmation of the sale. The testimony of appellant is that he regarded him as capable of attending to his business, and was not aware of his lunacy, and that he (appellant) had nothing to do with the judgment or sale of the land until after the same was purchased by said Noe. The decisive question in this case is whether or not Nathan Noe was of such un-

proceedings in error, and not by an original action to vacate the judgment. *McAlister v. Lancaster County Bank*, 15 Neb. 295.

And judgment rendered against a person admitted to be *non compos mentis* and incapable of taking care of himself and managing his business affairs at the time may be reversed on writ of error. *Leach v. Marsh*, 47 Me. 548, 74 Am. Dec. 503.

In *Leach v. Marsh*, 47 Me. 548, 74 Am. Dec. 503, *supra*, *King v. Robinson*, 33 Me. 121, 54 Am. Dec. 614, *supra*, IV., was distinguished upon the ground that in that case it was not admitted, as it is in this, that the plaintiff in error was actually *non compos*. And exception was taken to the statement therein that "the law does not appear to have imposed it as a duty to be performed by a plaintiff to ascertain the mental capacity of the defendant, and to bring it before the court for its consideration, that such a guardian may be appointed."

But a writ of error on a scire facias to review a judgment brings up only the proceedings in a scire facias where the record of the first judgment is not before the court except so far as it is exhibited in replication to the plea of *null tel* record. *Henry v. Brothers*, 48 Pa. 70.

So, a circuit-court judge has power, after the expiration of a term, to issue the writ of error coram nobis to reverse a judgment of conviction in a criminal prosecution when it appears that the accused was insane when tried, and the fact was not made known at the trial, and if it is disputed by the state he may cause a jury to be impaneled to try such issue, and the venue for the trial of such issue may be changed to another county, but the change carries the whole case. *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48.

And where the fact of insanity is judicially known only from an admission in the record of another suit brought to enforce the purchase of the lunatic's land under execution of the judgment against him, relief may be had upon a writ of error coram nobis. *Allison v. Taylor*, 6 Dana, 87, 32 Am. Dec. 68.

And a judgment for taxes, rendered against an insane man, may be reviewed and the error rectified in the court where committed, on writ of coram nobis, and there seems to be no limitation as to the time within which such a motion or writ of error may be invoked. *Heard v. Sack*, 81 Mo. 610.

But a writ of error coram nobis, or a motion in lieu thereof, is not a proper process to reverse a judgment against a person who was insane at the time of its rendition, where there was no suggestion of his insanity in the record of the judgment; the remedy in such case is by action in equity. *Withrow v. Smithson*, 37 W. Va. 757, 19 L. R. A. 762.

So, the remedy of a lunatic against whom a judgment has been obtained and execution issued and property taken in satisfaction thereof is by application by the court appointing his committee to restrain the prosecution of the suit at law and to punish the plaintiff for contempt. *Crippen v. Culver*, 13 Barb. 428; *Re Hopper*, 5 Paige, 491.

And where a judgment is irregular or erroneous on the ground that the suit was prosecuted against one who was legally incompetent to make any defense thereto the remedy is by summary application to the court in which the judgments were

obtained, or by writ of error. *Demelt v. Leonard*, 19 How. Pr. 142.

And if there is no remedy at law, and judgments have been recovered against a lunatic for pretended claims which were not justly due, it may be proper for the committee to proceed by bill in equity to be relieved against such judgments. *Re Hopper*, 5 Paige, 491.

And after a judgment against a lunatic has stood beyond the statutory period within which it may be reviewed, set aside, or opened up as provided for by Ind. Rev. Stat. 1881, § 386, relief can only be had by appealing to the equity jurisdiction of the court, and in such case it might be necessary to show that the judgment plaintiff had been guilty of some fraud or unfairness in taking it. *Dickerson v. Davis*, 111 Ind. 438.

The proper remedy of a lunatic against whom a judgment has been rendered is to apply to chancery to restrain the proceedings and compel the plaintiff to come there for justice, and where the proceeding was originally in chancery the court has all the jurisdiction that any court can have to relieve against any harm. *Maloney v. Dewey*, 127 Ill. 305.

And an injunction will be granted to restrain a judgment creditor who issues an execution on his judgment and levies on personal property in the hands of the committee of a lunatic. *Re Eckstein*, 1 Clark (Pa.) 224, 1 Para. Sel. Eq. Cas. 59.

Unless a judgment against a lunatic is obtained before the appointment of a committee for him, it is within the power of the chancellor to restrain the enforcement of the claim against such lunatic. *Re Delahunty*, 28 Abb. N. C. 245.

And the remedy of a lunatic against whom a judgment has been rendered subsequent to the judicial establishment of his insanity is by action in equity to set aside the judgment where it was fraudulently obtained. *Pollock v. Horn*, 18 Wash. 638.

A judgment and subsequent proceedings thereon will not be set aside in a court of law for irregularity, however, on the ground that a judgment debtor had been found by inquisition to be a lunatic or an habitual drunkard; the committee should apply to a court of chancery for relief. *Clarke v. Dunham*, 4 Denio, 262.

And that a defendant was a lunatic or otherwise incompetent to manage his own affairs at the time an action was brought against him, or that he has since become so, is not ground for setting aside proceedings at law, it must be left to the court of chancery to enforce its own jurisdiction. *Robertson v. Lain*, 19 Wend. 650.

But a judgment against a lunatic may be set aside by the supreme court in New York where courts of chancery have been abolished and their general jurisdiction in law and equity has been conferred upon that court, and difficult questions of fact arising may, on a motion therefor, be referred to a referee. *Demelt v. Leonard*, 19 How. Pr. 142.

Equity in interposing against a judgment against an insane person, however, will require justice to be done to the creditor by way of payment of whatever was due. *Litchfield's Appeal*, 23 Conn. 127, 73 Am. Dec. 682.

And a judgment entered upon a bond and warrant of attorney against a lunatic in good faith, by a creditor, will not be set aside without restoring to him so much of the estate of the lunatic as has

sound mind at the time of the rendition of the judgment and the sale of the land as to render the same void or voidable. The presumption of law is that all men are sane, and capable of understanding the nature and effect of contracts, and all suits and proceedings in court, and, although a party may be in bad health, and his mind, to some extent, impaired,

yet, if he has sufficient mind to understand and comprehend the nature and effect of contracts, or comprehend and understand the effect and result of legal proceedings, the same are binding upon such persons. In this case the judgment and sale complained of were rendered at a time when Nathan Noe was going at large, and attending to his own business,

actually been benefited by the transaction for which they were given. *Loomis v. Spencer*, 2 Paige, 138.

And one who sues a lunatic for a debt, and obtains judgment at law, must give up his advantage and pay his own costs before a court of chancery will interfere for his relief. *Re Heller*, 3 Paige, 199.

And a court of chancery has no power to annul a judgment and set aside the verdict of a jury and order a new trial in an action at law, on the ground that the judgment debtor therein was insane. It may act on the parties, but not directly on the judgment, nor on the court which rendered it. *Wryne v. Newman*, 75 Va. 818.

So, a judgment against an insane person cannot be vacated or modified under Ohio Code Civ. Proc. § 534 *et seq.*, providing a remedy by a proceeding in the court rendering the judgment for erroneous proceedings against a person of unsound mind, where the condition of the defendant, or the error in the proceeding, does not appear upon the record, until it is adjudged that there is a valid defense to the action. *Johnson v. Pomeroy*, 31 Ohio St. 247.

And while relief may probably be obtained in equity against a judgment rendered against an insane person where the proceeding provided for by the Ohio Code cannot be had, it would be necessary in such case to show that the judgment, through some fraud or unfairness, was such as in equity and good conscience should not stand. *Johnson v. Pomeroy*, 31 Ohio St. 247.

In *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317, however, it was held that a bill in equity will not lie to set aside a judgment on the ground that the judgment debtor was a lunatic when no actual fraud, collusion, or conspiracy was charged.

This ruling was placed on the ground that in Maryland no statute exists to authorize equitable interference, and *Re Eckstein*, 1 Pars. Sel. Eq. Cas. 56, and *Brasher v. Cortlandt*, 2 Johns. Ch. 408, *supra*, III., were distinguished upon the ground that the decisions therein were rendered under the peculiar provisions of a state statute.

So, *audita querela* will lie to set aside a judgment rendered upon a writ issued by a justice of the peace against one who was insane and under guardianship at the time, as such justice has no jurisdiction, and consent in such a case cannot confer it. *Miller v. Potter*, 54 Vt. 287.

And an action will lie to set aside a tax deed made under a judgment for unpaid taxes which was regular on the face of the record, where at the time of the accruing of the taxes, as well as at the time of service upon the owner and the rendition of the judgment and making of the sale, he was of unsound mind and incapable of transacting business. *Heard v. Sack*, 81 Mo. 610.

And it is optional with the court, on a proceeding in equity to avoid a judgment for taxes against a lunatic, whether it will submit issues to the jury or not, and it may or may not adopt the finding of a jury. *Heard v. Sack*, 81 Mo. 610.

In *Heard v. Sack*, 81 Mo. 610, *supra*, *Robertson v. Lain*, 19 Wend. 850, and *Clarke v. Dunham*, 4 Denio, 282, *supra*, and *Sternbergh v. Schoolcraft*, 2 Barb. 153, *supra*, I., were distinguished upon the ground that the rulings therein had their foundation in a special statute of New York conferring jurisdiction on the chancery court.

An action to have judgments vacated and de-

clared fraudulent and void upon the ground that the judgment debtor was insane when they were rendered must be commenced in Texas within two years after the removal of such disability. *Fleming v. Seeligson*, 57 Tex. 524.

And the Texas Constitution of 1890, art. 12, § 14, providing that insane persons shall not be barred of their rights of property by adverse possession or law of limitation of less than seven years, from and after the removal of each and all their respective legal disabilities, does not apply to an action to have a judgment vacated and declared fraudulent and void because of the insanity of the judgment debtor. *Fleming v. Seeligson*, 57 Tex. 524.

VII. Effect of inquisition.

An inquisition of insanity appointing guardians for a person found to be insane is *prima facie* evidence that he was *non compos mentis* upon an issue as to his soundness of mind at the time at which a judgment was rendered against him. *White v. Palmer*, 4 Mass. 147.

And a finding of the jury upon an inquisition of lunacy that a person had been of unsound mind and incapable of taking care of herself, or her affairs, without interval, for about nine years, is presumptive evidence that she was a lunatic at the time a judgment was obtained against her within that period. *Demelt v. Leonard*, 19 How. Pr. 142.

And the record of an inquisition and proceedings under a commission in lunacy finding a judgment debtor to have been a lunatic without lucid intervals for about twenty years is *prima facie* evidence of his incapacity to execute a waiver of inquisition under which his property was sold under the judgment. *Hope v. Everhart*, 70 Pa. 231.

So, a commission of idiocy finding a party to be of sound mind, and a fine and recovery suffered by him, and the caption of the fine and a warrant of attorney and caption, are conclusive evidence of the capacity of the party to make the warrant of attorney and suffer a recovery, where the issue upon his sanity is joined after his death, and the warrant of attorney and caption appear to have been made and acknowledged before the chief justice at the same time that the caption of the fine was taken and acknowledged before him. *Hume v. Burton*, 1 Ridgeway, P. C. 204.

But the appointment by the court of a guardian *ad litem* for a lunatic defendant is not cause for reversal of judgment where the record shows that he appeared and pleaded by his guardian *ad litem* and by attorney,—especially where it appears that the guardian *ad litem* was appointed at the instance of the defendant's attorney. *Walker v. Clay*, 21 Ala. 797.

And an inquisition finding that a person against whom a judgment had been rendered was a lunatic, had several years after the rendition of the judgment, is not evidence that such person was a lunatic at the time of its rendition. *Shirley v. Taylor*, 5 B. Mon. 99.

And insanity of an individual at a particular period from the effect of some violent disease does not authorize the inference of his insanity several months later, at the time of service of a writ upon him and the rendition of a judgment against him. *Hix v. Whittemore*, 4 Met. 545. F. H. B.

without restraint or objection from his friends, or from his numerous family of children. It is true that he was found a lunatic after confirmation of the sale, and by statute the verdict of the jury should have shown the date of his first attack; but, if such was shown by the proceedings, the plaintiffs have failed to exhibit the record in that case. It also appears that one of his sons was appointed his committed in 1884, and, although said Nathan Noe was reported as having no property, no steps were taken by said committee, or anyone else, to set aside the judgment or sale complained of. Public policy requires that the judgments and orders of courts should not be

lightly vacated or set aside upon the assumption that the parties against whom the same was rendered were lunatics at the time of such rendition; and, taking all the facts and circumstances proved in this case into consideration, it seems to us that the evidence is not sufficient to establish such unsoundness of mind upon the part of Nathan Noe as to authorize the sale, confirmation, and deed to be set aside or vacated.

For the reason indicated, *the judgment of the court below is reversed*, and the cause remanded, with directions to dismiss the petition of appellees, and for proceedings consistent herewith.

ARKANSAS SUPREME COURT.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Appt.*,

v.

Paul JONES, Admr., etc., of Samuel Berger, Deceased.

(64 Ark. 613.)

1. A conductor beating a passenger who slapped his face with his hand renders the carrier liable if he uses force greatly exceeding that which would appear to a reasonable man necessary to repel the assault.
2. A carrier has the burden of showing that its conductor in beating a passenger in alleged self-defense used no more force than appeared to him as a reasonable man necessary to repel the assault.
3. The refusal of a proper instruction is not ground of reversal if it could not have been prejudicial.

(Bunn, Ch. J., and Wood, J., dissent.)

(January 22, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Miller County in favor of plaintiff in an action brought to recover damages for alleged assault made upon plaintiff by defendant's servant. *Affirmed.*

Statement by **Hughes, J.:**

Appellee filed his suit in the circuit court of Miller county, alleging that on June 4, 1894, while a passenger on the road of appellant, en route between Lewisville and Texarkana, the conductor of the train, Randall Silverman, cursed and abused him wilfully, and did beat, bruise, and illtreat him, striking him with a lantern, by reason of which curses, blows, and illtreatment he was damaged in the sum of \$20,000. Appellant answered, denying that appellee was a passenger, and alleging that the wounds received by appellee at the hands of Randall Silverman were received in a personal encounter between himself and Silverman, for

which appellee alone was responsible; that the altercation was brought about by appellee striking the conductor in the face; that appellee's attack on the conductor was not occasioned, by a desire to protect himself, but originated in anger towards the conductor, because of the attempt of the said conductor to prevent him from making improper advances towards a young lady passenger on said train; that the conductor, in defending himself and in striking appellee, acted, not as the agent of appellant, but in his own individual capacity, for which appellant is in no wise responsible. Upon trial, verdict was for appellee in the sum of \$700, for which judgment was rendered.

At the instance of appellee the court gave the following instructions: "(1) If the jury find, from a preponderance of the evidence in this case, that, as alleged in the complaint, plaintiff was on the 4th day of June, 1894, a passenger in a coach of defendant, being transported from Lewisville, Arkansas, to Texarkana, Arkansas, and that, while being so transported as a passenger by the defendant, without lawful cause, he was beaten and wounded by the conductor of the defendant in charge of said train, and said plaintiff was thereby injured or damaged in any amount, then is plaintiff entitled to recover. (2) The fact that the plaintiff may have first struck said conductor would not excuse or justify said conductor in using against plaintiff any more force than sufficient to protect said conductor from said blow, or a repetition thereof, or from any further violence at the hands of plaintiff. (3) Though the jury should believe, from the evidence, that plaintiff made the first assault upon the conductor on defendant's train, still, if they further believe, from the evidence, that the conductor so attacked repelled plaintiff's assault with more force and violence, and did more injury to plaintiff, than was reasonably necessary for his own protection from injury at the hands of plaintiff, then, as a matter of law, the conductor using such excessive force would be guilty of assault and battery; and if, in this case, defendant seeks to justify the as-

NOTE.—As to the liability of a carrier for an assault upon a passenger, see *note* to *Davis v. Hough-tell* (Neb.) 14 L. R. A. 737; also *Baltimore & O. R. 89 L. R. A.*

Co. v. Barger (Md.) 26 L. R. A. 220; *Goodloe v. Memphis & C. R. Co.* (Ala.) 29 L. R. A. 729; and *Krantz v. Rio Grande Western R. Co.* (Utah) 30 L. R. A. 297.

sault and battery committed by the conductor upon the plaintiff, if you find such an assault and battery was made, from the evidence, on the ground that plaintiff first assaulted the conductor, it is incumbent on the defendant to show that no more force was used than the exigencies of the case called for. The force used must be suitable in kind and reasonable in degree; otherwise, the justification fails. An assault by a passenger upon a conductor of a train will not justify the conductor in pursuing and punishing the passenger after the assault is over. If he does so, he makes the defendant liable for the injury. (4) If the jury believe, from the evidence, that the plaintiff was guilty of indecorous conduct towards the lady passenger, then it was the duty of the conductor of the train to use all necessary and reasonable means to protect her from insults or annoyance, but he would have no right to abuse or insult the plaintiff as a punishment for such conduct; the conductor's duty being only to prevent a continuation of such conduct by the use of all necessary and reasonable means. (6) The jury are instructed that the facts, if proved, that the plaintiff may have spoken the first word or made the first remark to the conductor on the defendant's train, and this word or remark so spoken by plaintiff brought on the difficulty, and caused the assault and battery which ensued, and the plaintiff struck the first blow, would not, of itself, excuse or justify said conductor in using against the plaintiff any more force than was reasonably necessary to protect him (said conductor) from said blow, or a repetition thereof, or from any further violence at the hands of plaintiff." To the giving of each of which the appellant separately excepted.

The appellant asked the court to give the following instructions, which the court refused: "(2) The jury are instructed that, while the defendant is responsible for the acts of its conductors, in their treatment of passengers, done in the line of their duty, in the scope of their authority, yet the conductor has the right to resent and resist an assault made on him by a passenger, or anyone else, and his act in resisting or resenting such an assault is a personal act of the conductor, for which the principal (the defendant in this case) is not responsible. (3) If the jury find, from the evidence, that the assault of the defendant's conductor on the plaintiff was not malicious, and was not the result of a reckless disregard of plaintiff's rights as a passenger, but was occasioned by the assault of plaintiff on the conductor, and was made to repel and resent such assault, then the plaintiff is not entitled to recover any damages for the pain, suffering, or humiliation experienced by him, and your verdict should be for the defendant. (5) If the jury find, from the testimony, that the conductor in charge of the train on which plaintiff was a passenger did strike plaintiff, and injure him, as claimed by plaintiff, and that in so doing he used more force than was necessary in order to repel any assault which may have been made on him by the plaintiff, or that he used more force than was necessary in order to prevent any improper interference with another passenger on the train by the plaintiff, and you also find that the unnece-

sary force and violence on the part of the conductor was done under excitement and in anger, occasioned by the assault of plaintiff, or by improper conduct of plaintiff towards another passenger, then plaintiff cannot recover, as against defendant, and your verdict will be for defendant. (6) If the jury find, from the testimony, that the plaintiff was a passenger on the defendant's railroad at the time and place claimed by him, and that he was beaten and bruised by the conductor of said train with a lantern, and that from the said beating and bruising the plaintiff has suffered physical pain, and may probably continue to suffer therefrom, and also experienced humiliation by reason thereof, and that said beating and bruising was caused by the act of plaintiff in slapping the said conductor's face, by which the said conductor was angered and excited, and while so angered and excited gave the blows with the lantern, then your verdict should be for the defendant, although you should find, from the testimony, that the conductor used more force than was necessary to repel the assault made on him by the plaintiff." Of which the court amended instruction No. 8, by adding at the end thereof the words, "Unless you find that he used more force than was necessary to protect himself." The court gave No. 8, as amended, and refused Nos. 2, 5, and 6. To the amending of said instruction No. 3 as aforesaid, and giving the same as amended, and to the refusal of the court to give each of said instructions Nos. 2, 5, and 6, appellant separately excepted.

Messrs. Samuel H. West and Gaughan & Sifford, for appellant:

If the conductor did use more force than seemed to him necessary for his own protection, the appellant, the master, is not liable in damages.

If the appellee by his own culpable misconduct was the assailant, or provoked the anger of the conductor and unfitted him mentally for discharging his duties as such servant, he, the appellee, cannot recover.

Harrison v. Fink, 42 Fed. Rep. 787; *Peary v. Georgia R. & Bkg. Co.* 81 Ga. 485.

One detected in an act of the kind in which appellee was engaged is not usually filled with a Christian spirit. The interference by the conductor as a rule will bring the vengeance of the suspect on his head. How unjust to require of him such strict care and then expose him, at the peril of his master, to the taunts, insults, and blows of the evil-minded.

Where one by his own carelessness contributes to an injury inflicted on him by the negligence of another, it will defeat his recovery, even where the act complained of is the neglect of a positive requirement of the statute.

St. Louis, I. M. & S. R. Co. v. Leathers, 62 Ark. 285; *St. Louis S. W. R. Co. v. Dingman*, 62 Ark. 245.

On petition for rehearing.

There is sufficient evidence from which the jury could have found that the conductor did not use more force than appeared to him as necessary to protect himself. And if this is true this court should reverse and let the jury decide, under proper instructions.

If the proper instructions had been given to

the jury, and this court would not have disturbed the verdict in favor of appellant, on the evidence, then it should not now decide on the weight of evidence and take the case away from the jury.

It is the province of the jury, and not of the appellate court, to weigh the evidence, and determine whether the testimony of a witness is to be believed.

Wilcox v. Boothe, 19 Ark. 684.

A judgment of the lower court will not be reversed upon the weight of evidence if there is any legal evidence upon which the verdict might be found.

Gavin v. Armistead, 57 Ark. 577.

Where there is a conflict of the testimony the supreme court will not disturb the verdict.

Mayson v. Edington, 28 Ark. 208; *Bostick v. Brittain*, 25 Ark. 482; *Bright v. Bostick*, 27 Ark. 57; *Holt v. State*, 47 Ark. 196; *Brooks v. Perry*, 23 Ark. 32; *Berry v. Elliott*, 25 Ark. 89; *Cogswell v. McKeogh*, 46 Ark. 524; *Williams v. State*, 50 Ark. 511.

Where it was the appropriate province of a jury to determine a matter of fact before them, and their verdict is not without evidence to sustain it, this court will not disturb their finding.

Hirsch v. Patterson, 23 Ark. 112.

A verdict will not be disturbed if there is competent evidence to support it.

Fayetteville & L. R. R. v. Combs, 51 Ark. 324; *St. Louis, A. & T. R. Co. v. Trigg*, 63 Ark. 599.

The court erred in deciding that the burden of showing that the conductor used no more force than was necessary is upon the appellant.

The court erred in deciding the appellant liable for damages, in this case, notwithstanding the conductor may have used more force in repelling the assault of appellee than appeared to him as necessary for his self-defense.

Elliott, Railroads, § 1638; *New Orleans & N. E. R. Co. v. Jones*, 142 U. S. 18, 35 L. ed. 919.

Messrs. Scott & Jones, for appellee:

The resistance must not exceed the bounds of mere defense and prevention, or the force used in defense must not be more than commensurate with that which provoked it.

Webb's Pollock, Torts, p. 255.

If the conductor used more force than seemed to him necessary for his own protection, the appellant, the master, is liable in damages.

Seymour v. Greenwood, 6 Hurlst. & N. 359, 7 Hurlst. & N. 356; *East Tennessee, V. & G. R. Co. v. Fleetwood*, 90 Ga. 23; *Hanson v. European & N. A. R. Co.* 62 Me. 84, 16 Am. Rep. 404; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *Dillingham v. Anthony*, 73 Tex. 47, 3 L. R. A. 634.

Hughes, J., delivered the opinion of the court:

Briefly the case may be stated as follows: Appellee was a passenger on train of appellant. He was a New York jewelry drummer, and took a seat near a girl of seventeen years, a stranger to him. The conductor removed this girl to the rear of the coach. Appellee said to a friend he would go back and see why the conductor moved this girl. He went back, sat down by the girl, and began inquiring where

she was going, and asked her other questions. The conductor looked at him in a manner that convinced him that the conductor, to say the least, was suspicious of his intentions. From this an altercation ensued, in which appellee struck the conductor first, and in turn the conductor struck him, and beat him with a lantern. There was evidence tending to show that the conductor gave the appellee a serious and severe beating with his lantern, and that the appellee was endeavoring to ward off the blows, or protect himself by throwing up his hands; that the brakeman, while this was going on, stood behind the conductor, and twice, when the conductor ceased beating the plaintiff, told him to give him some more; and that thereupon the conductor hit him two more licks. To use his language, "I think he gave him some more twice." The evidence tended to show that the conductor only stopped beating the appellee because he discovered he was a Mason; that the conductor struck several blows,—as many as three to five each time: then he would talk to the plaintiff, and strike him again. The blows were upon the head and shoulders of the plaintiff, who tried to ward them off with his hands. Plaintiff's hat was knocked off, there was a scalp wound, and the blood ran over his face, hands, and clothing. Dr. Webster, who dressed the plaintiff's wounds, testified: "The wounds were on his head, left shoulder, and arms; two or three wounds on the head, his shoulder was pretty badly bruised, and finger pretty badly cut. One of the wounds on his head was about two and a half inches long, cut to the skull. The other one was cut to the skull, but was more of a puncture. It was probably one half inch long. . . . The wound on his finger was quite a gash." On cross-examination he said, "I did not regard his wounds of a serious nature." There was other testimony tending to show that the beating was severe; in fact, very unnecessary to repel the force used by the appellee in slapping the conductor in the face, which, there is proof tending to show, was provoked by the conductor calling the appellee "a son of a bitch."

The appellant contends that by the instructions of the court it was left to the jury to decide whether or not the conductor used more force in repelling the assault of appellee than was necessary to protect himself, and that this was error; that the court should have instructed as appellee asked, that if they found that the conductor used more force than appeared to him necessary, acting as a reasonable man, under the circumstances and surroundings, etc. Conceding that, as an abstract proposition, the contention is well founded, yet the refusal to so instruct in this case could not be prejudicial, as it is plain from the testimony that the conductor did use more force than was reasonably necessary to repel the assault of the appellee. If error, therefore, it is not prejudicial.

The appellant contends that, if the servant is justifiable, under the law, in what he did, the master is not liable. Very true. "When one is wrongfully assaulted it is lawful to repel force by force (as also to use force in the defense of those whom one is bound to protect, or for keeping the peace), provided that no unnecessary violence is used. . . . We must be con-

tent to say that the resistance must 'not exceed the bounds of mere defense and prevention,' or that the force used in defense must be not more than 'commensurate' with that which provoked it." Webb's Pollock, Torts, p. 255. We think the burden was on the appellant to show that the conductor used no more force than appeared to him, as a reasonable man, necessary to repel the assault of the appellee. This has not been done. On the contrary, it appears, from the evidence of the appellant, as well as that of the appellee, that the amount of force used by the conductor greatly exceeded that which would appear to any reasonable man to have been necessary to repel the assault made by the appellee upon the conductor by slapping him in the face with his hand.

The appellant also contends that, if the conductor did use more force than seemed to him necessary for his own protection, the appellant (the master) is not liable in damages. To support this contention, they cite *Peavy v. Georgia R. & Bkg. Co.* 81 Ga. 485 (in which no authority is cited to sustain the opinion), and *Harrison v. Fink*, 42 Fed. Rep. 787, a case originating in Georgia, to support which *Peavy v. Georgia R. & Bkg. Co.* is cited. We cannot yield assent to such a doctrine, which is based upon the ground that the injured party is the aggressor or brings on the difficulty. This would exempt a railroad company from liability in a case where, for a simple assault upon a servant, representing the company, the servant might severely and cruelly beat the assailant, a passenger, whom the law makes it his duty not to abuse or mistreat unnecessarily. The rule applicable to such cases is this: That when a prima facie case of assault and battery is sought to be justified, it is incumbent upon one who justifies to show that no more force was used than the exigencies of the case called for. The force used must be suitable in kind and degree to the exigencies of the occasion; otherwise, the justification fails. *Hanson v. European & N. A. R. Co.* 62 Me. 84, 16 Am. Rep. 404; *Dillingham v. Anthony*, 73 Tex. 47, 3 L. R. A. 634.

There are objections based on language used in argument by appellee's counsel, which was, perhaps, not altogether proper, but we think the case ought not to be reversed on account of it. We do not think it probable that the jury was misled or prejudiced by it. We cannot say that there was an abuse of discretion by the trial court. The verdict was for \$700 actual damages, which we do not think excessive.

Upon the whole case, finding no reversible error, the judgment is affirmed.

Bunn, Ch. J., dissenting:

The statement of the facts in this case, as detailed by the young lady involved, presents the plaintiff in a very different attitude from that in which his own testimony presents him, and the conductor's testimony puts quite a different phase on his use of unnecessary force to repel the assault from that made to appear in plaintiff's testimony. But, since no testimony, antecedent to the assault on the conductor by the plaintiff, ought to have any influence upon our decision on the question raised by the instructions called in question, and 39 L. R. A.

since, in discussing those instructions, it must be conceded, for the sake of the argument, at least, that there was unnecessary force employed by the conductor in repelling the assault upon himself by the passenger, I forbear to make any particular statement of the facts.

The question at issue arises upon instructions given and instructions refused and instructions modified, and, briefly stated, is this: "Where a passenger assaults the conductor of the train in which he is traveling, and the latter, in resenting it, uses more force than is necessary to repel the assault, is the company liable for damages occasioned by the employment of the excessive force?" The authorities cited by a majority of the court in support of their view of the question involved, are Webb's Pollock, Torts, pp. 255, 256; *Hanson v. European & N. A. R. Co.* 62 Me. 84, 16 Am. Rep. 404, and *Dillingham v. Anthony*, 73 Tex. 47, 3 L. R. A. 634, and these I will endeavor to analyze and discuss in the order named.

In the first,—a text book,—under the heading of "Self-Defense," it is stated: "When one is wrongfully assaulted, it is lawful to repel force by force (as also to use force in the defense of those whom one is bound to protect, or for keeping the peace), provided that no unnecessary violence is used." [Webb's Pollock, Torts, p. 255]. How much force, and what kind, it is reasonable and proper to use in the circumstances, must always be a question of fact; and, as it is incapable of being concluded beforehand by authority, so we do not find any decisions which attempt a definition. We must be content to say that the resistance must "not exceed the bounds of mere prevention," or that the force used in defense must be not more than "commensurate" with that which provoked it. It is obvious, however, that the matter is of much graver importance in criminal than in civil law. It is generally held that the rule on the subject is not exactly the same in civil as in criminal actions, and the statement of the author is but the statement of the rule in criminal actions. Moreover, the rule as stated only reaches the direct and immediate actor, and has nothing to say as to the duty or liability of a third party, holding, for instance, the relation of master or employer to the prime actor. The authority, therefore, is not applicable to the case in issue, and it states nothing that is inconsistent with what I have to say, or with the authorities I shall take occasion to cite.

Hanson v. European & N. A. R. Co. 62 Me. 84, 16 Am. Rep. 404, was a case where a brakeman was attempting to put off the coach a dog belonging to the plaintiff, a passenger; it being against the rules to carry dogs on the coach. The brakeman attempted, in rather a rude and uncereemonious manner, to put the dog off, and this gave rise to a difficulty between the plaintiff and the brakeman, in which the former rather rudely pushed the latter down into a seat, and the latter, stretching out his legs, kicked the plaintiff, breaking the pane of glass behind him in doing so, but failed to release himself by so doing from the grasp of the former. When the plaintiff had finally released the brakeman, under promise that the latter should behave himself, and while the plaintiff's back was turned, the brakeman

struck him severe blows with a poker about the head and shoulders and over the eye, which constituted the assault and battery for which the suit was brought. In that case the court said: "If, therefore, it be true, as defendants contend, that the plaintiff was the aggressor,—that he first assaulted the brakeman, and resisted him in the performance of a legitimate duty—it was still a question of fact, for the jury to determine, whether the brakeman did not use greater violence than the exigencies of the case demanded; whether he did not pursue the plaintiff, and inflict the blows upon his head with the iron poker, after the latter had ceased his assault, had ceased his resistance, and was returning to his seat with his back to the brakeman." In that case the servant was within the line of his employment and duty in attempting to put the dog off the coach. In doing so, he became involved in difficulty with the plaintiff—the owner of the dog—which at first extended no further than the act of plaintiff in pushing or pulling the brakeman down into his seat, and the latter kicking the former by stretching out his legs, or in the act of so doing, for the record is not clear on that point. The scuffle seems to have ended at this point, on the plaintiff's promise to the brakeman that he would let him up if he would afterwards behave himself, which agreement the brakeman assented to and was released; but, as soon as he could slyly do so, he seized the iron poker, and badly beat the plaintiff. The first difficulty having closed, the brakeman became the aggressor and assaulting party in the latter. Whatever name the court may employ to designate this character of assault on the part of the servant, it was not in self-defense, and therefore it was done while in the line of his employment, and done in violation of his and his master's duty to the passenger. And such was the theory upon which the court decided the case. We have no quarrel with the decision on the facts of the case, however wanting in precision its language may be.

In *Dillingham v. Anthony*, 73 Tex. 47, 8 L. R. A. 634, the much-mooted question was whether or not the malicious and wilful assault of a conductor upon one of his passengers, in a personal controversy between the two, disconnected from any duty of the conductor as such, rendered the railway company liable. The court held the company liable upon the facts of that case, but not for exemplary damages. It was manifest that the court took the side of the long-standing controversy to the effect that the malice and wilfulness of the servant in making an assault upon the passenger did not excuse the master from liability, since the latter owed a duty to the passenger, that of protection, which, through his servant, he had violated. I have no desire to enter upon that threadbare discussion, since the question is not presented in this record.

In *Harrison v. Fink*, 42 Fed. Rep. 787, the doctrines of which the court repudiates, as well as *Peavy v. Georgia R. & Bkg. Co.* 81 Ga. 485, upon which it is founded, the court said, quoting from *Peavy v. Georgia R. & Bkg. Co.*: "Did he [the plaintiff] have a cause of action for the shooting? But for his fault, the conductor would not have been brought into a state of excitement, from danger and insult, 39 L. R. A.

which unfitted him for discharging his proper duties, either to the company or to the passenger. Whether the conductor was more or less in fault than the plaintiff was in shooting, certainly the plaintiff was more in fault than the company, because the plaintiff was there upon the ground, stirring up excitement, and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune, and, though the conductor might not be altogether excusable for the shooting (according to his own evidence, however, he was excusable), the company was not in fault for it; and it would be unjust for the plaintiff to recover of the company, when he boarded its train, violating the law, as we can well infer, by carrying upon his person a concealed weapon, violating the law again by swearing and using obscene language, violating the law again by committing an assault upon the conductor with a pistol, drawing the pistol, and presenting it at him, and violating the law by general disorder and misconduct throughout the transaction, up to the moment he was shot." And, continuing, the Federal Court said: "This quotation expresses very clearly, in our opinion, the correct rule on this subject."

Why the doctrine asserted in those cases failed to receive the sanction of the majority we do not see; for it is a doctrine now generally held, I believe, that a passenger who so acts as to disqualify a servant from properly performing his duty to his master and to the public by assaulting him and causing him to resort to whatever present means of self-defense he may have, ought not to be heard to complain of the consequences. This is the doctrine held in *City Electric R. Co. v. Shropshire* (Ga.) 28 S. E. 508, in which Judge Lumpkin, speaking for the supreme court of Georgia, said: "One who voluntarily, and by his own misconduct, places it beyond the power of a master to protect him [that is, by disqualifying his servant] surely cannot complain of an omission so to do." The same principle is announced in *Scott v. Central Park, N. & E. River R. Co.* 58 Hun, 414. This last case is authority for saying that, while in criminal law words do not justify an assault, so far as the party making an assault is concerned, there is no reason for holding that the carrier should be held responsible when a passenger, by his own improper and insulting behavior while a passenger on the road of the railroad company brought upon himself an assault.

I come now to consider what will be regarded as conduct not within the line of his employment on the part of a servant. Some of the cases already cited throw light on this question, but it may be well to consider others. In *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 133, 2 Am. Rep. 373, the supreme court of Ohio said: "The evidence of the company as the trial tended strongly to prove that the plaintiff, by his importunate conduct and

abusive language towards the servant, provoked a personal quarrel between them; that the assault was the result of this quarrel, and that the blow was inflicted by the servant as an act of personal resentment. If these facts had been found by the jury, the wrongful act of the servant in striking the plaintiff could not be regarded as authorized by the master, nor as an act done by the servant in the execution of the service for which he was engaged by the master. The fact that the blow was inflicted with a hatchet furnished by the master to be used for a wholly different purpose, though in connection with the servant's business, was wholly immaterial as respects the liability of the master. If he would not otherwise have been liable for the assault, the fact that it was committed with his hatchet did not contribute to make him so." In *New Orleans & N. E. R. Co. v. Jones*, 142 U. S. 25, 35 L. ed. 924, the Supreme Court of the United States, after discussing the rule which governs in cases where a conductor removes a passenger from the coach for misconduct, goes on to say: "But if an employee may use force to protect other passengers, so he may to protect himself. He has not forfeited his right to self-defense by assuming service with a common carrier; nor does the common carrier engage against the exercise of that right by his employee. There is no misconduct when a conductor uses force and does injury in simply self-defense; and the rules which determine what is self-defense are of universal application, and are not affected by the character of the employment in which the party is engaged. Indeed, while the courts hold that the liability of a common carrier to his passengers for the assaults of his employee is of a most stringent character, far greater than that of ordinary employers for the actions of their employees, yet they all limit the liability to cases in which the assault and injury are wrongful." The idea is that, where the servant leaves the line of his employment to attend to his own affair,—defend himself against the assault of a passenger,—he is, nevertheless, doing a lawful act, and neither he nor his master is liable. In *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 131, 2 Am. Rep. 373, in speaking of the master's responsibility for the acts of the servant, the court said: "But, to make the master responsible, the act of the servant must be done in the course of his employment; that is, under the express or implied authority of the master. Beyond the scope of his employment, the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master."

It is impossible to get the full force of this decision by mere quotations and making extracts therefrom. Nor is it possible to do so in any case. I can only invite the reader to an examination of the cases I have cited and merely made quotations and extracts from, and I feel confident that, without a jar or discordant note anywhere, they all amply sustain the doctrine that lawful self-defense on the part of a conductor entails no liability upon him, and of course, none upon the com-

pany; that such defense, as its definition implies, is a matter personal to himself, and is something he neither engages to make or not to make in whatever employment he may enter; that it is therefore not within any employment he may make, being a natural right which he can neither surrender, nor qualify by any contractual act; and that, in making a self-defense, he is not directed or influenced in the same by any lawful engagement whatever with another. If the servant, by lawful assault, in response to an assault upon his own person, is not within the line of employment to any master, can it be said that continuing his defense, to the extent of using more and greater force than is necessary to repel the assault and force his antagonist to desist, will have the effect of bringing him back into the line of his employment. The absurdity of such a proposition renders a discussion of it more or less insulting to even the most generous and patient reader. All the cases in which the master has been held liable for the use of excessive force by the servant are cases where the servant was acting in the line of his duty to and employment by the master, and most frequently illustrating the conduct of conductors and other servants in putting off the train passengers and others who refuse to pay fare, or are guilty of misconduct such as renders them liable to be put off; for the ejecting of disorderly persons is one of the express duties of the conductor, not only to the railroad company, but to the public and to the law of the land.

Wood, J., concurs in the dissenting opinion.

Rehearing denied.

PHENIX INSURANCE COMPANY,
Appl.,
v.
FLEMMING & COMPANY.

(.....Ark.....)

1. **Benzine kept bottled in small quantities** as part of a stock of drugs and chemicals does not avoid a policy on such a stock, although there is a stipulation against keeping benzine in the store.
2. **An insurer's demand of an exhibition of the books** of the insured and of proofs of loss is not a waiver of any condition of the policy, where it provides for the right to make an examination of the books and that this shall not be treated as a waiver of any condition.
3. **An adjuster's insistence upon strict proofs** of loss, made in reply to a question if other proofs are necessary, does not waive any forfeiture that may have occurred.
4. **The fact that fireworks were on exhibition in a store** when a policy of insurance was issued on the stock, or that one of a firm of agents which issued the policy soon after purchased fireworks at the store, is insufficient

NOTE.—For keeping fireworks as breach of contract of insurance, see also *Heron v. Phoenix Mut. F. Ins. Co. (Pa.)* 86 L. R. A. 517.

to show knowledge of the agent when issuing the policy that fireworks were kept in stock.

5. An insurance agent's knowledge, acquired while attending to his own affairs, of the fact that fireworks are kept in an insured stock of goods, must have been present in his mind when the policy was issued, or some act done in the course of his duties as agent recognizing the continued validity of the policy, in order to make a waiver of a condition against keeping such articles.

6. A general objection is not sufficient to raise the point that an instruction is slightly defective in form and may be misunderstood.

(February 5, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Phillips County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

Statement by **Riddick, J.:**

Action upon an insurance policy issued by the defendant, the Phoenix Insurance Company, upon a stock of merchandise owned by plaintiffs for the sum of \$1,500. The presiding judge, at the trial in the circuit court, among other instructions, gave to the jury the following, at the request of the plaintiffs, to which the defendant objected: "(3) And even if the agent did not have such notice, or give plaintiffs permission to keep these articles, still, if you find from the evidence introduced that after the loss by fire defendant's agent was informed of these facts, and with full knowledge thereof required plaintiffs to exhibit to him their books of account, and demanded of them proofs of loss, as prescribed by the policy, and in pursuance of these demands plaintiffs did produce to them their books, and afterwards made out, at inconvenience and expense, proofs of their loss for defendant, in that event a forfeiture of the policy, if there was one, was waived by defendant, and plaintiffs are entitled to a verdict on that issue. The reason of this rule of law is that, as soon as an insurance company ascertains the facts which they claim cause a forfeiture of the policy, it is their duty to notify the plaintiffs that they deny all liability under the policy, and, if they fail to do so, but insist on proofs of loss, or examining his affairs, and putting to trouble and expense, the law estops them from afterwards claiming such forfeiture." There was a verdict and judgment against the insurance company.

Messrs. John J. Horner and E. C. Horner, for appellant:

If the agent agreed with the appellees that they could keep such hazardous articles, appellees should have refused to accept a policy in which it was expressly stipulated that they should not keep them.

Germania Ins. Co. v. Bromwell, 62 Ark. 43.

It was the duty of the appellees to read their contract of insurance.

Southern Ins. Co. v. White, 58 Ark. 281; *St. Louis, I. M. & S.R. Co. v. Weekly*, 50 Ark. 406; *Walker v. State Ins. Co.* 46 Kan. 312; *Cuthbertson v. North Carolina Home Ins. Co.* 96 N. C. 480.

89 L. R. A.

The policy issued by the insurance company is the contract. The insured must bring himself within its terms. Compliance therewith is a condition precedent to recovery.

Imperial F. Ins. Co. v. Coos County, 151 U. S. 462, 38 L. ed. 236; *Thompson v. Knickerbocker Ins. Co.* 104 U. S. 259, 26 L. ed. 768; *Laclede Fire Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co.* 19 U. S. App. 520, 60 Fed. Rep. 858, 9 C. C. A. 1; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 547, 24 L. ed. 676.

The first act of the adjuster was to obtain an agreement of nonwaiver. As soon as this nonwaiver was executed the adjuster announced that the policy was of no validity by reason of the violation of the agreement relative to fireworks.

Richards v. Continental Ins. Co. 83 Mich. 508; *Boyd v. Vanderbilt Ins. Co.* 90 Tenn. 212; *Ostrander, Fire Ins.* p. 754; *Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496.

It is certainly within the province of the insurance company to say what character of articles it will permit kept in the stock, and what it will prohibit, and to incorporate such agreement in the policy so that there may be no doubt as to the understanding. If the assured is unwilling to accept the contract, and violates it by keeping upon the premises such articles as are prohibited, he must suffer the consequences of the violation of his agreement.

Pindar v. Resolute F. Ins. Co. 47 N. Y. 118; 1 May, Ins. § 232; *Baumgartel v. Providence Washington Ins. Co.* 136 N. Y. 551; *Robinson v. Fire Assn. of Philadelphia*, 63 Mich. 90.

If appellant's agent ever knew any facts which would bring home to him notice of the violation of a condition of the contract it was while engaged in making a purchase which pertained solely to his private affairs.

Wood, Ins. § 403; *Sun Mut. Ins. Co. v. Texarkana Foundry & Mach. Co.* 20 Ins. L. J. 856.

It was competent for the insurance company to incorporate into its contract for insurance the stipulation that the conditions of said policy should not be changed by any agent, officer, or representative of the company except such change be in writing indorsed on or added to said policy.

Moore v. Hanover Ins. Co. 141 N. Y. 219; *Baumgartel v. Providence Washington Ins. Co.* 136 N. Y. 547; *Quinn v. Providence Washington Ins. Co.* 138 N. Y. 356; *Martin v. Universal L. Ins. Co.* 85 N. Y. 278, 39 Am. Rep. 657; *Walsh v. Hartford F. Ins. Co.* 73 N. Y. 10; *Kyle v. Commercial Union Assur. Co.* 144 Mass. 43; *Hale v. Mechanics' Mut. F. Ins. Co.* 6 Gray, 169, 66 Am. Dec. 410; *Worcester Bank v. Hartford F. Ins. Co.* 11 Cush. 265, 59 Am. Dec. 145; *Curey v. German American Ins. Co.* 84 Wis. 80, 20 L. R. A. 267; *Gould v. Dwelling House Ins. Co.* 90 Mich. 308; *German Ins. Co. v. Heiduk*, 80 Neb. 288; *Egan v. Westchester Ins. Co.* 28 Or. 289; *Cleaver v. Traders Ins. Co.* 65 Mich. 522; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216; *Hankins v. Rockford Ins. Co.* 70 Wis. 1; *Gladding v. California Farmers' Mut. F. Ins. Co.* 66 Cal. 6; *Enos v. Sun Ins. Co.* 67 Cal. 621; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348.

Agents who are authorized to countersign policies and issue them, under the form of policy in this suit, have no power to waive conditions except by written indorsement. It can only be done in the manner pointed out by the policy.

Ostrander, Fire Ins. p. 748.

Messrs. Stephenson & Trieber and Quarles & Moore, for appellee:

A general exception to a number of instructions is bad if any one of them be good.

Crisman v. McDonald, 28 Ark. 8; *Atkins v. Swope*, 38 Ark. 528; *Quertermous v. Hatfield*, 54 Ark. 16; *Fordyce v. Russell*, 59 Ark. 812; *Dunnington v. Frick Co.* 60 Ark. 250.

Where the written part of the policy conflicts with the printed provisions thereof, the written part will control.

The issuing of a policy of insurance with a full knowledge or notice of all the facts affecting its validity is equivalent to an assertion that it is valid at the time of its delivery, and is a waiver of any ground for avoiding it then known to the insurer.

Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 4 L. R. A. 458; *Sprott v. New Orleans Ins. Assn.* 53 Ark. 215; *Firemen's Fund Ins. Co. v. Norwood*, 32 U. S. App. 490, 69 Fed. Rep. 71, 16 C. C. A. 136; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562.

When an insurance company becomes aware of a forfeiture it must immediately cease to deal with the insurer, and a demand for proofs of loss according to the terms of a policy, and production of books and causing any inconvenience or expense, are a waiver of the forfeiture.

German Ins. Co. v. Gibson, 53 Ark. 494.

The written part of a policy shall always prevail over the printed part in case of repugnancy.

Harper v. Albany Mut. Ins. Co. 17 N. Y. 194; *Wood, Ins.* §§ 58-64; *Pindar v. Kings County F. Ins. Co.* 36 N. Y. 648, 93 Am. Dec. 544; *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687; *Stout v. Commercial Assur. Co.* 12 Fed. Rep. 554; *Plinsky v. Germania F. & M. Ins. Co.* 32 Fed. Rep. 48; *Steinbach v. La Fayette F. Ins. Co.* 54 N. Y. 90; 1 May, Ins. § 233; *Faust v. American F. Ins. Co.* 91 Wis. 158, 30 L. R. A. 783; *Yoch v. Home Mut. Ins. Co.* 111 Cal. 503, 34 L. R. A. 857; *Maril v. Connecticut F. Ins. Co.* 95 Ga. 601, 30 L. R. A. 885; *Fraim v. National F. Ins. Co.* 170 Pa. 151; *Wood, Ins.* §§ 63, 64; *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. 350.

When an agent or adjuster of the insurance company, with full knowledge of all the acts constituting the forfeiture claimed in the trial, put the plaintiff to the inconvenience, trouble, and expense of perfecting his proof of loss, the company by such conduct waived the forfeiture and estopped itself from setting it up as a defense.

German Ins. Co. v. Gibson, 53 Ark. 494; *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 4 L. R. A. 458; *Burlington Ins. Co. v. Kennerly*, 60 Ark. 582; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348; *Firemen's Fund Ins. Co. v. Norwood*, 32 U. S. App. 490, 69 Fed. Rep. 71, 16 C. C. A. 136; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562; *Phoenix Ins. Co. v. Munger*, 49 Kan. 178; *Phoenix Ins. Co. v. Public Parks Amusement* 39 L. R. A.

Co. 63 Ark. 187; *King v. Cox*, 63 Ark. 204; *Queen Ins. Co. v. Kline*, 17 Ky. L. Rep. 619; *German Ins. Co. v. Gray*, 8 L. R. A. 70, 43 Kan. 497; *Thompson v. Phoenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408; 11 Am. & Eng. Enc. Law, p. 388; *Haight v. Continental Ins. Co.* 92 N. Y. 51; *Lamberton v. Connecticut F. Ins. Co.* 39 Minn. 128, 1 L. R. A. 222; *Bartlett v. Fireman's Fund Ins. Co.* 77 Iowa, 155.

Riddick, J., delivered the opinion of the court:

This is an action upon a fire insurance policy to recover the value of property insured which had been destroyed by fire. The property is described in the written portion of the policy as a "stock of merchandise, consisting of drugs, stationary, liquors, tobacco, toys and fancy articles, paints, oils, chemicals, and such other goods, not more hazardous, such as is usually kept for sale in a drug store." The printed portion of the policy stipulated that the policy should be void if benzine or fireworks were kept, unless by agreement indorsed on the policy. No such agreement was indorsed upon the policy, and the evidence showed that both benzine and fireworks were kept in the store of plaintiffs. The insurance company contends that this avoided the policy. As to the benzine, only a small quantity was kept in the store. This was put up in bottles containing from two to six ounces each, to be sold to ladies for the purpose of cleansing gloves. It amounted to about a gallon in all. The testimony showed that it was customary for druggists to keep benzine bottled in small quantities, to be sold for such purposes, and that as one witness stated, "a drug store without it would be incomplete." The question arises whether this benzine was not included in the written description of the property insured, for, if it was a part of the property insured, it follows as a matter of course that its presence in the store did not avoid the policy. The written portion of the policy insuring the benzine as a part of the stock of merchandise would override the printed portion, forbidding it to be kept. To hold otherwise would make the contract mean, in effect, that the company contracted to take pay and insure the owner of this benzine against its destruction by fire, but only on condition that no benzine was kept. The courts will not presume that the parties intended to make such an absurd agreement, but in such a case will presume that the intention was that the printed portions of the policy, forbidding the keeping of benzine, should not apply to the keeping of it bottled in small quantities, as customary with druggists, but only to storing or keeping it in large quantities. *Faust v. American F. Ins. Co.* 91 Wis. 158, 30 L. R. A. 783; *Mears v. Humboldt Ins. Co.* 92 Pa. 15, 87 Am. Rep. 647; *Hall v. Insurance Co. of N. A.* 58 N. Y. 292, 17 Am. Rep. 255; *Pindar v. King's County F. Ins. Co.* 36 N. Y. 648, 93 Am. Dec. 544; *Harper v. Albany Mut. Ins. Co.* 17 N. Y. 197; *Archer v. Merchants & Mfrs. Ins. Co.* 43 Mo. 434; *Cushman v. Northwestern Ins. Co.* 34 Me. 487.

Now, the property insured is described as a stock of merchandise consisting, among other things, of "drugs" and "chemicals." The word "drug" is defined as any animal or min-

eral substance used in the composition of medicines; any stuff used in dyeing or in chemical operations; any ingredient used in chemical preparations employed in the arts. Webster Dict.; Century Dict. The term "chemical" is defined as a substance used for producing a chemical effect, or one produced by a chemical process; a chemical agent prepared for scientific or economic use. Webster Dict.; Century Dict. The definition of "benzine" given in Webster's International Dictionary is: "A liquid consisting mainly of the lighter and more volatile hydrocarbons of petroleum or kerosene oil, used as a solvent and for cleansing soiled fabrics." It is used in the arts as a solvent for fats, resins, and certain alkaloids. Century Dict. Without going into a discussion of the scientific or exact meaning of these terms, we will say that, in our opinion, benzine kept in the quantities and for the purposes that the proof shows that it was kept by plaintiffs, was included in the terms "drugs" and "chemicals," used in describing the property insured. As the company writes the policy, the rule is to resolve doubts arising as to its meaning in favor of the assured. *Jones v. Southern Ins. Co.* 38 Fed. Rep. 19. Benzine put up in small quantities was a part of the stock asked to be insured. Bottled and corked in such quantities, it was probably not more dangerous than other chemicals. It was not necessary to give the particular name of each drug or chemical, or other article that went to make up the entire stock, and the company, in describing the property insured, has chosen to use general terms, which we think fairly include the benzine in the stock. For these reasons we are of the opinion that the policy was not avoided by the fact that benzine was kept bottled in small quantities as a part of the stock of drugs and chemicals. The agents of the appellant company seem to have been of this opinion also, for, after the fire, when they had examined the books, and knew the facts, they stated to plaintiffs that their policy was void because they kept fireworks, but said nothing of the benzine.

Was the policy avoided by the fact that fireworks were kept in plaintiffs' store? We will first notice the contention made by plaintiffs that the forfeiture, if any existed, was waived by a demand made on the part of the company after knowledge that fireworks were kept in the store, that plaintiffs should exhibit their books, and make out proof of loss. The policy provided that, in case of loss, the company should have the right to make an examination of the books of account kept by the assured, and that such examination should not be treated or considered as a waiver of any condition of the policy, or of any forfeiture thereof. For this reason the demand for the books and the examination thereof cannot, we think, be treated as a waiver of the conditions of the policy. After finding from an examination of the books that fireworks had been kept, the adjuster of the company stated to plaintiffs that their policy was void because fireworks were kept; but he offered to settle by compromise, and they made an agreement to appraise the goods, it being stipulated therein that such agreement and appraisal should not waive any of the conditions of the policy. After the

appraisement, the adjuster again told the plaintiffs that their policy was void, and that the company would resist any effort to collect it by action at law, but offered to pay another sum in compromise. This offer being refused, the adjuster said that he would leave on the first boat for Memphis. He was thereupon interrogated by one of the counsel for plaintiffs as follows: "Mr. Boyd, in behalf of these companies you represent, you have had the books, and have gone through them. Do you require any further proofs of loss, or are you satisfied with everything?" to which Boyd replied, "We shall insist upon strict proof of loss under the terms of the policy." Now, the positive denial of liability, and the assertion of the agent that the policy was void because fireworks were kept, may have been a waiver of proof of loss, but we do not think that the forfeiture, if any had occurred, was waived by the reply of the agent quoted above. By the terms of the policy the assured agreed to furnish proof of loss, and agreed that the loss should not be payable until such proof was furnished. Unless proof of loss was waived, the assured had no right of action against the company until the same was furnished, and, in order to determine whether the company would waive such proof, or for some other reason, the attorney for appellee propounded the above question. What the agent said was in reply to this question, and, when taken in connection with his previous assertion that the policy was void, and that the company would resist its enforcement, meant, in our opinion, nothing more than that the company did not intend to waive proof of loss. In a recent case decided by the court of appeals of New York it was said that "the rule is now established, however, that if in any negotiations or transactions with the assured after knowledge of the forfeiture, it [the company] recognizes the continued validity of the policy, or does acts based thereon, or requires the insured to do some act or incur some trouble or expense, the forfeiture is waived." The court further said that, "while the later decisions all hold that such waiver need not be based upon a technical estoppel, in all cases where this question is presented where there has been no express waiver, the fact is recognized that there exist the elements of an estoppel." *Armstrong v. Agricultural Ins. Co.* 130 N. Y. 560. This seems to be a correct statement of the law upon this question. *German Ins. Co. v. Gibson*, 53 Ark. 494. Now, it will be noticed that the agent here made no demand or request that the assured should furnish proof of loss. He said nothing from which the assured could infer that, if such proof was furnished, the loss would be paid. It cannot be legitimately inferred from his reply, above quoted, that he intended to recognize the validity of the policy, for he had previously stated that the policy was void, nor was such reply calculated to mislead the assured in any way, and it cannot be taken as a waiver of the forfeiture, if any existed. We are therefore of the opinion that it was improper for the presiding judge to submit the question arising on this point to the jury, as he did in the third instruction given on the trial. While such an instruction might be properly given under a

different state of facts, yet in this case there was no evidence upon which to base such an instruction, and it was calculated to mislead, and was prejudicial to appellants.

But it is further contended by plaintiffs that there could have been no forfeiture of the policy on the ground that fireworks were kept, for the reason, as they contend, that the agent of the company who issued the policy knew at the time it was issued that fireworks were kept in stock by plaintiffs, and that the issuance of the policy under such circumstances was a waiver of the condition forbidding fireworks to be kept. We will proceed to consider the evidence bearing on that point, for, if the proof was conclusive that the agent of appellant knew at the time he issued the policy that fireworks were kept in the store of assured, it would be presumed that the condition forbidding the keeping of such fireworks was waived, and the error above noticed would be harmless. It is now too well settled to require discussion that the issuance of a policy of insurance with knowledge of facts which, by the terms of the policy, render it void, will be treated as a waiver of such ground of forfeiture. *Dwelling House Ins. Co. v. Brodte*, 52 Ark. 11, 4 L. R. A. 458. And this is true even though the policy contains a stipulation that the conditions of the policy shall not be waived by any officer or agent of the company unless such waiver be indorsed upon the policy. It is a general rule of law that the parties to a written contract may afterwards change or alter such contract by a parol agreement to that effect, and contracts with insurance companies furnish no exception to this rule. *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187; *Westchester F. Ins. Co. v. Earle*, 83 Mich. 148; 2 Beach, Ins. § 787. The facts bearing on this point are as follows: The policy in question was issued by R. H. Crutcher & Co., a firm composed of R. H. Crutcher and one Friborg. This firm was the agent of the defendant company, and, in order to show that these agents knew at the time the policy was issued that fireworks were kept in the store, J. H. Flemming, one of the plaintiffs, was sworn as a witness. After stating that the policy was issued by Crutcher & Co. he was asked the following question: "Please state whether, at the time they issued this policy of insurance, they had notice and knew the fact that you kept fireworks for sale and on hand in that store," to which he replied: "This policy was issued on the 24th day of December, I believe, at a time when our stock of fireworks was very large, and on exhibition; and Mr. Friborg bought fireworks from me during that Christmas, and knew we had them for sale." Now, no express waiver of the condition forbidding the keeping of fireworks is claimed, and, in order that a waiver of such condition may be implied from the issuance of the policy, it must be shown that it was issued with knowledge on the part of the agent that fireworks were kept, and the burden of proof

to show this is on the plaintiffs. But the witness, in the answer above quoted, which was all the testimony on this point, does not show that the agent had such knowledge at the time the policy was issued. It does not necessarily follow from the fact that fireworks were on exhibition, or that one of the agents, after the policy was issued, purchased fireworks at the store, that the agent issuing the policy knew of the presence of such fireworks. The fact that one of the agents went to the store shortly after the policy was issued to purchase fireworks is a circumstance tending to show that he knew that fireworks were kept there, but the witness does not say that this member of the firm issued the policy. The agent of the insurance company was a partnership, and each member of the firm could act for the firm, and issue the policy. If in the course of the negotiations for this policy, and before it was issued, plaintiffs had notified either member of the firm that they kept fireworks in their store this would have been notice to the company, and it would have been bound; but no such notice was given. The knowledge of the fireworks shown here was acquired by the agent, not while acting for the company or his firm, but casually, while attending to his own affairs. To make this knowledge affect the company, it must be shown that the agent afterwards, with this information present in his mind issued the policy, or consented to its issuance, or did some act in the course of his duties as agent recognizing the continuing validity of the policy. *The Distilled Spirits Case*, 78 U. S. 11 Wall. 356, 20 L. ed. 167. But this was not shown, or at least it was not so conclusively shown as to justify us in saying as a matter of law that the knowledge of the agent was established. We cannot, therefore, say that the error heretofore noticed was harmless, for the jury may not have found that the agent issuing the policy had notice of the fireworks, and may have based their verdict upon a belief that the forfeiture was waived by the statement of the adjuster that the company would insist upon strict proof of loss under the terms of the policy.

Several other rulings of the court have been called to our attention and considered, but, except as above stated, we do not discover that the court committed any material error.

We agree with counsel for appellant that instruction No. 2 given by the presiding judge is slightly defective in form, and it is possible that it might be misunderstood. We feel sure that, if the attention of the judge had been called to the defect, it would have been corrected. It does not appear that his attention was called to it, or that appellant, during the trial in the circuit court, objected to the instruction on that ground, and a general objection is not sufficient to raise such a question in this court.

For the error indicated, the judgment is reversed, and a new trial ordered.

CONNECTICUT SUPREME COURT OF ERRORS.

NORWALK STREET RAILWAY COMPANY'S APPEAL.

(69 Conn. 576.)

1. The incapacity of the legislature to execute a power which is essentially and merely a judicial power, and of the judiciary to execute a power which is essentially and merely a legislative power, as well as the limitation of the meaning of legislative power by force of certain primary principles of government fairly embodied in the Constitution, and by the necessities involved in the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government as established in the United States.

2. A superior court or judge thereof cannot validly exercise a power which is not "a judicial power" within the meaning of the Constitution.

3. An original application to a superior court or judge thereof for the approval and adoption or modification of a plan for the location and construction of a street railway, including the determination of the streets to be occupied and the location as to grade and center line of the street, as well as changes to be made in the street or kind and quality of track to be used, the motive power and method of applying it, does not call for the exercise of a judicial power within the meaning of the Constitution, although the application is called an appeal and is made after the refusal or neglect of local authorities to give notice of their decision on the plan within sixty days after it is presented to them; and this is by statute deemed to be a refusal on their part to approve and accept the plan.

(Baldwin, J., dissents.)

(July 13, 1897.)

APPeAL by the City of Norwalk from a judgment of the Superior Court for Fairfield County establishing a plan for the location and construction of a railway in some of the city streets. *Reversed.*

Statement by Hamersley, J.:

The petition in this case represents that on April 4, 1896, the Norwalk Street Railway Company presented a plan for the location and construction of its railroad in the streets of the city of Norwalk, to the mayor and council of said city, and that the mayor and council failed to notify the petitioners, within sixty days of that date, in writing, of their decision upon said plan, and asks the judge to accept or modify the same as he might deem equitable. Due service of the petition was made. Upon the hearing, the mayor and council moved that the "appeal" be dismissed, "because the questions raised by this appeal in-

volve only the consideration and determination of matters not of a judicial character, and the tribunal to which the appeal is taken has no jurisdiction to hear and determine any matters except those of a judicial character." This motion was denied, and the judge rendered a judgment accepting and adopting a plan (being the plan presented to the mayor and council, modified in some respects) for the location and construction of the railroad. The only questions raised by the assignment of errors, and pressed in argument, were: Can the "superior court or a judge thereof" validly exercise a power which is not a "judicial power," within the meaning of the Constitution? Was the action of the judge in this case an exercise of such judicial power?

Messrs. Goodwin Stoddard and Edward M. Lockwood, for the City:

The Federal Constitution and the Constitutions of all the states contain a provision calculated and intended to assign the functions of government to three separate and distinct departments: the legislative, the executive, and the judicial. This provision is regarded as fundamental.

The Federalist, Nos. 47, 78, 81; Cooley, Const. Lim. 44; 3 Daniel Webster's Works, p. 29; *Hayburn's Case*, 2 U. S. 2 Dall. 409, 1 L. ed. 436; *United States v. Ferreira*, 54 U. S. 13 How. 40, 14 L. ed. 42; *Re Senate of the State*, 10 Minn. 78.

Even if, by the unusual condition prevailing in Connecticut, the legislature is vested with some powers properly belonging to another department, nevertheless, in other respects, the principles underlying constitutional government are in force, and prevent the imposition of nonjudicial duties upon the courts

Starr v. Pease, 8 Conn. 547; *Day v. Cutler*, 22 Conn. 625; *Wheeler's Appeal*, 45 Conn. 306; *Brown v. O'Connell*, 86 Conn. 432, 4 Am. Rep. 89.

The functions of the three departments of government are clearly defined in:

Wayman v. Southard, 23 U. S. 10 Wheat. 46, 6 L. ed. 263; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Hawkins v. The Governor*, 1 Ark. 591, 33 Am. Dec. 346; Cooley, Const. Lim. 111, 115; *Bates v. Kimball*, 2 D. Chip. (Vt.) 77; *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Taylor v. Place*, 4 R. I. 324; *Auditor of State v. Atchison, T. & S. F. R. Co.* 6 Kan. 500, 7 Am. Rep. 575.

Instances of legislative attempts to force nonjudicial duties upon the courts have been somewhat infrequent. The usual breach of the constitutional provisions has been by an assumption of power, and not by attempted delegation to an unwilling judiciary. But the question has at times arisen in the same form as in the present suit.

Hayburn's Case, 2 U. S. 2 Dall. 409, 1 L. ed.

NOTE.—As to the limitation of the power of the courts to judicial matters, see also *State, Pauly, v. Circuit Court Judge* (N. J.) 1 L. R. A. 86; *White County Comrs. v. Gwin* (Ind.) 22 L. R. A. 402; *French v. State, Harley* (Ind.) 29 L. R. A. 113.

For some cases on the question as to what are judicial questions, see also *State, Adams County, v. Cunningham* (Wis.) 15 L. R. A. 561; *State, Lamb, v. Cunningham* (Wis.) 17 L. R. A. 145; *Parker v. State, Powell* (Ind.) 18 L. R. A. 567; *Atty. Gen., Werts, v. Rogers* (N. J.) 23 L. R. A. 354.

ditional questions, see also *State, Adams County, v. Cunningham* (Wis.) 15 L. R. A. 561; *State, Lamb, v. Cunningham* (Wis.) 17 L. R. A. 145; *Parker v. State, Powell* (Ind.) 18 L. R. A. 567; *Atty. Gen., Werts, v. Rogers* (N. J.) 23 L. R. A. 354.

436; *United States v. Ferreira*, 54 U. S. 18 How. 40, 14 L. ed. 42.

In another class of cases the legislature has attempted to delegate the power of taxation. This is, of course, plainly a legislative function.

Rees v. Watertown, 86 U. S. 19 Wall. 107, 22 L. ed. 73; *Heine v. Leece Comrs.* 86 U. S. 19 Wall. 655, 22 L. ed. 223; *State, Munday, v. Rahway*, 43 N. J. L. 338; *McLean County Precinct v. Deposit Bank*, 81 Ky. 254; *Tillman v. Cocke*, 9 Baxt. 429; *Galesburg v. Hawkinson*, 75 Ill. 152; *People, Shumway, v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *People v. Carpenter*, 24 N. Y. 86; *State v. Armstrong*, 3 Sneed, 634; *People v. Nevada*, 6 Cal. 143; *Lothrop v. Stedman*, 42 Conn. 583; *State, Hovey, v. Noble*, 118 Ind. 359, 4 L. R. A. 101.

The duties required of the court in hearing an appeal under this act are not judicial, nor to be performed in a judicial manner, and the act is therefore unconstitutional and void.

Messrs. John W. Alling and George D. Watrous, for the Railway Company:

The general argument which supports the proposition of the city is, that the three departments of the government, the legislative, executive, and judicial, are distinct, separate, and independent of each other; and that the assumption of any of the powers appropriate to one is an unconstitutional invasion of the province peculiar to one of the others. If this proposition be true, and the argument sound, no duty of any kind could be imposed by law upon a judge, which is not strictly judicial in its nature.

Starr v. Pease, 8 Conn. 547; *Wheeler's Appeal*, 35 Conn. 306; *People, Smith, v. Twelfth Dist. Judge*, 17 Cal. 548.

In its last analysis the distinction between executive and judicial officers is lost in metaphysics.

2 Eaton's Cyclopædia of Political Science, p. 640.

A judge will be none the less a judicial officer because some duties he may have to perform are administrative in their character; nor will an administrative become a judicial officer simply because some acts which he may be required to perform may be to some extent judicial in their character.

Waldo v. Wallace, 12 Ind. 583; *Mills v. Brooklyn*, 32 N. Y. 497; *Den, Murray, v. Hoboken Land & Improv. Co.* 59 U. S. 18 How. 290, 15 L. ed. 378; *Re District Attorney*, 28 Fed. Rep. 26.

The power involved in the case at bar is certainly not legislative.

Wolfe v. McCaull, 76 Va. 880.

The real question involved in cases of this character would seem to be this: Do public convenience and necessity require the construction of the railroad according to the plan submitted by the company, or otherwise? This question is pre-eminently a judicial one, and our statutes and reports contain numerous instances of the exercise of such powers by the superior court. This question ought to be regarded as no longer open for discussion in this state.

Central R. & Electric Co.'s Appeal, 67 Conn. 197; *Hopson's Appeal*, 65 Conn. 146.

The statute of 1895 was drawn in close analogy to the statute allowing an appeal from an order of the railroad commissioners to the superior court, and also to those statutes which permit a layout of a highway by the superior court. The validity of these statutes has been repeatedly affirmed.

perior court, and also to those statutes which permit a layout of a highway by the superior court. The validity of these statutes has been repeatedly affirmed.

Rev. Stat. 1784, pp. 95-97; *Lockwood v. Gregory*, 4 Day, 407; Gen. Stat. §§ 2669, 2777, 3233, 3245; *People v. Long Island R. Co.* 134 N. Y. 506; *Chicago, M. & St. P. R. Co. v. Minnesota, Railroad & W. Commission*, 134 U. S. 419, 32 L. ed. 972, 3 Inters. Com. Rep. 209; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560.

Hamersley, J., delivered the opinion of the court:

The act of 1895* confers upon city councils certain powers in establishing regulations for the location, construction, and operation of street railways, and requires a council, if requested by a railway company, to take some action within sixty days, and to notify the company in writing of its action. Whenever a council fails to give such written notice, the act of 1895† confers the same powers upon the "superior court or any judge thereof," to be exercised on application of a railway com-

*Pub. Acts 1893, chap. 169, provides as follows: "Sec. 2. Whenever any railway company shall have been chartered by the general assembly of this state for the purpose of operating street railways in any town, city, or borough, or whenever any such corporation already organized has been or shall be given the right to lay additional tracks in any such town, city, or borough, or whenever any street railway company shall desire to change its motive power, before such company shall proceed to construct such railway, lay additional tracks, or change its motive power, it shall cause a plan to be made showing the highway or highways, street or streets, in and through which it proposes to lay its tracks, the location of the same as to grade and to the center line of said streets or highways, such change, or changes, if any, as are proposed to be made in any street or highway, the kind and quality of track to be used, and the method of laying the same, the motive power to be used in propelling its cars, and the method and manner of applying the same, which said plan shall be presented to the mayor and court of common council of any such city, the selectmen of any such town, or the warden and burgesses of any such borough within their respective jurisdictions, who shall thereupon, upon public notice, proceed to a hearing of all persons interested therein, and after such hearings may accept and adopt such plan, or make such modifications therein, as to them shall seem proper, and shall within sixty days after the presentation of such plan to the local authorities, notify said company in writing of their decision thereon, and of such modifications therein as they may deem proper. The refusal or neglect of any such local authority to notify said company of its decision within said period of sixty days as aforesaid shall be deemed to be a refusal to approve and accept said plan as presented by said company. Nothing in this act shall be construed so as to prevent such street-railway company from presenting to such local authorities a plan or plans as heretofore provided, until said street-railway company and local authorities shall agree upon the same, and no such company shall construct such railway, lay additional tracks, or change its motive power except in accordance with a plan approved by the authorities aforesaid."

†Pub. Acts 1895, chap. 283, provides as follows: "Sec. 1. Whenever the warden and burgesses of any borough, the mayor and common council of any city, or the selectmen of any town, shall make, pass, or render any decision, denial, order, or direction with respect to any matters relating to street railways which, by virtue of any public or private act or resolution, now are, or may hereafter be, within the respective jurisdictions of such warden and burgesses, mayor and common council, or selectmen, any street-railway company affected thereby may appeal from any such decision,

pany, and calls this application an "appeal." The power so conferred on the court is described in the act of 1893 as the power to approve and adopt a location and lay out a street railway, with such modifications therein as shall seem proper, in respect to the streets to be occupied, the location of the same as to grade and to the center line of the streets, and changes to be made in the street, the kind and quality of the track to be used, the motive power to be used, and the method of applying the same. Can such powers be conferred on the superior court? The limitation of their exercise to cases where there has been a prior failure of the municipal board to act cannot affect the principle involved. If the legislature can confer the power in a limited class of cases by calling an original application for its exercise an "appeal," it can confer the power in all cases without limitation.

This court has said in *Brown v. O'Connell*, 36 Conn. 432, 446, 4 Am. Rep. 89: "No judicial power is vested by the Constitution in the general assembly, either directly or as an incident of the legislative power, and the general assembly cannot confer it. . . . It was one of the objects which the people had in view, in framing and adopting the Constitution, to divest the general assembly of all judicial power. . . . While the entire legislative power is vested in the general assembly, the judicial power is separated from it, and vested in the courts 'as a separate magistracy.' It is obvious . . . that the judicial power is not conferred by the general assembly, but vests, by force of the Constitution, in the courts. . . . It was therefore competent for them [the legislature] to provide for the organization of the court in question [a city police court], and to define the jurisdiction it should possess; and, when so constituted, the judicial power of the state vested in it, by force of the Constitution, to the extent of the jurisdiction so defined." In an opinion by Judges Hinman, Sanford, Butler, and Dutton, the Constitution is thus defined: "The Constitution of the state, framed by a convention elected for that purpose, and adopted by the people, embodies their supreme original will in respect to the organization and perpetuation of a state government, the division and distribution of its powers; the officers by whom those powers are to be exercised; and the limitations necessary to restrain the action of each and all for the preservation of the rights, liberties, and privileges of all; and is therefore the supreme and paramount law, to which the legislative, as well as every other branch of the

government, and every officer in the performance of his duties, must conform. Whatever that supreme original will prescribes, the general assembly, and every officer or citizen to whom the mandate is addressed must do; and whatever it prohibits, the general assembly and every officer and citizen must refrain from doing; and if either attempt to do that which is prescribed in any other manner than that prescribed or to do in any manner that which is prohibited, their action is repugnant to that supreme and paramount law, and invalid."

Opinion of the Judges, 30 Conn. 593

It is claimed that *Wheeler's Appeal*, 45 Conn. 313, recognizes a sovereign power in the legislature, not derived from the Constitution, in addition to that embraced in the grant of legislative power, and unrestrained by the division of the powers of government into distinct departments; and this case is relied on as justifying the legislation now in question. It is unnecessary to discuss the precise point determined by the judgment in *Wheeler's Appeal*, but the ground on which the opinion seeks to justify the judgment is erroneous. It is this: The opinion says it is "obvious from the past history of our own jurisprudence and long-continued legislative practice that we have reserved a much larger field for legislative action than has ever been recognized" in other states. This divergence is due "in part, perhaps principally, to the very extensive powers which were originally conferred on the general assembly by the charter of Connecticut. Under the authority of this charter, our general assembly exercised executive and judicial as well as legislative functions. . . . Upon the adoption of our Constitution in 1818, which by article II. divided the powers of government, . . . it was . . . logical to hold that all judicial functions of the general assembly were at an end; and this claim was made at an early day, but was not accepted by this court. *Starr v. Pease*, 8 Conn. 547; *Day v. Outler*, 22 Conn. 625; *Booth v. Woodbury*, 32 Conn. 126. . . . If, then, an act of the state legislature is not against natural justice or the national Constitution, and it does not appear affirmatively and expressly that there is some provision in the Constitution forbidding it, we must hold it to be *intra vires* and valid."

There are no affirmative and express provisions in the Constitution forbidding the exercise by the general assembly of the equity jurisdiction which in former days was exclusively exercised by the "general court;" and so the proposition asserted is broad enough to justify acts of the general assembly adminis-

denial, direction, or order within thirty days from the service of notice upon such street-railway company of the rendition, making, or passage of such decision, denial, direction, or order to the superior court, or any judge thereof; such appeal shall be by petition to such court or judge, and shall state specifically the portion or portions of such decision, denial, direction, or order appealed from, and the reasons of such appeal; and such court or judge shall order such notice as may be deemed reasonable to be given to such selectmen, mayor, and common council, and warden and burgesses of the time and place of appearance in answer to such petition, and upon the time fixed for appearance and answer, or as soon thereafter as said court or judge shall order, such appeal shall be tried by said court or judge, and said court or judge shall make such orders in reference to said matters ap-

pealed from as may by it or him be deemed equitable in the premises, and the decision of said court or judge shall be final and conclusive upon the parties. And whenever such warden and burgesses, mayor and common council, or selectmen shall, under the provisions of § 2 of chap. clxix. of the Public Acts of 1893, be deemed to have refused to approve and accept any plan presented by any street-railway company, said street-railway company shall have a like right of appeal therefrom to said superior court, or any judge thereof; and said court or judge shall have the same powers with reference to said plan and the acceptance or modification thereof that said principal authorities would have had under the provisions of said act, and may make all such orders with reference thereto as may be deemed equitable."

tering this branch of jurisprudence. Such a doctrine is subversive of the American idea of constitutional government. It affirms that the checks established by the division of governmental power have no existence in this state; that when the Constitution says, "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy," it means: "The general assembly shall exercise every power of sovereignty which it is not forbidden to exercise by some affirmative and express provision of the Constitution;" that the mandate, "The legislative power of this state shall be vested in two distinct houses, to be styled the 'general assembly,'" does not mean what it says, but means, "The governor and council and house of representatives in general court assembled" shall continue, under the style of the "general assembly," to exercise the supreme power of the state in all matters whatever not forbidden by some affirmative and express provision herein contained; that the mandate, "The judicial power of the state shall be vested in the supreme court of errors, the superior court," etc., means nothing, or means, "such portion of the judicial power as the general assembly shall not exercise by itself or other agencies." This doctrine originates in an expression in an opinion of Daggett, J., in *Starr v. Pease*, 8 Conn. 547 (Hosmer and Bissell, JJ., concurred in the judgment, and Peters, J., dissented), an expression not necessary to support the judgment rendered, for the validity of a legislative divorce—the matter in dispute—must rest on the claim that it is a law fixing a status on grounds of public policy, and is not a mere adjudication of private rights. *Maynard v. Hill* 125 U. S. 190, 81 L. ed. 654. Judge Daggett says that it is urged that by the "New Constitution" there is an entire separation of the legislative and judicial departments, and that now the legislature can pass no act not clearly warranted by the Constitution; that precisely the opposite of this is true; that from the settlement of the state there have been certain fundamental rules by which power has been exercised, which were embodied in an instrument called by some a "constitution" and by others a "charter;" that the charter gave extensive power to the legislature, and left everything almost to their will; that, when the new Constitution was framed, it adopted a bill of rights, provided for the election and appointment of certain organs of the government, such as the legislative and other departments, and imposed on them certain restraints; that it found the state sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people, not forbidden by the United States Constitution, nor opposed to sound maxims of legislation, and left them in the same condition, except so far as limitations were provided. This statement was substantially repeated in *Pratt v. Allen*, 13 Conn. 124, although the judgment in that case was supported on other grounds. In some respects the views of those engaged in framing a constitution, as to its meaning, are entitled to peculiar regard, but not in all respects, and especially not as to the extent of the radical change involved in

the adoption of a written constitution. Such a change brought into existence an absolutely new branch of jurisprudence, which judges trained under a different and antagonistic system were not peculiarly fitted to comprehend. In *Starr v. Pease*, however, the only judge who was a member of the convention of 1818 emphatically dissented. The error of Judge Daggett was fundamental. It was based on the denial of the essential meaning of a written constitution.

Prior to 1818 the whole sovereign power was exercised by the people, unrestrained by anything except their present will, through a body of magistrates chosen annually, and deputies chosen semiannually. This was a democracy, as close to a pure democracy as it is possible for a representative government to be. There were certain forms established by legislation, and certain fundamental principles generally acknowledged as true and important; but there was no power that could enforce them. They depended on the unrestrained will of the people, as expressed semiannually. This body of laws and customs might be broadly called a "constitution." But they were not, and the government was not a constitutional government, in the American sense, which was then taking definite shape, through the influence of the United States Constitution. There was no fundamental law made by the sovereign—the people—embodying their supreme original will, in pursuance of which, and in accordance with which alone, governmental power could be exercised. Such a law is in its very nature a grant of power; a grant by the sovereign to the governmental agencies established; a grant for the very purpose of preventing the sovereign from itself exercising the powers granted (for such exercise by the sovereign must, of necessity, be unrestrained and arbitrary). And so the grant is made to three distinct departments or magistracies, each deriving its delegated power direct from the sovereign, through the Constitution. The only sense in which a constitution may be termed a "limitation," rather than a grant of power, is that the power granted to each department is given broadly, and covers the whole range of that division of power, except as limited by the Constitution. It was this new form of government that the people demanded and established in 1818. It was this new form of government that the advocates of the so called "charter government" for thirty years successfully opposed. They claimed that they had a constitution, because they did not realize what a constitution meant, or were afraid of the restraints it imposed. The idea of a constitution was centered in the separation of judicial and legislative powers, and the grant of each power to a distinct magistracy. On this the fight for change of government was largely made.

When the legislature that called the convention of 1818 met, Governor Wolcott told them that their mandate for the people was "that the legislative, executive, and judicial authorities of our own government be more precisely defined and limited, and the rights of the people be declared and acknowledged." The committee appointed on a revision of the form

of civil government, in their report, said that the state was "then destitute of fundamental laws defining and limiting the powers of the legislature;" that the organization of the different branches of the government, and the separation of their power, rested on "the frail foundation of legislative will or discretion." The resolution reported by them, and adopted by the legislature, recommended to the people of the state to assemble and choose delegates who should meet in convention, and, if "by them deemed expedient, proceed in the formation of a constitution of civil government for the people of this state;" and said constitution, when ratified and approved by the people, "shall be and remain the supreme law of this state." There was then a democracy exercising supreme power through deputies chosen semiannually, but no constitution of civil government, in the American sense of that term. In these deputies, when assembled in general court, consisted "the supreme power and authority of this state." When so assembled, they had "the power and voice of all the freemen deputed them;" i. e., the whole power vested in the sovereign,—the people. By virtue of this power so deputed, they recommended to their sovereign to abolish the existing form of government, to establish a new form of civil government, and to appoint delegates to frame a constitution for that purpose, which, when adopted by the sovereign, should be a permanent grant of his power to the agencies therein named, under the limitations therein expressed. This, again, was declared when the convention met, and "resolved that this convention do deem it expedient to proceed at this time to form a constitution of civil government for the people of this state." The Constitution adopted declared that the people of Connecticut, grateful for having been permitted to enjoy a free government (i. e., a democracy), in order more effectively to define and secure the liberties derived from their ancestors (i. e., the English heritage of civil liberty), heretofore resting on "the frail foundation of legislative will or discretion," do "ordain and establish the following Constitution and form of civil government."

The convention adopted the Constitution on September 15; the people approved and ratified it; and on October 12, 1818, it became the Constitution of civil government of the people of Connecticut. On that day and thereafter all powers of government were exercised only by virtue of the authority granted in that instrument. It was "the original supreme will of the people," from which all authority was derived. This clearly appears from § 3 of art. 10, by which the existing rights and duties of corporations are confined and established, subject to the regulations contained in the Constitution. Officers previously commissioned are authorized to exercise their offices until the 1st of June following. Laws not inconsistent with the Constitution are continued in force until altered or repealed in pursuance of the Constitution; and the general court to be formed in October is granted all powers, not repugnant to the Constitution, which they now possess, until the first Wednesday of May following. When it is remembered that the last session of the "general court" had no

power whatever, except that granted by the Constitution, the theory that this general court handed over to the general assembly established by the Constitution undefined sovereign power, not derived through that instrument, appears in its naked absurdness. No declaration could be more clear and specific than that on October 12, 1818, the democracy first established in 1637 ceased to exist, and the general court or assembly through which the powers of that democracy had been exercised was then abolished, and every power of government thereafter exercised found its authority only in the Constitution of civil government then adopted by the people as the supreme law of the state. This result was recognized by those who had opposed as well as by those who had advocated the revolution. William L. Stone, editor of the Connecticut Mirror, speaking for the former, said: "Our form of government, under which for near two hundred years all have enjoyed privileges and blessings unknown to any other people upon earth, has been swept away." John N. Niles, editor of the Hartford Times, speaking for the latter, said: "A government of men has been superseded by a government of laws. Distinct and independent bodies of magistracy have been constituted; their powers and duties defined, limited, and separated." Trumbull, *Hist. Notes Const. Conv. 1818*, p. 59.

The forms of procedure under the Constitution were so similar to those under the former government, and were so largely administered by men who were not only fixed in the old ways of thought, but opposed to the radical change involved in the adoption of a constitution, that it is not strange that some legislation should pass unchallenged, and *dicta* of judges pass current, clearly contrary to the supreme law. But the form of government established in 1818 cannot be destroyed in that way. This change in the structure of government was a pregnant fact, which anyone long settled in the belief that an exercise of the whole unrestrained power inherent in an absolute democracy, through a body of delegates frequently chosen, furnished the best organic plan for ruling a commonwealth, might well find it difficult to accept in its full significance. The views of Judge Daggett, as expressed in *Starr v. Pease*, on the effect of a constitution, are those of an able and thoughtful jurist; but we find it more easy to reconcile them with the traditions in which he had been educated, and the conditions existing during the greater part of his long and extensive practice at that bar than with the plain provisions of the Constitution itself. It was the expression of these views that led up to the *dictum* in *Wheeler's Appeal*. The other two cases cited do not support the *dictum*. *Day v. Cutler* was an action on a promissory note, which involved the validity of a legislative divorce. Ellsworth, J., assumed the validity of the divorce, and held the note given in connection with it to be valid, and Waite, J., concurred. Hinman, J., tried the case below, and gave no opinion. Church, Ch. J., said: "It may be too late now to discuss the question whether, since the powers of this government were separated by the Constitution of 1818, and distributed to the distinct executive, legislative, and judicial

departments, respectively, the general assembly can constitutionally exercise the power of granting divorces. This has been doubted by some of our best jurists." But, passing that, he held that, in any event, the note in suit was not valid; and in this opinion Storrs, J., concurred. *Booth v. Woodbury* does not support, but denies, the dictum. The court expressly says the legislative power is granted to the general assembly by the Constitution. We do not recall a case that necessarily depends on the theory of Judge Daggett, followed in *Wheeler's Appeal*, unless it be that case. Other utterances of this court are wholly inconsistent with the theory. In the opinion of the judges above cited, the true meaning of a Constitution is conclusively stated. In *Brown v. O'Connell*, 36 Conn. 482, 446, 4 Am. Rep. 89, the power of the legislature to either exercise or confer judicial power is denied. The case of *Re Clark*, 65 Conn. 17, 41, 28 L. R. A. 242, plainly assumes that the legislature is confined to the exercise of legislative power. In *State v. Conlon*, 65 Conn. 478, 488, 31 L. R. A. 55, we say: "The legislative power of this state is, in the broadest terms, vested in the general assembly. This power is, in a certain way, defined and limited by the provisions dividing the powers of government into distinct departments, and by those relating to the operation of the state government and duties of particular officers. But, unlike the Constitutions of many states, it contains no specific limitations on the exercise of legislative power, except some slight restrictions in one or two recent amendments. The limitations, however, are no less real, and perhaps more effective, than if phrased in specific terms." In *State, Bulkeley, v. Williams*, 68 Conn. 181, 149, the opinion of the court assumes that only legislative power is granted to the general assembly; and the dissenting opinion of Andrews, Ch. J. (in this matter not antagonizing the majority), states that, upon the ratification of the Constitution, "the former government by general assembly was finally and forever dissolved. The people, in the exercise of their sovereignty, established a new government in their separate and independent departments, whose powers were to be exercised and exercised only, in accordance with their supreme original will, embodied in the Constitution." Page 169, 68 Conn.

But no dicta of judges, no doubtful or improper legislation, can alter the plain fact that in 1818 the people, in the exercise of their sovereignty, granted to the general assembly then constituted the legislative power, and forbade their exercise of other than legislative power (unless specially granted), and granted to this court and other courts then constituted the judicial department,—the judicial power,—and forbade their exercise of other than judicial power. The assertion of original and consistent opponents of a constitution that the victory of 1818 was a barren victory, that constitutional government, as known to the people of the United States, is unknown to Connecticut, and that the fundamental principles of constitutional law have here no existence, however often repeated, cannot affect the paramount authority of the supreme original will of the people, as plainly declared in the Constitution 89 L. R. A.

itself. The unequivocal mandate therein contained, that the powers delegated or granted by the sovereign,—the people,—through the Constitution, shall be divided into three distinct departments, and those belonging to each confided to a separate magistracy, and the equally unequivocal mandate that the powers granted to the general assembly (unless by some specific provision) shall be confined to the exercise of the "legislative power of this state," and the powers granted to the judiciary shall be confined to the exercise of "the judicial power of the state," are binding upon this court at all times. These mandates are the voice of the sovereign, speaking ever with a present authority, from which there is no escape. The incapacity of the legislature to execute a power which is essentially and merely a judicial power, and of the judiciary to execute a power which is essentially and merely a legislative power, as well as the limitation of the meaning of legislative power by force of certain primary principles of government plainly embodied in the Constitution, and by the necessities involved in the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government, as established in the United States. *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627, 7 L. ed. 542; *Houston v. Williams*, 18 Cal. 24, 78 Am. Dec. 565; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Cochran v. Van Sur- lay*, 20 Wend. 865, 32 Am. Dec. 570; *Campbell's Case*, 2 Bland (Ch.) 209, 20 Am. Dec. 860. This court has not hesitated to affirm and apply the principle here involved. *Brown v. O'Connell*, 36 Conn. 482, 446, 4 Am. Rep. 89; *Opinion of the Judges*, 30 Conn. 593; *Clark*, 65 Conn. 17, 41, 28 L. R. A. 242, and *State v. Conlon*, 65 Conn. 478, 488, 31 L. R. A. 55. We believe *Wheeler's Appeal* to be the only case that necessarily may involve a different view, but for the reasons given it is powerless to change the principle. The Supreme Court of the United States has uniformly held that a law conferring on the courts a power which is not a judicial power, within the meaning of the Constitution, is unconstitutional, and that such power cannot be lawfully exercised by the courts. Note by court on *United States v. Todd*, 54 U. S. 13 How. 58, 14 L. ed. 47; *Ex parte Siebold*, 100 U. S. 893, 25 L. ed. 725.

The power which Judge Hall was asked to exercise in the present case does not seem to us to be a judicial power, within the meaning of our Constitution. It is claimed that the difficulty of defining the powers of government renders impracticable the enforcement by this court of their division, and so makes nugatory the most important command of the Constitution. A difficulty attends the application of a general principle to particular cases, and sometimes, the more vital the principle, the greater the difficulty. This was felt when the United States Supreme Court first dealt with a conflict between a law of Congress and the Constitution. It was felt still more when the court began to apply the general principle that a state law dealing with internal police may, to a certain extent, validly occupy a field of legislation, within the exclusive jurisdiction of the United States. It is a peculiarity of the essence of constitutional government that the judicial de-

partment must deal with such difficulties; otherwise, constitutional provisions for the guaranty of civil liberty, the harmonious separation of state and national functions, as well as the separation of governmental departments, become a solemn mockery. But the difficulty now alleged is more apparent than substantial. Chief Justice Marshall says: "The legislature makes, the executive executes, and the judiciary construes, the law." *Wayman v. Southard*, 28 U. S. 10 Wheat. 46, 6 L. ed. 263. The Supreme Court of the United States, speaking by Justice Field, says: "The distinction between a judicial and legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496.

One controlling consideration in deciding whether a particular act oversteps the limits of judicial power is the necessary inconsistency of such acts with the independence of the judicial department, and the preservation of its sphere of action distinct from that of the legislative and executive departments. A main purpose of the division of powers between legislature and judicature is to prevent the same magistracy from exercising in respect to the same subject the functions of judge and legislator. This union of functions is a menace to civil liberty, and is forbidden by the Constitution. There is no intrinsic difficulty in recognizing a plain infraction of such prohibition. It is true that the different magistracies must act upon the same subjects, for every matter that may be dealt with by the state government may be acted on by each department thereof; but the action must be that belonging to the department whose powers are invoked. The main difficulties suggested in argument result from a failure to distinguish between the exercise of a legitimate power and the employment of necessary means for exercising that power. The grant of the powers embraced in one of the great departments of government carries with it the right to use means appropriate to the exercise of that power. Any attempt to cripple the power through metaphysical classification of the means essential to its exercise must produce difficulties, if not absurdities. For example, the power to make laws may require the accurate ascertainment of facts. For this purpose, witnesses must be summoned, examined, and conclusions drawn from their conflicting testimony. This is a means peculiarly appropriate to the judicial power and the ordinary mark of an exercise of that power; yet, when so employed by the legislature (without violation of other constitutional provisions), it is a means within the limits of legislative power. But should the legislature, after the passage of an act, attempt, by another act, to adjudicate the rights of parties which have arisen under its provisions, such act, although only means appropriate to legislation might be employed, would be an exercise of judicial, and not of legislative, power. It would be void, because it involves the union, in the same magistracy, in respect to the same matter, of the functions of judge and legislator. Again, there are certain necessary execu-

tive acts which cannot be performed without the power of enforcing immediate obedience to an order authorized by law. The employment of legal restraint for the purpose of securing the essential immediate obedience is a means peculiarly appropriate to the exercise of judicial power; but for such purpose, and subject to the restrictions of other provisions of the Constitution, it is a means within the limits of the executive power. *Re Clark*, 85 Conn. 17, 28 L. R. A. 242; *Murray v. Hoboken Land & Improv. Co.* 59 U. S. 18 How. 272, 15 L. ed. 872.

So, means of a legislative nature must be used by courts in establishing necessary rules of practice, and by executive officers in making regulations for the conduct of subordinates. Again, appointment to office is in the nature of an executive act. Apart from the purpose of the appointment, it is an exercise of executive power. Our own Constitution, like most constitutions, provides for certain elective and legislative appointments; but, except in the cases specified, appointment to office is an exercise of executive power, unless used as a means appropriate to the exercise of powers granted to another department, and, when so used, it is not the exercise of executive power, within the meaning of the Constitution. The Constitution of the United States specifies the methods of appointment. Certain officers must be appointed by the president in concurrence with the Senate. All other officers shall be appointed in the same way. "But the Congress may, by law, vest the appointment of such inferior officers as they shall think proper in the president alone, in the courts of law, or in the heads of departments." In commenting on this clause, the United States Supreme Court says that the appointing power designated in respect to inferior officers "was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." *Ex parte Hennen*, 38 U. S. 13 Pet. 257, 10 L. ed. 151. In affirming the validity of the law providing for the appointment of supervisors of elections by circuit courts, the supreme court held that there were reasons why such appointments might most appropriately be made by courts, relied on this clause as giving a certain discretion to Congress in assigning such appointments to the appropriate department, and, referring to the intimation in *Ex parte Hennen*, said: "In the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void." *Ex parte Siebold*, 100 U. S. 371, 398, 25 L. ed. 717, 727.

Under our state Constitution, appointments other than those whose mode is prescribed are governed by the division of governmental powers. This question has never come before us directly. It was incidentally considered in some recent cases in connection with the law allowing an appeal from the action of county commissioners in granting licenses. In *Smith's Appeal*, 65 Conn. 185, we held that the statute required the county commissioners to select, as the recipient of a license, one having "a personal fitness to perform the quasi-public duties required by law of a licensee;" & c., one

who is shown to be suited or adapted to the orderly conduct of a business which the law regards as dangerous to public welfare, unless conducted by a carefully selected person duly licensed, whose fitness to the legal requirements must be determined in view of the statutory regulations. In *Hopson's Appeal*, 65 Conn. 140, we held that the selection or appointment of such a license was a means apparently appropriate both to the exercise of executive and judicial power; that the uniform practice of courts and legislature in so treating such appointment might be safely accepted when the distinction to be drawn must be subtle and doubtful; and that the action of the superior court upon an appeal from the county commissioners is a judicial proceeding in so far that the judgment of the court may be reviewed by this court when founded on a misconception of the law as was held in *Smith's Appeal*, 65 Conn. 185, and in *Beard's Appeal*, 64 Conn. 526, but that errors claimed in the lawful exercise of discretion in making the selection or appointment could not be reviewed. Such proceeding by appeal is an anomalous one. It confounds process for invoking the exercise of judicial power by way of ordinary judicial proceedings in protecting an individual against the illegal acts of a public officer with the use of the power of appointment as a means incident to the full exercise of judicial power. It is evident that the justification of such judicial appointments must be found in the circumstances peculiar to each case.

While the necessity and right of each department to use the means requisite to its unfettered operation is clear, it is equally clear that when one department not only uses the means appropriate to another, but uses them for the purpose of executing the functions of that other department, it is not in the exercise of its granted power. The legislature, by judicial means, may find the facts showing that a charter subject to repeal ought to be repealed, and act in the exercise of its legislative functions. *Crease v. Babcock*, 23 Pick. 344, 34 Am. Dec. 61. But when, by the same means, it attempts to adjudge the forfeiture of a charter not repealable, it acts in the exercise of a judicial function, and in excess of its power. This distinction is illustrated in the decisions of the United States Supreme Court dealing with legislative regulations of charges by railroad companies. The regulation of such charges is held to be distinctly a legislative function, which may be delegated by the legislature to a subordinate legislative or administrative body; but if this subordinate body, or the legislature, exceeds its powers, and a person is thereby injured in his rights of property, he may invoke the judicial power to determine that question of legal injury; and the reasonableness of the charges, although a question legislative in its nature, must be reviewed by the court, as necessarily incident to the exercise of its judicial power. But, if the court should attempt to establish for the future a schedule of charges, it would exceed the limits of judicial power; it would act as legislator in respect to a matter as to which it must also act as judge. As was said by Mr. Justice Brewer in one of the latest of this class of

cases: "The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation." *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 363, 38 L. ed. 1014, 4 Inters. Com. Rep. 560. The same distinction is noted by this court in referring to the anomalous process for protection against illegal taxation, provided by § 3860 *et seq.* of the General Statutes. In construing that statute, we held that "the assessment of property for taxation is an administrative proceeding; the judicial power is called into action to remedy an illegal assessment;" but that the law did not impose upon the superior court the duties of assessors, nor purport to give the court general authority to review the action of the assessors or board of relief. *Ives v. Goshen*, 65 Conn. 456, 459. It is true, however, that in cases arising under statutes enabling the court to settle rights of person or property invaded by illegal acts of administrative boards, and which may be questioned rather for the defective process provided than for any substantial misconception of the limits of judicial power, this distinction has not been marked, as it must be when the validity of a statute is directly put in issue. We think this distinction is decisive of the present case.

The meaning of the act of 1893, relating to street railways, is uncertain in several particulars; but there can be no doubt that it confers on municipal authorities, in addition to certain executive powers, the power of establishing regulations and conditions (within the limitations prescribed) which shall control all the street railways in the state, in the location, construction, and operation of railways. There can be no doubt that making such regulations is essentially and distinctively a legislative function. It is also certain that the judicial power does not include the exercise of such a legislative function, and that the duty of making such regulations cannot be imposed upon the superior court, because it involves the exercise of legislative power by the court, and because a power in the legislature to impose such duties is inconsistent with the existence of an independent and separate judicial department of government. The power to make the superior court a subordinate legislative body for one purpose involves the power to so utilize it for every purpose. But it is equally certain that the judicial power does extend to the protection of every right of person or property that may be invaded by a municipal council in the unlawful exercise of the powers conferred by the act of 1893. This judicial power may be called into action by any appropriate process. The act of 1895 provided, among other things, that an aggrieved person might appeal from an order made by a

municipal council in pursuance of the act of 1893; that such appeal should be a petition to the court, which should specifically state the portion of the order appealed from, and the reasons, and be served on the council, and that such appeal should be tried by the court, and appropriate judgment rendered. Construing this act as we have construed other acts authorizing appeals from the action of legislative and administrative boards, as providing a nondescript kind of process intended to serve the combined purposes of a writ of injunction, certiorari, and mandamus, or of any other process for invoking the judicial power to determine a legal injury complained of, we substantially held in *Central R. & Electric Co.'s Appeal*, 87 Conn. 197, 214, that a party aggrieved by such illegal order might find lawful redress in this way. Our attention was not directed to the possible limitations of the redress. We went to the furthest limit in our desire to give effect to a legitimate intention of the legislature, most inadequately expressed. But the act of 1895 goes further, and contains an additional provision, which is not fairly susceptible of being construed as merely providing for a process to bring into action the judicial power of the court, and which, without any action by a municipal council other than a failure to act within a limited time, purports to transfer to the court all the powers conferred upon municipal councils by the act of 1893. The distinction between the two provisions of the act is vital. The application to the court in such case is called an "appeal,"—an unfortunate name, because it does not express the real function of the process. "Appeal," in the sense of transfer of jurisdiction from one court to another, cannot be predicated of any process by which a court is called upon to determine the legality of an act done by officers of another department. In this sense there can be no appeal from a common council to a court, any more than there can be an appeal from the legislature to the court, or from the court to the legislature. In appeals from the court of probate to the superior court we sometimes speak of the superior court as being for that case the court of probate, and speak correctly, for probate jurisdiction is within the judicial power, and may be exercised by the superior court; but when we speak in the same way, as occasionally we have spoken, in commenting on the discretionary power that may be exercised in one of these amorphous "appeals" from administrative boards, the expression is allowable only as a figure of rhetoric. The so-called "appeal" in this case is not a process to invoke the judicial power. It is simply an application to the superior court to exercise a legislative function. The conditions on which the act of 1893 authorizes such an application cannot affect its real nature. They only serve to limit for the time being the extent of the evil involved.

We have assumed, as was assumed in argument, that the act of 1895 purports to confer the powers in question upon a judge, in his exercise of the judicial power vested in the superior court, and does not purport to appoint, for the exercise of the powers, an executive officer, designated by an official title, instead

of by name. If the latter were true, the judge would be at liberty to accept or decline the appointment, and this court would have no jurisdiction to review his action. Legislation authorizing process (mostly under the misleading name of "appeal") for invoking the judicial power, to be returned to a judge of the superior court or to the "superior court or any judge thereof," has produced some confusion in respect to the nature of the power thus exercised. This court has decided that a "writ of error" (which formerly, in connection with the auxiliary means of reservation, was the only process for calling into action its jurisdiction) does not lie without a judgment or an award in the nature of a judgment (*Williams v. Hartford & N. H. R. Co.* 18 Conn. 110, 118); and also that this court has cognizance only of writs of error from the superior court (*Green v. Hobby*, 8 Conn. 165; *Humphrey v. Marshall*, 15 Conn. 841, 345; *Trinity College v. Hartford*, 82 Conn. 466, note). But these decisions did not hold that judicial power could be exercised by a judge of the superior court only when holding a stated session of court. The legislation which followed the decision in *Trinity College v. Hartford*, providing for a proceeding in error to this court from the final judgment rendered by a judge of the superior court in the exercise of his jurisdiction, could have no application unless such judgments are rendered in the exercise of the judicial power vested in the superior court. In *Clapp v. Hartford*, 35 Conn. 66, 78, 220, 222, decided shortly after the enactment of this legislation, language is used indicating that a judge in such case does not exercise that power, and this language is followed in the dissenting opinion in *Central R. & Electric Co.'s Appeal*, 87 Conn. 228. But such views cannot be maintained. "The superior court," in which judicial power is vested by the Constitution, is a magistracy consisting of the judges. The manner in which they shall exercise that power must to a large extent be governed by legislation in respect to procedure. Ordinarily, that power can only be exercised at a formal session of court, which may be held for some purposes by one judge, and for other purposes by two or more judges. But some things within the limits of judicial power may more properly be done by a judge in chambers; and jurisdiction which should ordinarily be intrusted only to a judge while holding a formal session of court may, in cases of emergency, be exercised in vacation. That most important portion of judicial power invoked by the writ of habeas corpus would be seriously crippled if it could only be exercised at a formal session of court; so with the granting of injunctions and other incidents of chancery jurisdiction. A large portion of the judicial power from its very nature can be lawfully exercised only at a formal session of court; and it may be true that the exercise of other judicial power by a judge in chambers, justifiable in cases of emergency, has been carried too far, and that it would be better if all "appeals" or other process intended to invoke the judicial power should be made returnable to a court in session, unless in plain cases of emergency; but when process for bringing such matters before a judge in chambers is provided by law, the jurisdiction

which he exercises must be within the judicial power vested by the Constitution in "the superior court." This view is indicated in our decision in *Central R. & Electric Co.'s Appeal*, 87 Conn. 228. We think the act of 1895 intended to impose the duties therein prescribed upon a judge of the superior court, in his exercise of "the judicial power" granted to the judicial department. As the present application calls for an exercise of power which is not a judicial power, within the meaning of the Constitution, it should have been dismissed.

In no way has the confidence of the people in their superior court been more clearly shown than in the increasing number of instances in which special process has been provided for obtaining, in a summary manner, its aid in protecting rights liable to be infringed by the action of executive officers and administrative boards. This court fully appreciates the desirability and necessity of enlarging and simplifying procedure so as to call into action, in the most speedy and effectual manner, the judicial power for the purpose of dealing with all questions arising under changing conditions, which it may properly determine, and has endeavored to construe legislation for that purpose, sometimes perhaps with apparent inconsistency, so as to give the fullest possible effect to the legislative intent. The law under consideration, however, goes too far. It involves a recognition by the court of a right to exercise powers plainly beyond the scope of that judicial power confided to it by the Constitution, and to exercise these powers, not as an incident to some legitimate judicial function, but, in the first instance, independent of any purpose except the mere execution of the powers. We cannot recognize such a right, because the recognition leads inevitably to the obliteration of any line of separation between the judicial and other departments of government.

There is error in the judgment complained of, and it is reversed.

The other Judges concur, except **Baldwin, J.**, who dissents.

Baldwin, J. dissenting:

I concur in the view that divorces may be granted by the general assembly in cases where no court has jurisdiction to act, and that the judgments in *Starr v. Pease*, 8 Conn. 547, and *Day v. Culler*, 22 Conn. 625, can therefore be supported. I also concur in overruling the decision in *Wheeler's Appeal*, 45 Conn. 806, but do so upon the ground that the legislation which was there in question assumed to grant to a particular person a special and exclusive privilege from the community, of applying for extraordinary judicial relief, as to a particular cause of action in derogation of the general laws. I dissent in other respects from the judgment and opinion of the court.

The whole legislative power of the state is vested in the general assembly. Except for the few restrictions which the Constitution imposes upon it, that body is as free and untrammelled as the people would themselves have been had they retained the

lawmaking power in their own hands, or as they are in adopting such constitutional amendments from time to time, as they think fit. *State, Buikley, v. Williams*, 68 Conn. 181, 149.

One of these restrictions is the subject of article 2, entitled "Of the Distribution of Powers." As originally reported to the constitutional convention by the committee charged with the duty of preparing the draft of a Constitution, this article read thus:

Article Second. Distribution of Powers.

Sec. 1. The powers of government shall be divided into three distinct departments, and each of them confided to a separate body of magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judicial to another.

Sec. 2. No person or collection of persons, being of one of those departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

This article, except for some merely formal alterations in the 1st section, was a copy of one adopted by Mississippi in the preceding year. 2 Poore's Const. 1056. Objection was made in our convention to the 2d section, and ten days later that was stricken out, without a division. Jour. Conn. Const. Conv. pp. 78, 55. This seems to me clearly to evince an intention not to attempt to limit the functions that might be imposed upon those holding a place in any particular one of the three magistracies to such as should be strictly incident to their special department. It was sufficiently implied from the 1st section, in connection with the three following articles, relating to the legislative, executive, and judicial departments, that no legislative power should be exercised except by the general assembly, and no judicial power except by judicial officers. The supreme executive power (not, as in the Constitution of the United States, the executive power) was also exclusively vested in the governor. But the framers of our Constitution, differing from many of those who had fulfilled similar tasks for other states, recognized the fact that it is practically impossible to establish in every instance a plain line of demarcation between legislative, executive, and judicial functions, and deemed it unnecessary to deprive the state of such services as it might desire from any of its citizens, because he held office in a department to which they might not properly pertain. See 1 Story, Const. § 524; Pom. Const. § 178. Certain judicial and executive officers were, by art. 10, § 4, expressly debarred from the general assembly, but I find no other provision to prevent the discharge by any magistrate of public duties in addition to those peculiarly belonging to his special department, whether he assume them voluntarily or they be imposed as a statutory duty. There are powers of government which in one sense are, as the case may be, legislative or judicial, and in another sense are not. The powers ordinarily granted to municipal corporations to regulate their local affairs, and pass by-laws or ordinances, are of a legislative character. Such ordinances have,

within their proper sphere, the force of law; but no one would contend that they are void because not passed by the general assembly. The rules of practice and pleading prescribed by the judges of the superior court from time to time are also law as to the cases to which they apply; but the legislative action from which they proceed is really made, by the statute which authorizes them, an incident of judicial power. The jurisdiction long exercised by our courts with respect to the lay-out of new highways is of an administrative, quite as much, to say the least, as of a judicial, nature. The general assembly might itself give such relief, and sometimes does. *State, Buikley, v. Williams*, 68 Conn. 181. It might confide these functions to an administrative board, like the railroad commissioners. It can give an appeal from such a board to the courts. *Westbrook's Appeal*, 57 Conn. 95, 104; *Fairfield's Appeal*, 57 Conn. 167, 172. It can give a similar appeal to a taxpayer who claims that his property has been assessed upon an undue valuation, or who objects to the licensing of a particular liquor seller. Such an appeal may serve to turn the matter of controversy into a cause of a judicial nature. *Beard's Appeal*, 64 Conn. 526, 534. Yet its origin may still so far determine the form of proceeding as to leave the court free to exercise a discretionary power, unfettered by the ordinary rules that govern judicial trials. Its function is, in truth, one both judicial and executive in its nature, and so one which the general assembly might properly commit to either the judicial or executive department, or to both. *Hopson's Appeal*, 65 Conn. 140, 146.

Our statutes were revised in 1821, three years after the adoption of the Constitution, by a very able commission, headed by Chief Justice Swift. They fully appreciated the great revolution that had been accomplished by the constitutional distribution of the powers of government. Rev. 1821, p. 150. Part of their task was to weed out all existing legislation that was inconsistent with it. Nevertheless, this revision retained the old provisions authorizing the county courts to lay county taxes, and added one charging them with the duty of taking care of, letting, selling, or buying county property, at their discretion (pp. 141, 250); gave any two justices of the peace in any town power to make rules for confining or killing dogs when necessary for public safety (p. 179); authorized any justice of the peace to commit a witness who refused to answer any proper question put to him by grand jurors, meeting as a court of inquiry (p. 260); and forbade tanning except by persons who had proved their skill to the county court, and received a license from it for the purpose (p. 308). Our statutes since the Revision of 1821 have contained continually increasing grants of jurisdiction to our courts and judges over matters of administrative procedure. They rest, it seems to me, on solid ground of public convenience and practical necessity; and if it be claimed, as in this case, that the constitutional provision as to the distribution of powers has been transgressed, "the sufficient answer is [to quote from a recent opinion of this court, in which all the judges concurred] that these great func-

tions of government are not divided in any such way that all acts of the nature of the functions of one department can never be exercised by another department; such a division is impracticable, and, if carried out would result in the paralysis of government. Executive, legislative, and judicial powers of necessity overlap each other, and cover many acts which are in their nature common to more than one department. These great functions of government are committed to the different magistracies in all their fullness, and involve many incidental powers necessary to their execution, even though such incidental powers, in their intrinsic character, belong more naturally to a different department." *Re Clark*, 65 Conn. 17, 38, 28 L. R. A. 242. Courts may properly be called upon to aid administrative tribunals in the exercise of their powers, whenever there is need of judicial relief. The dignity and independence of the judiciary is in no way impaired by making it ancillary, in such cases, to the work of another department. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 487, 38 L. ed. 1047, 1060, 4 Inters. Com. Rep. 545.

The applicant in this case holds a franchise from the state for the construction of a railway in certain streets in the city of Norwalk. The general laws provide that in such a case the city authorities, or the superior court, or a judge thereof, on appeal, shall first approve the plan of construction, and that a neglect by the city either to approve or disapprove, within a time specified, shall be deemed equivalent to a disapproval. It was undoubtedly competent for the general assembly to grant this franchise, and to guard against its improper exercise by giving the city supervisory powers. It was equally within its appropriate domain to grant an appeal to some suitable tribunal from any unreasonable conditions which the city might impose. I do not think that it can be said, as matter of law, that the superior court, or a judge thereof, is an unsuitable tribunal, or one upon which the Constitution forbids such duty to be imposed. The function so conferred upon it may, perhaps, be regarded as one both judicial and executive in its nature. If so, the long-continued practice of the state has settled, if it was ever doubtful, to quote from another of our recent opinions, "the true meaning of the constitutional requirement that judicial and executive powers shall each be confided to a separate magistracy, so far as it affects this question. Such a practical construction may safely be accepted when the theoretical distinction to be drawn by the court must be subtle and doubtful." *Hopson's Appeal*, 65 Conn. 140, 146. I think, however, that the appeal to Judge Hall may fairly be regarded as a judicial proceeding, calling for the exercise of judicial power. He was bound to dispose of it in accordance with the fundamental rules of law. *Hopson's Appeal*, 65 Conn. 140, 148. His decision, subject to that limitation, was "final and conclusive upon the parties." Pub. Acts 1895, p. 631. Here is a cause, brought before a judicial magistrate, to redress a wrong, and so obtain the benefit of a public grant; known rules of procedure; a party plain-

tiff and a party defendant; provision for a final judgment determining the right in controversy, and for an appeal to this court for error in law. *Central Railway & Electric Co.'s Appeal*, 67 Conn. 197, 206. Such a proceeding, it seems to me, may fairly be termed "judicial." But, if it be deemed to involve only an exercise of quasi-judicial or administrative power, for reasons already stated I think such a power can be lawfully conferred on a judge of the superior court. Controversies as to the manner in which the use of a franchise, granted for the public benefit, shall be guarded in the public interest, may ordinarily be settled either by legislative, judicial, or administrative proceedings, at the will of the legislature, as it may be expressed in the grant, or in the general laws passed to regulate its exercise.

The fact that the city of Norwalk took no action upon the plan submitted by the railway company does not seem to me to vary the appellate character of this proceeding. Inaction, under such circumstances, was as prejudicial to the company as adverse action. It is always competent for a legislature to treat a failure to dissent within a reasonable time as equivalent to assent, or an omission to accept as equivalent to a refusal. *Giffillan v. Union Canal Co.* 190 U. S. 401, 27 L. ed. 977. I do not, however, regard the duty of the judge of the superior court to take cognizance of this petition as at all dependent on its being in the nature of an appeal. In my opinion it would have been the same had the statute authorized the submission of the plan of construction to him as an original proceeding. *United States v. Ritchie*, 58 U. S. 17 How. 525, 15 L. ed. 236. The Constitution required the establishment of a superior court, but its "powers and jurisdiction," as well as those of all inferior courts, were left to "be defined by law." Article 5, § 1. The statute which governs this case is such a law. It defines the powers and jurisdiction of the superior court and of its judges as to a particular class of controversies. A difference of opinion between a municipal corporation and private corporation as to what is a reasonable use of a legislative franchise affecting the public highways, which difference must be settled before the franchise can be used at all, seems to me to present a case which it is eminently proper to place within the jurisdiction of a court. An analogous proceeding at common law was that by writ of certiorari, in the exercise by the court of King's bench of a general superintending power over, not only inferior courts, but any persons invested by the legislature with power to decide on the property or rights of the citizen. *Le Roy v. New York*, 20 Johns. 480, 438, 11 Am. Dec. 289; *Mendon v. Worcester County Comrs.* 2 Allen, 463, 465. Had the general assembly authorized a railway company, whose plan of construction, though duly submitted to the city authorities, had neither been approved nor disapproved, to apply to the superior court for a mandamus to compel them to act, there could have been no objection to such a remedy. 39 L. R. A.

But, if such a matter can be brought before the judiciary in that way, is it not a mere question of legislative policy whether an opportunity shall be granted to seek full relief in the same forum by substituting, for an authority that has failed to do its duty, an authority not less fitted to decide impartially, and better fitted to weigh evidence and construe the law? To me it seems also a mere question of legislative policy whether or not to confer upon the courts in the first instance the right to pass upon the plan of construction proposed as the mode of exercising a railway franchise. A law to that effect would define their jurisdiction none the less because it extended it. It would remit for judicial decision an administrative question, but one involving rights of property, and so affecting large public interests as to call for a prompt and final decision. It would, in my view, become a judicial question as soon as the law brought it before judicial authority in a judicial proceeding. *People v. Long Island R. Co.* 184 N.Y. 506.

A petition for rehearing having been filed, the following opinion was handed down on November 5, 1897:

Per Curiam:

The motion is denied. The appeal to Judge Hall was taken under the provision of the act of 1895 authorizing an appeal whenever the municipal authorities shall fail to notify the railroad company of their decision as prescribed, and transferring, in such event, to the court "the same powers with reference to said plan and the acceptance or modification thereof that said municipal authorities would have had under the provisions of said act" of 1893. This appeal should have been dismissed, because the court had no jurisdiction to entertain such an application; and for this reason we reversed the judgment. Counsel now claim that the appeal to Judge Hall was also an appeal under the preceding provision of the act of 1895, authorizing an appeal from any "decision, denial, order, or direction," and requiring such appeal to be by petition stating specifically the portion of such decision, etc., appealed from, and the reasons of such appeal, and urge their failure to argue this claim upon the original argument as a ground for granting the present motion. The considerations now suggested in support of their claim, as well as those in further support of the appellant's main contention, were carefully weighed before our decision was announced. We held that the appeal to Judge Hall was not taken from any decision, etc., under the first provision of the act of 1895, but was taken solely under the latter provision, which we held to be invalid. The judgment of reversal simply directs the dismissal of the application to Judge Hall, for want of jurisdiction. It is not a bar to the new presentation of a plan to the city council, and a proper appeal, if occasion shall arise, under the first provision of the act of 1895.

MARYLAND COURT OF APPEALS.

Alexander BROWN, *Appt.*,

v.

Sarah G. MCGILL *et al.*

(.....Md.....)

A trust to place one's property beyond the reach of creditors, while retaining full enjoyment of the income and revenues therefrom through the instrumentality of a trustee, cannot be created, even by a married woman or a woman in contemplation of marriage.

(Page, J., *dissents*.)

(February 10, 1898.)

A PPEAL by plaintiff from a judgment of the Circuit Court of Baltimore City in favor of defendants in a suit brought to enforce payment of defendants' debt out of property which she had placed in the hands of a trustee for her benefit. *Reversed*.

The facts are stated in the opinion.

Messrs. Carroll T. Bond and William L. Marbury, for appellant:

Before a married woman's separate estate can be bound, it must be shown that her contract was made with direct reference to such separate estate.

Koontz v. Nabb, 16 Md. 549.

The intention to charge the separate estate need not necessarily appear upon the face of the written contract, but may be gathered from evidence *aliunde*.

Jackson v. West, 22 Md. 71.

When a married woman acquires property in any of the modes prescribed by the statute, without any declaration or limitation to her separate use, and without any special mode or power of disposition annexed to the estate, the statutory use attaches, and the statutory mode of disposition exclusively applies and controls. But where property is conveyed or settled upon a *feme covert* to her separate use, and a specific mode of alienation or appointment is provided in the instrument creating the estate, that mode must be pursued, as it operates as a negation of any other, and is a paramount law governing and controlling the contract in relation to the property. In such case, however, if there be no specific mode of disposition prescribed, or no restriction thereon, the *feme covert* may act in reference to the disposition of the estate as a *feme sole*.

Armstrong v. Kerns, 61 Md. 367.

The idea that this man (or this woman) who to day is worth a quarter of a million with property all liable for the payment of his debts, can by any act of his own transform himself into a pauper so far as creditors are concerned, while continuing to enjoy his wealth, is one which he cannot be reasonably expected to conceive of.

This court went as far as they could in *Smith v. Tower*, 69 Md. 77, to effect the intention of the testator, which was so expressly declared;

but proper adherence to the policy of the law in the state will not allow the extension of the doctrine of *Tower's Case* beyond the limitations of that decision, nor to a case not falling clearly within its reasons and reasoning; and this case does not.

Baker v. Keiser, 75 Md. 332.

The exemption attempted to be conferred upon the use of the property, by the declaration that the same shall be free from liability for any of the debts of the author and beneficiary of the trust, is simply void and without effect, as being contrary to law.

Warner v. Rice, 66 Md. 436; *Mackason's Appeal*, 42 Pa. 330, 82 Am. Dec. 517; *Andrew v. Lewis*, 17 W. N. C. 270; *Lewis v. Miller*, 21 W. N. C. 94; *Ghormley v. Smith*, 139 Pa. 584, 11 L. R. A. 565; *Mellivaine v. Smith*, 42 Mo. 58, 97 Am. Dec. 295; *Bryan v. Knickerbacker*, 1 Barb. Ch. 409; *Gray, Restraints on Alienation*, §§ 180, 268; *Pacific Nat. Bank v. Windram*, 138 Mass. 175; *Jackson v. Von Zedlitz*, 136 Mass. 342; *Lackland v. Smith*, 5 Mo. App. 153.

It is true that in England, ever since Lord Thurlow's time, the law which, contrary to the law of this state, as announced in *Smith v. Towers*, forbids such restraints on alienation when attempted in favor of all other persons, does favor and sustain the same in favor of a married woman so long as her coverture continues.

Jackson v. Hobhouse, 2 Meriv. 483; *Tullett v. Armstrong*, 4 Myl. & C. 377; *Hulme v. Tenant*, 1 White & Tudor, Lead. Cas. in Eq. 5th ed. 521, 4th Am. ed. 481, and notes; *Pemberton v. McGill*, 1 Drew. & S. 266; *Arnold v. Woodhams*, L. R. 16 Eq. 29; *Stanley v. Stanley*, L. R. 7 Ch. Div. 589; *Stogdon v. Lee* [1891] 1 Q. B. 661; *Baggett v. Meux*, 1 Colly. Ch. Cas. 133.

But it will be found upon examination of these authorities that this doctrine was adopted with great reluctance by the courts of England; that it grew out of the necessities of the case as the law relating to married women then stood, and that there is no conceivable reason why it should be adopted as a rule of law in this state in cases where the married woman is at once the author and beneficiary of the trust, in view of the fact that the conditions which gave rise to it and made it necessary and proper in England are entirely absent here, having been removed by recent legislation.

The reason against adoption of the English doctrine on this point by the courts of this country, where common-law restrictions upon the property rights of married women have been so largely swept away by statute, as in our state, and in most of the other states in the Union, are very cogently stated in:

Pacific Nat. Bank v. Windram, 133 Mass. 175; *Jackson v. Von Zedlitz*, 136 Mass. 342; *Ghormley v. Smith*, 139 Pa. 584, 11 L. R. A. 565; *Stewart v. Madden*, 153 Pa. 445; *Hall v. Eccleston*, 37 Md. 520; *Cooke v. Husbards*, 11 Md. 506; *Pybus v. Smith*, 3 Bro. Ch. 347.

Courts of equity will not presume that a wife will be subjected to importunities of her husband.

NOTE.—As to spendthrift trusts, see *Lampert v. Haydel* (Mo.) 2 L. R. A. 113, and some other authorities in note thereto; also *Day v. Slaughter* (Va.) 39 L. R. A.

13 L. R. A. 212, and note; *Roberts v. Stevens* (Me.) 17 L. R. A. 206; and *Wetmore v. Wetmore* (N. Y.) 33 L. R. A. 708.

band in constant endeavors to wrest her property from her, the only possible reason why a court of equity should deem it desirable that married women should not have the power of disposition as contended for in this case.

Cooke v. Husbands, 11 Md. 505; *Jaques v. Methodist Episcopal Church*, 17 Johns. 582, 8 Am. Dec. 447.

Messrs. Bernard Carter, Stewart Brown, Arthur George Brown, and F. W. Brune for appellees.

Boyd, J., delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Baltimore city, dismissing the bill of complaint filed by the appellant against Sarah G. McGill, Carroll S. McGill, her husband, and James McEvoy, trustee. The bill alleges that on the 16th day of September, 1895, Sarah G. McGill gave the appellant her note for the sum of \$3,000, which she borrowed from him with the understanding and agreement that it should be payable, when demanded, out of her separate estate, whether held in her own name or by the intervention of her trustee, James McEvoy, and that it was her intention and purpose to bind and charge her separate estate with the payment thereof. On the 10th day of September, 1894, which was a day or two before Mrs. McGill, who was the widow of George B. Graham, deceased, was married to Carroll S. McGill, she executed a deed of trust by which she assigned and conveyed to James McEvoy, trustee, all property which she had derived from the estate of George B. Graham, and which she might receive from her daughter, Isabella Brown Graham, in trust, "to collect, receive, and, after making all proper deductions for taxes and other charges thereon, to pay over, the net rents, profits, dividends, interest, and income of all said property, real, personal, and mixed, to her, the said Sarah G. Graham, during her natural life, into her own hands, and not to another, whether claiming by her authority or otherwise, for her sole and separate use, and upon her separate receipts, without power of anticipation, and excluding all right of interest in, or power over, the same of any husband she may have, or any liability for his debts, contracts, or engagements." It then provides for the disposition of the property after her death. It is conceded that the debt was contracted by Mrs. McGill with direct reference to her separate estate, and that it was her intention to charge the same. The testimony on that point is ample, under the decisions of this court, to charge any separate estate she had with this debt, unless there be other reasons for its exemption.

It is contended, and the learned judge below so held, that, by reason of the provisions in the deed of trust above quoted, she had no power to charge or pledge the property held by James McEvoy, trustee. That being her only separate estate, so far as disclosed by the record, we are necessarily called upon to determine the effect of those provisions. Cases involving the right to place restrictions upon the alienation of property have been numerous, and have resulted in a great diversity of opinions between the courts that have passed upon

the question. In England it has been persistently and steadfastly held that a gift or grant of a beneficial fee simple or life estate, whether legal or equitable, carried with it the right of the donee or grantee, other than a married woman, to alienate the estate, and charge it with his debts; and that all attempts to restrict these incidents belonging to such estates, by forbidding payment of the income to anyone other than the donee or grantee, or prohibiting anticipation, were nugatory and without effect, except by way of cesser or limitation over of the estate. We will have occasion to consider the exception in favor of married women later on. In 28 Am. & Eng. Enc. Law, p. 5, there is a very excellent note on the subject of "Spendthrift Trusts," where it can be seen how widely the courts of this country have differed on the main question. But it would serve no good purpose to enter into a discussion of those cases, as this court held in the case of *Smith v. Towers*, 69 Md. 77 and 91, that the founder of a trust may lawfully provide, in direct terms, that his property shall go to his beneficiary to the exclusion of the alienees and creditors of the latter; and accordingly it was determined that the rents and profits held by the trustee in that case, which the testator directed should be paid into the hands of his son, and "not into the hands of another, whether claiming by his authority or otherwise," could not be reached by his creditors, either at law or in equity, before such rents and profits were paid to him. It was conceded that the English cases, as well as many in this country, were opposed to the views adopted by this court; but it was held that the reasons on which was founded the rule that the right to sell and dispose of property is a necessary incident to the ownership of it do not apply to the transfer of property in trust. It was said that "the donor or deviser, as the absolute owner of the property, has the right to prescribe the terms on which his bounty shall be enjoyed, unless such terms be repugnant to the law. . . . The creditors of the beneficiary have no right to complain, because the founder of the trust did not give his bounty to them." By the will before the court in the case of *Reed v. Safe Deposit & T. Co.* 86 Md. —, 88 Atl. 899, the testator left his property to trustees, who were succeeded by the appellee in that case, with directions that they should pay the net proceeds from time to time, to his wife during her natural life, "and especially so that the same shall not be liable for the debts or contracts of any future husband, or in any manner subject to his control, or to be taken in execution or attachment or otherwise howsoever, and so that she shall not pledge or anticipate said property or said net proceeds of income, or any part thereof." We held that, by virtue of those provisions, the net income from the property in the hands of the trustee was not liable for her debts, and that the testator had full power to make such provisions, under the decision in *Smith v. Towers*.

But whether one who is the owner of property can thus place it beyond his own control and power of alienation, especially beyond the reach of his creditors, presents another question. The case of *Warner v. Rice*, 66 Md. 436,

goes very far towards denying such right. George Warner and others conveyed to a trustee certain property which had been left them by their father by a deed in which certain trusts were declared by the grantors. The property of George Warner sought to be made liable to attachment in that case, had by the deed been made subject to a declaration of trust, as follows: "In trust for the use and benefit of said George Warner and his immediate family, free from liability for any of his debts, contracts, or engagements; and when, if so by said trustee found requisite, by him deemed proper, to apply the uses, rents, income, and profits to the support and maintenance of said George and his said family, during his, said George's, life," etc. This court held that the exemption attempted to be conferred upon the use of the property by that declaration was void and without effect, being contrary to law, and held the rents from Warner's equitable estate in the ground rents attached liable for the plaintiff's debts. It was said in that case that a beneficial legal estate in fee or for life could not be conveyed or devised to a person with a provision that it should not be alienated or subject to the debts of the legal owner, and it was also stated that, as a general principle, equitable estates cannot be effectually created with such provisos, except in the case of trusts created for the protection and benefit of married women. In *Baker v. Keiser*, 75 Md. 383, the cases of *Smith v. Towers* and *Warner v. Rice* were discussed, and it was said that in the latter case this court "emphatically declared that it was wholly against the policy of the law to allow property, whether legal or equitable, to be fettered by restraints upon alienation; and, generally, the court said: 'Whenever property is subject to alienation by the owner, it is subject to his debts.'" It was stated in that opinion that the majority of the court concluded in *Smith v. Towers* that there was nothing in the decision of *Warner v. Rice* "which should restrain this court from saying that the founder of the trust could, by sufficiently clear language, create a trust for a beneficiary without the power of alienation;" but the opinion concluded by saying that "this court went as far as it could in *Towers' Case* to effect the intention of the testator which was so expressly declared; but proper adherence to the policy of the law in the state will not allow the extension of the doctrine of the *Towers Case* beyond the limitations of that decision, nor to a case not falling clearly within its reasons and reasoning." But the case of *Warner v. Rice* is clearly distinguishable from that of *Smith v. Towers* and *Reed v. Safe-Deposit & T. Co.* inasmuch as in that case there was an attempt of the owner of the property to place it beyond the reach of his creditors, and yet retain the enjoyment of it during his life, while in the other two cases the testators were creating trusts in favor of third persons. The theory upon which courts have held restraints upon alienation, etc., valid is that the *cestui que trust* only has what the donor has given him,—is the recipient of his bounty; and therefore, if the donor has not given him the right to alienate the property or made it subject to the payment of his debts, no one has the right to complain. As is well said in *Broadway Nat.*

Bank v. Adams, 133 Mass. 170, 43 Am. Rep. 504: "Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given." This is well illustrated in the Missouri cases. In *Lampert v. Haydel*, 96 Mo. 439, 2 L. R. A. 118, and in *Partridge v. Casender*, 96 Mo. 452, the doctrine had been distinctly announced that by the use of apt terms a testator could forbid the alienation of property in trust, and could place it beyond the reach of the creditors of the beneficiary; but in *Bank of Commerce v. Chambers*, 96 Mo. 459, a husband who had released his curtesy in his wife's estate, accepting in lieu thereof an income given him by her will, was regarded as a purchaser of such income, and not a mere recipient of his wife's bounty, and therefore the income was held to be subject to the claims of his creditors, notwithstanding the provisions in the will to the contrary. In referring to *Lampert v. Haydel* that court said that it, "and the class to which it belongs, rest in a large part upon the distinct ground that a creditor is not defrauded, and therefore has no cause of complaint, because the owner of property in the free exercise of his will so disposes of it that the object of his bounty, who parts with nothing in return, has a sufficient income provided for and applied to his life support." Even that class of cases should be carefully guarded, and courts should not be inclined to exempt property from its usual incidents of the right of alienation and liability for debts unless the language of the donor be free from doubt. But it is going too far, and is too violently assailing the policy of the law of this state, as indicated above, to permit a person to convey property owned by him to a trustee, and still retain full enjoyment of the income and revenues from it, through the instrumentality of the trustee and yet have the interest he retains for himself, worth, it may be, thousands or tens of thousands of dollars *per annum*, so fettered by his own act that it cannot be disposed of or be reached by his creditors. It is true that our land records are open to the public, and, in contemplation of law, what is properly recorded therein is presumed to be known by all; yet the fact remains that if a person has once owned property, and continues to occupy it or use it just as he has always done, it would occur to but few persons, if any, at least in ordinary transactions, that he must inquire, perhaps employ counsel to ascertain, whether there had been any change in the legal status of such property. It may be argued that this may happen in the cases we have already said are lawful in this state, where the bounty is bestowed upon third persons, and to some extent that may be true, but in those cases persons dealing with them may perhaps be expected to ascertain what the party receives,—what interest in the property was given to him; but in the case before us he would not only have to find out what property he owned in the beginning, but from time to time examine the records to see whether the former and still ostensible owner of it continued to retain any interest that was liable for his debts. It cannot be denied that property is deprived of some of its

greatest value to the community in which it is held or located when beyond the power of alienation or reach of the creditors of its present owners. To hold that a grantor can retain all the use and enjoyment of his property for life, "free from the incidents of property, and not subject to his debts, would be a dangerous and startling proposition to sanction." We do not think it can be sustained by reason or authority. So far as we are aware, the authorities are the other way. *Warner v. Rice*, 66 Md. 436; 4 Kent, Com. 311; *Mackason's Appeal*, 42 Pa. 380, 82 Am. Dec. 517; *Ghormley v. Smith*, 189 Pa. 584, 11 L. R. A. 565; *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295 (approved as to this point in *Lampert v. Haydel*, 96 Mo. 489, 3 L. R. A. 113; *Pacific Nat. Bank v. Windram*, 183 Mass. 175; *Jackson v. Von Zedlitz*, 186 Mass. 842.

But, conceding this to be the law as to those who are *sui juris*, how far does it apply to married women or to a deed made by one in contemplation of marriage? That is the important and most difficult question before us. The doctrine of the separate estate of a married woman was purely a creature of equity, and worked a radical change in the principles of the common law applicable to the marital relation, as affecting the rights of property between husband and wife. In *Buckton v. Hay*, L. R. 11 Ch. Div. 645, the master of the rolls said that "it was considered that to give it her without such a restraint would be practically to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income, and thus fettering the free alienation;" and in *Tullet v. Armstrong*, 4 Myl. & C. 377, Lord Chancellor Cottenham said: "The separate estate and the prohibition of anticipation are equally creatures of equity, and equally inconsistent with the ordinary rules of property. The one is only a restriction and qualification of the other. The two must stand or fall together." And again: "It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation." In other words, the reason that the English courts permitted these restrictions on property of a married woman, although they had denied their validity as against the property of persons *sui juris*, was that her right to hold property free from her husband's control was created for her by courts of equity, and the chancellors thought she was not sufficiently protected from her husband without this restraint. It was very reluctantly done, and only because it was deemed necessary for the protection of wives from their husbands, as a study of the English cases will show. What we have said above in regard to these restraints imposed by third persons will, of course, apply to a married woman when she is the recipient of the bounty of another; but we cannot consent to the establishment of a doctrine in this state which will enable a married woman, or a woman in contem-

plation of marriage, to place her property that would be otherwise responsible for debts contracted with reference to it beyond the reach of her creditors, and still enjoy the use and benefit of it as fully and completely as she had done before. We do not mean to intimate that she cannot so settle her separate property as to place it beyond the control and reach of her husband and his creditors, but when the rights of her creditors are involved, and the property in question be of the character that would be liable to such creditors but for such restraints, she should not be permitted to escape the payment of her just debts by reason of her own declaration that such property should not be liable for her debts, or that the income should be paid to her alone and not to another, notwithstanding it is made a matter of record before the debts are contracted. There is no necessity to establish such a doctrine for her protection against her husband, as, under the laws of this state, she has ample protection against him and his creditors, and we do not "assume, that husbands will be constantly endeavoring to wrest their wives' property from them, and devote it to their own uses." *Cooke v. Husbands*, 11 Md. 505; *Olivet v. Whitworth*, 82 Md. 262. Separate estates were created in equity because married women could hold no other. As the husband at common law became the absolute owner of the wife's personal property and of the rents and profits of her real estate during coverture, she was not liable for debts, or, to speak more accurately, she could not contract them. When, therefore, chancellors created an estate that she could hold and dispose of, and which was liable for her debts, if contracted with reference to it, by going a step further, and permitting restraints on alienation and anticipation, they did not place the property in a worse position, so far as the debts of married women were concerned, than it was before the equitable separate estate was created. But, under our laws, a married woman may not only have an equitable separate estate, but by statute she may acquire property by purchase, gift, grant, devise, bequest, descent, in course of distribution, or, as amended in 1892, in any other manner, and, however obtained, it is protected from the debts of her husband. Such property she holds for her separate use, with power of devising it as fully as if she were a *feme sole*, and she may convey it by joint deed with her husband. It is not necessary for her to have a trustee to secure her the sole and separate use of her property, but, if she desires it, she can appoint one by deed, her husband joining with her, or she can apply to a court of equity, and have one appointed. The husband and wife may jointly charge her statutory separate property in the same way that she could charge her equitable separate estate, even by a parol contract, and courts of equity have the power to enforce the one as well as the other. *Wingert v. Gordon*, 86 Md. 106, and cases there cited. She may be sued at law, on a note, bill of exchange, single bill, bond, contract, or agreement, executed jointly with her husband. Property earned by her skill, industry, or personal labor, as well as the income therefrom, is held by her to her sole and separate use, with power as a *feme sole* to dis-

pose of it, and it is liable for debts incurred by her about such business. In short, the tendency of our legislation is to greatly enlarge both her powers and liabilities, although it carefully protects her property from her husband and his creditors, so that now many of the reasons for decisions rendered in the past century, or the early part of the present one, can no longer have much force under our changed conditions. This particular question was not passed upon by this court when we still had the conditions to meet that originally influenced the English courts, and as we are now called upon for the first time to decide it, at a time when the policy of the state is so radically different in its dealing with married women from what it formerly was, we do not feel called upon to be governed by reasons no longer applicable, and make an exception in favor of married women, or those in contemplation of marriage, especially as it might result in creating a privileged class, which would not reflect credit upon the law that created it nor the state that fostered it. Property is too easily transferred from husband to wife to permit her to do what he is prohibited from doing, because it is contrary to the policy of the law, calculated to tempt his honesty, and to impose upon and deceive those dealing with him. If the wife is at the mercy of and under the absolute control of the husband, as seems to be the moving cause of the English courts when they supported the validity of the prohibition against alienation in her favor, then he can with great facility make use of her to do what he himself cannot do, if we hold she can place such restraints on her property. He would only be required to convey the property to her, and let her place such restraints on it as he desired, to make it impregnable against the assault of creditors, although he could not do it himself as long as the property was his own, because he was *sui juris*. Would not the result of such a decision be that a married man who wanted to have such restraints on his property could convey it to his wife, and thus accomplish indirectly, through his wife, what he could not do directly?

Without meaning to say that the facts and reasoning are in all respects applicable, the Massachusetts and Pennsylvania cases are more in accord with our views of the proper doctrine to establish as the law of this state on this question than the English cases are. See *Pacific Nat. Bank v. Windram*, 188 Mass. 175; *Jackson v. Von Zedlitz*, 186 Mass. 342; and *Ghormley v. Smith*, 189 Pa. 584, 11 L. R. A. 565,—in which the courts of those states have passed on the general subject, as well as on the proposed exception in favor of married women. In the case of *Reid v. Safe Deposit & T. Co.* 86 Md. —, 88 Atl. 899, this court, after referring to *Brandon v. Robinson*, 18 Ves. Jr. 494; *Buckton v. Hay*, L. R. 11 Ch. Div. 645; and *Tullett v. Armstrong*, 4 Myl. & C. 877, to show the views of the English courts, said: "It thus appears that the exception in case of devises and settlements upon married women was deemed necessary only because of the general rule that restraints upon alienation and anticipation were always regarded as repugnant to the estate. But in Maryland this 39 L. R. A.

is not the general rule." And then, after quoting from *Smith v. Towers*, to show what the law is here, it was said: "In this state, therefore, where the law is as just stated, it is difficult to perceive why trusts in cases of married women do not stand on the same footing as other trusts of the same nature." Although this precise question was not involved in that case, we strongly intimated that we differed from the English decisions which applied a different rule in favor of trusts to married women from that applied to other trusts of the same nature, and we are of opinion that the rule which we have above laid down for persons who are *sui juris* is equally applicable to them. The income from the property in the hands of the trustee is therefore liable in equity to the payment of the debt due the appellant. We have not thought it necessary to advert to the fact that the deed was made when Mrs. McGill was single, as it seems to have been practically conceded that it was made in contemplation of marriage, or that her husband departed this life after the debt was contracted and after this suit was brought.

The decree will be reversed, and the cause remanded, in order that the lower court may pass a decree requiring the trustee to pay out of the income now in his hands, or that may hereafter come into his hands, the amount due on the note of Mrs. McGill, together with the costs in this court and the court below.

Page, J., dissents.

MARYLAND TUBE & IRON WORKS of Hagerstown, Appt.,

WEST END IMPROVEMENT COMPANY of Hagerstown.

(.....Md.....)

1. The subjection of what purports to be a corporation, but has no legal existence as such because of the nonpayment of the bonus tax imposed by Acts 1890, chap. 586, to a suit by the state for the recovery of the tax by Code, § 88H, does not, by implication, give it a legal existence for all purposes, including a capacity to sue, as it is expressly denied the exercise of any corporate powers until the bonus is paid, by § 88F.
2. The lack of the corporate existence of a plaintiff suing as a corporation can be set up to defeat the action by the defendant, where this is based on the failure of the plaintiff to pay the bonus tax prescribed by Acts 1890, chap. 586, under which such nonpayment prevents the attempted corporation from having or exercising any corporate powers.
3. The doctrine of estoppel cannot be successfully invoked against the denial of corporate existence unless the corporation has at least a *de facto* existence.
4. A right of action must be complete before the action is brought, and the subsequent

NOTE.—For estoppel as to character of powers of foreign corporations, see note to *Cone Export & Commission Co. v. Poole* (S. C.) 24 L. R. A. 297; also note to *Edison General Electric Co. v. Canadian Pacific Nav. Co.* (Wash.) 24 L. R. A. 820.

occurrence of a material fact will not avail in maintaining it.

(February 10, 1898.)

APPEAL by plaintiff from a decree of the Circuit Court for Washington County in favor of defendant in a suit brought to enforce specific performance of a contract to convey land. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry Kyd Douglas, for appellant:

The act of 1890 was passed for the benefit of the state exclusively and for revenue raising, and the state only by a direct proceeding after hearing the delinquent company can condemn such delinquency.

Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 120; 1 Thomp. Corp. § 581; 5 Thomp. Corp. § 6598; *Regents of the University v. Williams*, 9 Gill & J. 424, 31 Am. Dec. 72; *Vernon Society v. Hill*, 6 Cow. 28, 16 Am. Dec. 429; *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. 856; *Taggart v. Western Maryland R. Co.* 24 Md. 596, 89 Am. Dec. 760; *Keene v. Van Reuth*, 48 Md. 194; *Musgrave v. Morrison*, 54 Md. 166; *Bussey v. Hooper*, 35 Md. 30, 6 Am. Rep. 350; *Hagers-Town Turnp. Road v. Creeger*, 5 Harr. & J. 125, 9 Am. Dec. 495; 1 Beach, Priv. Corp. § 18; *Eaton v. Aspinwall*, 19 N. Y. 121; *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 485; *McFarlan v. Triton Ins. Co.* 4 Denio, 398; *Bank of Circleville v. Renick*, 15 Ohio. 388; *National Docks R. Co. v. Central R. Co.* 82 N. J. Eq. 761; Aug. & A. Corp. 10th ed. § 777, and cases cited; *Greenbrier Lumber Co. v. Ward*, 30 W. Va. 43.

The doctrine is of still stronger force where the action is in a court of equity.

5 Thomp. Corp. § 6598; *Soc. for Establishing Useful Manufactures v. Morris Canal & Bkg. Co.* 1 N. J. Eq. 157, 21 Am. Dec. 41; *Hamilton v. Annapolis & E. Ridge R. Co.* 1 Md. Ch. 107; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 34 L. ed. 784; also *Macon County v. Shores*, 97 U. S. 272, 24 L. ed. 889.

But the complainant did pay the bonus required by the act of 1890, although not promptly; and the state received it without objection and gave the usual receipt for it.

The state thereby waived any cause of complaint it had against the complainant company for its delay, and took no action in the matter.

The defendants can occupy no better position than the state. If the state waives a penalty the defendants cannot enforce it.

Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. 4 Gill & J. 120; *Regent of the University v. Williams*, 9 Gill & J. 424, 31 Am. Dec. 72; *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. 856; *Musgrave v. Morrison*, 54 Md. 166; *Taggart v. Western Maryland R. Co.* 24 Md. 598, 89 Am. Dec. 760.

The defendants were large stockholders in the complainant corporation,—although the cash they were to pay for their stock never made its appearance,—and took part in its management. Can they be heard now to set up a defense in this action, such as the one we

have discussed? Will not the court hold them estopped? They lived in Hagerstown and knew what was going on. Not having paid a cent on their stock, can they be permitted to stand by and see this large building go up and then when the time comes to make a deed of the lot say "No, you owed the state \$87.60 and didn't pay it in time and we'll hold on to the lot and freeze on to the buildings, too."

Morrison v. Dorsey, 48 Md. 472; *Hager v. Cleveland*, 86 Md. 491.

Messrs. Alexander Armstrong, Samuel B. Loose, and Norman B. Scott, Jr., for appellee:

The plaintiff admits that at the time this suit was instituted it had not paid the first installment of the bonus. This admission should preclude the plaintiff from maintaining this action.

People, Bishop, v. Kingston & M. Turnp. Road Co. 23 Wend. 198, 35 Am. Dec. 556; *Franklin P. Ins. Co. v. Hart*, 31 Md. 59; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 855.

The answer of the defendant is not in the nature of an information; it does not allege breach of corporate power, but only denies the legal existence and corporate power of this plaintiff. It submits that as no corporate franchise existed, none could be forfeited. For if the general laws of the state require certain acts to be done before a corporation comes into being, such requirements should be scrupulously observed. And should there be any vital omission, such omission can be taken advantage of collaterally.

Society for Propagation of Gospel v. Pawlet, 29 U. S. 4 Pet. 480, 7 L. ed. 927; *Mokelumne Hill Canal & Min. Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 660; *Hughes v. Antietam Mfg. Co.* 34 Md. 322; *Oler v. Baltimore & R. R. Co.* 41 Md. 589; *Robertson v. American Homestead Assn.* 10 Md. 897, 69 Am. Dec. 145; *Franz v. Teutonia Bldg. Assn.* 24 Md. 270; *Lord v. Essex Bldg. Assn.* 37 Md. 825; *Agnew v. Bank of Gettysburg*, 2 Harr. & G. 498.

Pearce, J., delivered the opinion of the court:

The bill was filed in this case September 19, 1892, by the appellant, against the appellee, for the specific performance of an agreement to convey land, made in writing between the appellee on the one part and O. C. Knipe and others on the other part, who subsequently assigned all their interest in said agreement to the appellant, with the consent, as it alleges, of the appellee. The appellee answered the bill, admitting the execution of the agreement, but alleging various defenses to the bill, among which is a denial of the existence of the appellant as duly incorporated under the laws of Maryland, and a denial of its right to maintain this suit by reason of its failure to comply with the provisions of chapter 536 of the Acts of 1890. The general replication was filed, and a mass of testimony was taken, and the bill was dismissed by the court below (Judge Stake) on the ground that the appellant had no legal existence as a corporation, and was, therefore not entitled to maintain the suit. Under the agreed statement of facts upon which this appeal was brought into this court, the sole

question for review is the right of the appellant to maintain this suit without having first paid the tax of $\frac{1}{4}$ of 1 per cent on the capital stock of the company in the manner provided by act 1890, chap. 536. The statement of facts admits that both the appellant and the appellee are incorporated in Washington county under the laws of Maryland, and that the agreement sought to be enforced is correctly set forth in the record. It also admits that at the time the bill was filed the appellant had not paid, and had not been notified to pay, the first instalment of bonus as per chapter 536, Acts 1890, but that it did on the 18th of May, 1893, pay the same to the controller of the state. The record does not show the date when this statement of facts was made or filed but the reference therein to the opinion of the court dismissing the bill which was filed June 1, 1897, shows it was made and filed after that date. This is only important to show that the admission of appellant's due incorporation can only be regarded as an admission of incorporation at that date, June, 1897.

It will thus be seen the question before the court is a narrow one. In the answer, the agreed statement of facts, and in the opinion of the court below, as well as in the argument in this court, the case was regarded as depending wholly upon the construction of chapter 536, Acts 1890, and, if this were the fact, there would be less difficulty in reaching a satisfactory conclusion. But the act of 1894 (chap. 114) deals with the same precise subject matter, and if it can be said it does not repeal the act of 1890, it yet materially changes the law applicable to cases arising under the act of 1890, and we are required to consider and construe the act of 1894. It will be seen that the titles of these acts are in precisely the same words, except that the act of 1890 is, "An Act to Add a [One] New Section to Article Eighty-One of the Code, . . . to be Designated as Section Eighty-Eight A," while the act of 1894 is, "An Act to Add Six New Sections to Article Eighty-One of the Code, . . . to be Designated as Sections Eighty-Eight," F. G. H. I. J; and that the word "corporation" is used in the title of the latter act where the word "company" is used in the title of the former. The act of 1894 specifically provides that no corporation incorporated prior to the date of the passage of that act shall in any manner, by that act, be relieved or released from the payment of any bonus due under the act of 1890; and this proviso, taken in connection with the repealing clause in § 2 of that act, clearly indicates the legislative purpose to repeal the future operation of the act of 1890, while saving all remedies and results by reason of the nonpayment of any bonus by any corporation incorporated prior to the passage of that act. It should be noted here that chapter 244, Acts 1890, adds five new sections to article 81 of the Code, to come in after § 88, and to be designated as §§ 88 A, B, C, D, and E. These sections deal only with taxes on the assessed value of the shares of capital stock of corporations, and not with the bonus tax. Then came chapter 536, Acts 1890, which added one new section to article 81 of the Code, to come in after § 88, and to be designated 88A, so that under these two acts there were two sections each design-

nated 88A. It is thus made evident that the draftsman of chapter 114, Acts 1894, with these two acts of 1890 before him, and intending to avoid the existing confusion arising from the designating of two sections as 88A, designed to repeal act 1890, chap. 536, and to substitute § 88A of that act for § 88A of act 1890, chap. 536, leaving § 88A-E; chap. 244, Acts 1890, to stand in their regular order of precedence. *Montel v. Consolidation Coal Co.* 39 Md. 171, 174. The appellant was incorporated prior to May 18, 1893, since it paid the first instalment of bonus tax on that date, but it appears from the examination of the act of 1894 that the proceeding prescribed therein for the recovery of the bonus tax upon corporations, and the provisions setting forth the result of nonpayment, are applicable as well to corporations created before as after the passage of that act, and that, if there is anything to be found in that act not contained in the act of 1890 which would sustain the appellant's right to maintain this suit, it is entitled to the benefit thereof. Comparing chapter 244, Acts 1890, with chapter 114, Acts 1894, it is evident that the draftsman of the act of 1894, overlooking the true theory and design of the act of 1890 (chapter 536), or deliberately intending to alter its true theory and design, substantially provided the same remedy and procedure for the recovery of the bonus tax as was, by chapter 244 of 1890, provided for the recovery of the tax, upon the assessed value of capital stock; and it is now argued by the appellant, since the oral argument, that, as the act of 1894 subjects the corporation to suit by the state for the recovery of this bonus tax, it necessarily follows that the corporation has a legal existence for all purposes, and therefore full capacity to sue. But with this contention, however plausible and forcible the argument at first blush, we are not able, after full and careful consideration, to agree; and we are of opinion that, if the appellant would be held incapable of maintaining this suit under the act of 1890, it must be so held under the act of 1894. To hold otherwise, and to hold, as the appellant urges, that this act recognizes a corporation which has not paid the bonus tax when due as an existing, moving, active corporation for all purposes, would be to strike with absolute nullity the plain and imperative language of section 88F, which declares that no such corporation shall have or exercise any corporate powers until such bonus has been paid. It is settled law that charters or statutes conferring franchises on a corporation are to be construed in favor of the public, rather than the corporation; and to gratify this rule where the charter, as here, is under a certificate, the general law is to be read into the certificate. Every word, phrase, or sentence doubtful or ambiguous is to be interpreted in favor of the state. Thompson, in his work on Corporations (vol. 4, § 5661), says: "The rule is simple. That which the company may do by its charter it may do. Beyond that its acts are illegal."

In *Roland Park Co. v. State*, 80 Md. 443, Acts 1890, chap. 536, and Acts 1894, chap. 114, were considered on another point, and it was said: "What we have to do is to discover the legislative intention and to give to it, when ascer-

tained in accordance with established canons or rules, full and complete effect. . . . This intent or design may be gathered, not merely from the language of the enactment, but also from the causes or necessity which prompted its passage. . . . A result which may follow from one construction or another of a statute is always a potent factor and is sometimes in and of itself conclusive as to the correct solution of the question as to its meaning." One result which might follow the establishment of appellant's contention would be that corporations defaulting under this act might not only continue in the full exercise of the prohibited powers for two years after such default, but might before the expiration of that period, dispose of all their property, and leave the state a barren judgment for this bonus. Such a result could not have been within the legislative contemplation, and ought not to be permitted if it can be avoided by any sound construction of the whole act. It is a cardinal rule of construction that, where one part of a statute is susceptible of two constructions, and the language of another part is clear and definite, and is consistent with one of such constructions and opposed to the other, that construction which will, under all clauses of the statute, be harmonious, must be adopted. *Magruder v. Carroll*, 4 Md. 348, 349; *Alexander v. Worthington*, 5 Md. 472. Sections 88F and 88H must be construed together, and by so doing § 88F must be taken to prohibit generally the having or exercising of any corporate powers before payment of the bonus, which would include generally suits by or against the corporation; and the office of § 88H is merely an exception withdrawing from the general purview and operation of § 88F the particular suit authorized for the recovery of the bonus tax by § 88H. Every corporation is the mere creature of the state, and where neither its charter nor any statute restricts the powers through which it maintains itself and responds to the discharge of its obligations, it may be conceded that the right to sue and the liability to respond to a suit are correlative; but the state which creates the corporation is sovereign, and, while withholding from the corporation or suspending the right to sue before compliance with a revenue measure, as the price of the exercise by it of corporate powers, may clearly, if it see fit, subject such corporation to suit by the state for noncompliance with such condition precedent; and we think the court below correctly and clearly stated the law when it said: "The effect of the law is to hold in abeyance the right and remedy of the suing corporation,"—and we are of opinion that this proposition is as clear under the provisions of chapter 114, Acts 1894, as it is under chapter 538, Acts 1890.

The appellant contended that the validity of its incorporation is conceded in the agreed statement of facts, but, even if this would affect the result, we do not so understand the concession. It is expressly denied in the answer, and the agreed statement of facts was entered into after payment of the bonus, when its corporate power to sue was no longer held in abeyance, and when the right to sue was complete under the statute.

39 L. R. A.

The next contention of the appellant is that the question of corporate power cannot be raised collaterally, or in any way except by a direct proceeding by the state to forfeit the charter. There is, of course, no doubt that mere causes of forfeiture cannot be taken advantage of collaterally, and that, where the right to sue has once become vested in the corporation by compliance with all conditions precedent thereto, it can only be divested by forfeiture in some legal mode of the charter. But this case does not come within that rule. We have carefully examined all the cases cited by the appellant, and it will be found that all of them are cases merely of irregularity, and not of nullity; cases in which the power to sue had become a vested power under the charter by a substantial compliance in good faith with the requirements thereof, notwithstanding some irregularity in the proceedings thereunder. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 122, was the case of nonuser of corporate powers, and Chief Justice Buchanan was careful to say: "Where there is an existing corporation capable of acting, . . . cause of forfeiture can only be enforced by scire facias, or a quo warranto, issued at the instance of the government creating the corporation, and cannot be taken advantage of incidentally, or in any other way, or by any individual, since the government, with which alone the contract arising out of the charter is made, may waive the breach of any condition of that contract, and cannot be made to enforce the forfeiture, whether it will or not." But here the state has, by the act of 1890, passed before the incorporation of the appellant, declared its will that, until compliance with the fundamental condition which was disregarded in this case, the appellant should have no other or greater corporate power than he would have had after forfeiture enforced; and this legislative limitation of power is as effective for the purposes of this case as a decree of forfeiture made prior to the suit.

Regents of the University v. Williams, 9 Gill & J. 426, 81 Am. Dec. 72, was a question whether one corporation was merged in another, and the court held that neither non-user nor misuser of corporate franchises would authorize granting the same franchises to others, before a forfeiture had been judicially declared, and Chief Justice Buchanan was again careful to say: "Scire facias . . . is the proper process when there is a legally existing body capable of acting, but who have abused their power. . . . [And] quo warranto, which properly applies, where there is a corporate body *de facto* only, but who take upon themselves to act, though, from some defect in their constitution or organization, they cannot legally exercise their powers." So with *Planters' Bank v. Bank of Alexandria*, 10 Gill & J. 346, where it was contended that the charter of the Planters' Bank, under one of its sections, by reason of the suspension of specie payments, became *ipso facto* null and void, without judicial inquiry upon the subject; but the court held proceeding by scire facias necessary.

The following cases, cited by appellant: *Taggart v. Western Maryland R. Co.* 24 Md. 566, 89 Am. Dec. 760; *Busey v. Hooper*, 85

Md. 30, 6 Am. Rep. 350; *Hagerstown Turnp. Road v. Creeger*, 5 Harr. & J. 122, 9 Am. Dec. 495; *Hamilton v. Annapolis & E. Ridge R. Co.* 1 Md. Ch. 107; *Keene v. Van Reuth*, 48 Md. 194; *Musgrave v. Morrison*, 54 Md. 166,—will all be found on examination to be governed by the principles applied in *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1, and are all cases of legally existing bodies capable of acting, and which had in good faith attempted to comply with all legal requirements precedent thereto. On the other hand, the decisions in Maryland have always been that the legal existence of a corporation is always open to inquiry. *Agnew v. Bank of Gattysburg*, 2 Harr. & G. 498; *Lyons v. Orange, A. & M. R. Co.* 33 Md. 18, in which the court speaks of "conditions . . . which, by the express provisions of the statute, are made a condition to be performed . . . before and as a foundation of the exercise of powers and privileges under the charter." Also *Hammond v. Slaus*, 58 Md. 12; *Smith v. Silver Valley Min. Co.* 64 Md. 94, 54 Am. Rep. 760; *Bonaparte v. Baltimore, H. & L. R. R. Co.* 75 Md. 847; *Lord v. Essex Bldg. Assn.* 37 Md. 325,—in which it is said (citing *Ang. & A. Corp.* § 83): "There is certainly no doubt . . . that, where a corporation is created by statute, or under a general statute, as in this case, which requires certain acts to be done before it can be considered *in esse*, there those acts must appear to have been done, in order to establish the corporate existence." We find nothing in *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 563, 34 L. ed. 784, in conflict with the law laid down in the Maryland cases just cited; and in *Eaton v. Aspinwall*, 19 N. Y. 121, relied on by the appellant, the language of the act was not that 10 per cent of the capital stock should be paid in "before it should be a corporation," but that, "where the certificate was filed, and 10 per cent of the stock paid in, it should be a body politic." But, even if it be conceded that the legal construction put by the appellant upon the language used is a correct construction, that case could not be accepted as controlling in the face of our own decisions, and when compared with other cases in New York. In *Williams v. Bank of Michigan*, 7 Wend. 589, Chancellor Walworth said: "A contract made with the company by that name is neither an admission or any evidence whatever that it is entitled to sue by that name as a corporation aggregate." And in *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 24 Am. Dec. 51, Judge Nelson said: When a corporation sues as such "if they have not the powers and privileges assumed on their part in their dealings with him, it is their own fault, and not his. Whether they had these powers must have been known to themselves: not to the defendant, and no act of his could legally add to or detract from them. Why, then, should he be estopped from denying their corporate capacity, or they be excused from establishing it by legal evidence, when they are endeavoring to enforce their rights in a manner, and before a tribunal, which can entertain their suit only upon the proof or assumption that they are a corporate body, duly constituted by competent authority." In *Feld v. Cooks*, 16

La. Ann. 153, it was held that the recognition of defendant as a company by the plaintiffs did not preclude them from showing that defendant had no legal existence as a corporation; and that, to produce an estoppel, there should be at least an admission that the company was entitled to exercise corporate powers. Thompson, in his work on Corporations, vol. 5, (§ 6586), while admitting a regrettable conflict of judicial opinion upon this question, says that those decisions which hold that corporations can enjoy franchises while repudiating conditions upon which they are conferred unless the state is worried into judicial proceeding to oust them "are inexcusable," and he says, in § 6587: "The sound doctrine is that, where a statute creating a corporation declares that, unless the corporation performs certain acts within a prescribed time, its corporate existence and powers shall cease, or its powers and franchises shall terminate, the statute executes itself . . . without the necessity of any further action by the state, either by a legislative declaration of forfeiture or by a judgment of forfeiture in a judicial proceeding. In such a case" its legal existence "is a fact *in pais*," to be ascertained in any judicial proceeding, direct or collateral. It is laid down in 2 Morawetz, Priv. Corp. § 778, that the doctrine of estoppel cannot be successfully invoked unless the corporation has a *de facto* existence; and Judge Cooley, in *Swartwout v. Michigan Air Line R. Co.* 24 Mich. 393, says: "Where there is a corporation *de facto* with no want of legislative power to its due and legal existence . . . in controversies between the *de facto* corporation and those who have entered into contract relations with it, . . . and [where] the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation, . . . such questions should not be suffered to be raised."

In *Johnson v. Hines*, 61 Md. 180, this court has said, speaking of the invalidity of a mortgagee's title derived from a trustee's deed made without ratification of the sale, but after ratification of an audit: "There is a marked and important distinction between nullities and irregularities. An irregularity may be waived; a nullity never can be waived." In recognition of this fundamental principle, the exact question raised here was decided in the recent case of *Jones v. Aspen Hardware Co.* 21 Colo. 283, 29 L. R. A. 143. This was an action of replevin by the company to recover a stock of goods. The statute in that case provided that every corporation incorporated under any general or special law should pay the state a fee, to be graded according to its capital stock, to be due and payable upon the filing of the certificate of incorporation, and that no such corporation should have or exercise any corporate powers until such fee should have been paid; and it was held that an association, having failed to comply with the statute with respect to the payment of the fee, was neither a *de jure* nor a *de facto* corporation, and was not competent to maintain a suit as such. The court said: "The language of the act is plain and unambiguous. . . . The doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a *de facto* existence."

... A *de facto* corporation can never be recognized in violation of a positive law. . . . There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisite to the exercise of such powers." These principles were clearly recognized and applied in *Boyce v. Towson Town Station of M. E. Church Trustees*, 46 Md. 373, 374, where the court said: "The statute law of the state expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law and clearly against its policy, and justified upon no sound principle in the administration of justice.

Nor can we agree that the subsequent payment of this bonus is equivalent to its payment

before the commencement of the suit. We think it clear that the right of action must be complete before the action is brought, and the subsequent occurrence of a material fact will not avail in maintaining it. *Dean v. Metropolitan Elev. R. Co.*, 119 N. Y. 545; *Hollingsworth v. Flint*, 101 U. S. 598, 25 L. ed. 1029; *Baker v. Tillman*, 84 Ga. 401. If the plaintiff is not itself incapacitated to sue, and yet cannot maintain the particular suit because the right of action did not accrue until after commencement of the suit, *a fortiori* should it be precluded from maintaining the suit where the inability is not a special one going to the particular suit but a general inability going to the maintenance of any suit at that particular time.

We find nothing in the authorities relied on by the appellant to overthrow the doctrine upon which this decision is placed, and we must affirm the decree appealed from.

MICHIGAN SUPREME COURT.

Willis J. PERKINS, *Plff. in Err.*,

v.

Louis J. GROBBEN *et al.*

(.....Mich.....)

The retaking by a vendor, as owner, of property sold by conditional sale with a reservation of title, and the giving credit to the vendee for one half the invoice price of the property, retaining the instalments of purchase price paid, as the contract allowed, for the use of the property, will preclude an action for the balance of the purchase price on a note therefor, where this provides that the property may be retaken, and also that a suit on the note shall not waive the vendor's title to the property. *منع*

(March 15, 1898.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of defendants in an action brought to enforce payment of notes representing the purchase price of shingle mill machinery which plaintiff had taken back upon breach by defendants of their contract. *Affirmed.*

The facts are stated in the opinion.

Messrs. Wolcott & Ward, for plaintiff in error:

The parties had the right to contract to retain both remedies until plaintiff should obtain satisfaction.

Fuller v. Byrne, 102 Mich. 461; *Tufts v. D'Arcambal*, 85 Mich. 185, 12 L. R. A. 446; *Vaughn v. McFadyen* (Mich.) 68 N. W. 185.

The disposition of the courts is to construe contracts where possible so as not to provide for anything in the nature of a forfeiture.

Hays v. Jordan, 85 Ga. 741, 9 L. R. A. 873; *Preston v. Whitney*, 23 Mich. 260.

The contract plainly provides for the preser-

vation to plaintiff of both remedies. It is expressly provided that suit may be commenced on such notes and that such suits shall not be a waiver of the vendor's title to the property.

The vendor having retained two remedies must be satisfied on receiving full compensation, and the fair inference is that the clause providing for the application of payments for the use, wear, and tear would be inapplicable in case the vendor received satisfaction in full from the pursuit of either remedy.

This construction, while doing full justice to the vendor, is for the benefit of the vendee, and is the logical conclusion of the provisions of the contract retaining both remedies in the vendor.

Not only this, it is a construction which will prevent any forfeiture, and if, in a proper case, forfeitures under this class of contracts can be successfully questioned, which seems quite probable, then it is the only construction which will give to all parts of the contract force and meaning, and is therefore the proper construction for that reason.

Thirby v. Rainbow, 98 Mich. 164; *Preston v. Whitney*, 23 Mich. 260; *New Home Sewing Mach. Co. v. Bolhane*, 70 Mich. 443; *Johnston v. Whittemore*, 27 Mich. 463.

To hold the vendees personally for the debt is necessarily inconsistent with the right to forfeit any money already paid.

This is the construction vendees would be entitled to, and they cannot deny to vendor the same construction.

The provisions in the contract for several remedies are not put in the alternative, but the vendor may retake the property and he may commence suit.

Tufts v. D'Arcambal, 85 Mich. 185, 12 L. R. A. 446.

The courts will not concern themselves with the question of the wisdom of such contracts, and a recovery may be had for the purchase price of an article before the title has passed

NOTE.—As to rights and liabilities of the parties on default under conditional sale, see note to *Cole v. Hines* (Md.) 32 L. R. A. 455.

to the vendee if the parties had so contracted.

White v. Solomon, 164 Mass. 516, 30 L. R. A. 587; *Beach's Appeal*, 58 Conn. 464; *Vaughn v. McFadyen* (Mich.) 68 N. W. 135.

Retaking the property will not necessarily amount to an election of remedies on the part of the vendor, nor cut off the right of the vendee to have the property on tendering performance of his contract.

Fuller v. Byrne, 102 Mich. 461; *Tufts v. D'Arcambal*, 85 Mich. 185, 12 L. R. A. 446; *Vaughn v. McFadyen* (Mich.) 68 N. W. 135; *Dederick v. Wolfe*, 68 Miss. 500; *Montgomery Iron Works v. Smith*, 98 Ala. 644; *Hays v. Jordan*, 85 Ga. 741, 9 L. R. A. 873; *Brewer v. Ford*, 54 Hun, 116; *Acue v. Aultman*, 2 Tex. App. Civ. Cas. (Willson) § 497; *Durr v. Replogle*, 167 Pa. 847; *Mott v. Havana Nat. Bank*, 22 Hun, 354; *McPherson v. Acme Lumber Co.* 70 Miss. 649; *Matthews v. Lucia*, 55 Vt. 808; *Root v. Lord*, 23 Vt. 568; *Turner v. Smith*, 7 Kulp, 139.

Retaking the property is not a rescission of the contract, but an act performed under and in affirmation of it.

Fairbanks v. Malloy, 16 Ill. App. 277; *Latham v. Summer*, 89 Ill. 233, 31 Am. Rep. 79.

Messrs. Pratt & Davis, for defendants in error:

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.

Ohio & M. R. Co. v. McCarthy, 96 U. S. 287, 24 L. ed. 696; *Dreyfous v. Adams*, 48 Cal. 131; *Long v. Fox*, 100 Ill. 43; *McQueen v. Gamble*, 83 Mich. 344; *Callaway v. Johnson*, 51 Mo. 33; *Edwards's Appeal*, 105 Pa. 103.

The taking of the property by plaintiff and crediting the value to the defendants, made the property his own, and he should now be held to that election, and should not be permitted to go in and claim relief entirely at variance therewith.

6 Am. & Eng. Enc. Law, p. 250; *Cole v. Hines*, 81 Md. 476, 32 L. R. A. 455; *Button v. Trader*, 75 Mich. 298; *Thomas v. Watt*, 104 Mich. 206; *Black v. Miller*, 75 Mich. 323; *Hinchman v. Weeks*, 85 Mich. 535; *McDonald v. Preston Nat. Bank* (Mich.) 70 N. W. 143; *Kunze v. Wixom*, 89 Mich. 888; 7 Am. & Eng. Enc. Law, p. 32.

On default of payment the plaintiffs were not bound to accept the machine or take possession of it; they could have entered a judgment on the bond, levied on the machine and any other property of the defendant, in satisfaction of their demand. But they rescinded the contract by retaking into their possession the subject of it, which they had a right to do, and then immediately entered their bond and issued execution to levy on other property of defendant, which they had no right to do, for the contract or obligation to which the bond was collateral no longer existed.

Seamor v. McLaughlin, 165 Pa. 157, 32 L. R. A. 467; *Earle v. Robinson*, 91 Hun, 363; *Min-39 L. R. A.*

neapolis Harvester Works v. Holly, 27 Minn. 495; *Aultman v. Olson*, 43 Minn. 409; *Campbell Printing Press & Mfg. Co. v. Hickok*, 140 Pa. 290; *Scott v. Hough*, 151 Pa. 630; *Hewison v. Richetts*, 10 Rep. 558, 63 L. J. Q. B. N. S. 711; *Campbell Printing Press Mfg. Co. v. Henkle*, 8 Mackey, 95; *Rodgers v. Bochman*, 109 Cal. 552; *Smith v. Gilmore*, 7 D. C. App. 192; *Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Dowdell v. Empire Furniture & L. Co.* 84 Ala. 317; *Hine v. Roberts*, 48 Conn. 267, 40 Am. Rep. 170; *Loomis v. Bragg*, 50 Conn. 228, 47 Am. Rep. 638; *Beach's Appeal*, 58 Conn. 464; *Green v. Sinker*, 185 Ind. 434; *Mott v. Havana Nat. Bank*, 22 Hun, 354; *Helby v. Matthews*, [1895] A. C. 471. See note to *Cole v. Hines* (Md.) 32 L. R. A. 455.

From the time of the taking of possession, the agreement for the sale may be treated as void, or more properly as terminated.

Preston v. Whitney, 23 Mich. 260; *Johnston v. Whittemore*, 27 Mich. 463; *Pettyplace v. Groton Bridge & Mfg. Co.* 103 Mich. 155; *Fuller v. Bryne*, 102 Mich. 461; *Button v. Trader*, 75 Mich. 295.

Moore, J., delivered the opinion of the court:

In 1893 plaintiff received from defendants and filled an order for shingle-mill machinery to the amount of \$2,600. Defendants paid thereon \$800 in cash, and gave their notes for \$300, \$700, and \$800. These notes all read alike, except the amounts and times of payment. The first one reads as follows:

\$300

No. 1.

Grand Rapids, Mich., Aug. 1, 1893.

June 15, 1894, after date, we promise to pay to the order of Perkins & Co. three hundred dollars, at Old National Bank, Grand Rapids, Mich.; value received; with interest at eight per cent per annum until due, and thereafter at eight per cent until paid. This note is one of three notes of even date, given for part purchase price of two Perkins & Co. Michigan Favorite shingle machines. . . . It is expressly agreed that the title and ownership of all said property shall remain in Perkins & Co. until the full purchase price is paid; and, in case of any default in the payment of this or any or either of said notes, all said notes shall, at the option of Perkins & Co., notice of which is hereby waived, become and be at once due and payable, and said property may be taken back by said Perkins & Co., and in such case all payments made, and amounts collected, on this or any of said notes, shall be deemed to be payments for the use, wear, and tear of the said property up to the retaking thereof. It is further expressly agreed that upon default in the payment of this or any or either of said notes Perkins & Co. may commence suit upon the same, which shall not be a waiver of Perkins & Co.'s title to said property, and the same may be retaken by them under this note, or any of said notes, upon default thereon, as hereinbefore provided. It is further agreed that no agreement in regard to said property made after this date, or new notes, collateral, or additional security, taken by Perkins & Co., shall in any way waive, transfer, or release their title to said property, it being ex-

pressly agreed that the title to said property shall, under all circumstances, remain in Perkins & Co. till this and all of said notes are canceled, and delivered up, or assigned by Perkins & Co. After maturity of any of said notes, Perkins & Co. may keep said property insured at maker's expense, premium of such insurance to be added to this note.

Groben & Hitchcock,
per William Hitchcock.

Afterwards a chain was returned by consent of the plaintiff. The defendants not paying the notes, the plaintiff took possession of the machinery, and returned it to Grand Rapids. Plaintiff sent a statement to defendants crediting them with the amount of the machinery, taken at inventory price, less 50 per cent on account of being depreciated, the statement showing a balance due plaintiff of \$1,176, accompanied by a letter reading as follows:

July 9, 1895.

Groben & Hitchcock, Leland, Mich.

Gentlemen: We have received and unloaded the shingle machinery, and carefully inspected the same, and inclose you herewith credit memorandum for the valuation we have placed on same. We also hand you herewith a statement of your account with us to date, after crediting you with the machinery received, as per inclosed credit memorandum. We ask you what is your pleasure in regard to the settlement of balance due? Owing to the ill treatment that we have received at your hands in regard to settlement of your account with us, we do not feel that you are entitled to any extended courtesies in regard to the payment of this balance. We should therefore be pleased to hear from you regarding the same by return mail, awaiting the favor of which we remain, very respectfully yours,

Perkins & Co.,
per Everhart.

Some statement is made in the brief of counsel as to what became of the machinery after it passed into the possession of plaintiff, but we are unable to find from the record what became of it. The defendants paid no attention to the letter of July 9, 1895. In August, 1896, this suit was begun by plaintiff, who declared upon all common accounts in assumpsit, with notice that under the money counts he would give in evidence the three notes in question. After the testimony was all in, the court directed a verdict in favor of the defendants, assigning as a reason that the exercise of the option to take the property was a satisfaction of the debt, the judge expressing himself as follows: "But the simple question to be determined now is whether or not the plaintiffs, having pursued one remedy, namely, by taking the property, resuming possession of it under their title, have waived all claims to enforce the note. That is the sole question that is to be determined now. I think it is proper to consider the other question in the same connection as bearing upon what should be the true interpretation of the contract. Then the contract further provides that, 'upon default in the payment of this, or any, or either of said notes, Perkins & Co. may commence suit upon the same, which shall not be a waiver of

Perkins & Co.'s title to said property, and same may be retaken by them under this note, or any of said notes, upon default thereon as hereinbefore provided.' Now, there is a stipulation that the plaintiffs may commence suit upon these notes, and not thereby waive their right to resume possession under their title. But the converse of that proposition is not stated. It is not provided that they may take the property, and that shall not be any waiver of their right to sue and collect upon these notes. Now, is there not an implied waiver by virtue of the provision that is contained in it that covers the agreement in relation to the title to the property and the remedies under the contract? Now, the plaintiffs have taken possession of this property under a contract of this nature, which provides expressly that the title remains in them, and they may take possession on default, and that all payments previously made shall be applied as compensation for the use, wear, and tear. Is it not a proper inference, and is it not a proper conclusion of law, to say that, when they exercise that right under that contract to take the property, and apply what has been paid in that way, that it determines the whole matter? The law does not favor the enforcement of two remedies. The law recognizes the right of a party to secure his claim by as many securities as he can get; but it does not recognize his right to enforce more than one to complete satisfaction. I think the true interpretation of this contract is that the parties reserved the right to commence a suit, and provided that it should not be a waiver of their rights to take the property, but they did not reserve any right to sue and collect upon these notes after repossessing themselves of the property. And to allow that to be done would be to allow them to take the property which the law conclusively presumes under their contract was full payment, I think, of any balance that might be due after such time as the plaintiffs might see fit to make the application of prior payments for the use, wear, and tear of the property. Here they had a contract that might have been enforced five months before, and applied the payment on the wear and tear and use of the property. They saw fit to let it run five months, and then, when they took the property, that application is made. 'Up to the time of the retaking' is the language of the contract. Then, by the very terms of the contract, the money paid prior to the retaking went to the plaintiffs as compensation for the use, wear, and tear of the property. They selected the time of taking it. They might have taken it earlier, and the fact that they took it so much later I think is conclusive that they deemed that the prior payments were adequate for the use, wear, and tear of the property up to that time, and that the property at that time was of sufficient value to pay the balance of the claim." The case is brought here by writ of error.

Some controversy arose about the question of estoppel because of a payment of \$60 claimed to have been made by defendants, after the letter of July 9, 1895. That payment resulted from a garnishee process. The circuit judge was of the opinion that it was not a voluntary payment by defendants, and did not affect the other questions in the case. We

think he was right, and shall not discuss that feature of the case further.

It is the contention of the plaintiff that, notwithstanding he has received back the machinery after it had been used about sixty days, which was billed at \$2,600, and has received a payment of \$800, he is still entitled to a judgment for the face of the notes and interest, and he urges this would not be unjust, because the parties have so agreed, and they must be presumed to know the effect of their agreement; and it is also said "that the proper construction of the contract is that, under such circumstances, plaintiff cannot lawfully retain the property on being tendered his money, and that, therefore, the mere retaking of the property cannot be treated (as was done by the trial court) as an application of all prior payments towards the use, wear, and tear, etc., of the machinery, and as an election of remedies so as to prevent his maintaining an action on the notes." This was not the construction put upon the contract by the plaintiff when he credited the defendants with the inventory price of the machinery taken back, less 50 per cent for depreciation, and wrote them July 9, 1895: "We also hand you herewith a statement of your account with us to date, after crediting you with the machinery received, as per inclosed credit memorandum. We ask you what is your pleasure in regard to the settlement for balance due? Owing to the ill treatment we have received at your hands in regard to the settlement of your account with us, we do not feel that you are entitled to any extended courtesies in regard to the payment of this balance." There was nothing in this letter indicating that plaintiff recognized any obligation to return the property upon a tender of the amount due upon the notes, or that he was holding it for the purpose of enforcing the lien he had upon it for the amount of his debt. Does the law give the contract any such construction as is now claimed by counsel? Counsel do not call our attention to any cases directly in point, but cite *Hays v. Jordan*, 85 Ga. 741, 9 L. R. A. 378; *Preston v. Whitney*, 23 Mich. 262; *Johnston v. Whittemore*, 27 Mich. 468; *New Home Sewing Mach. Co. v. Bothane*, 70 Mich. 448; *Thirby v. Rainbow*, 93 Mich. 164; *White v. Solomon*, 164 Mass. 516, 80 L. R. A. 587; and other cases,—claiming that the reasoning employed by the court tends to support their contention. So far as these cases are in point at all, we think they are against the position of the plaintiff. In the last-named case, Chief Justice Field wrote an opinion, which was joined in by two of the other judges, in which he said: "The contract, I think, is in effect a contract for a conditional sale, and the intention is that the title shall not vest in the defendant until the price is paid. If the price is not paid according to the terms of the contract, the plaintiffs are authorized to retake the manikin without being accountable to the defendant for any of the money paid by him

on account of the price. If the plaintiffs exercise this right of retaking the manikin into their possession because the price is not paid, they have both the title and the possession, because they have never parted with the title. What, then, is the rule of damages under such a conditional contract of sale, when the vendee refuses to receive the article, and it is returned to and retained by the vendor? I think that the construction to be given to the contract is that, if the defendant does not pay the price according to the contract, the plaintiffs may retake the manikin from the possession of the defendant and retain what he has paid on account of the price, or they may leave the manikin in the possession of the defendant and sue him for the instalments of the price which remain unpaid, but the plaintiffs cannot collect the whole price and also retake the manikin; they cannot hold the title to the property and also recover the price of it." It is not agreed in the contract that, if the property is retaken, and the payments made up to that time are treated as payments for the use, wear, and tear of the said property, that the vendor may also sue for the amount due on the notes. After the vendor has taken possession of the property, the contract does not give the vendees any further interest in it. The character of the contract, and the results which may be worked out under it, are not such as to make it desirable to read into it provisions it does not contain. The contract provides for two ways of enforcing it. The plaintiff might sue on the note, and retain the property until the judgment was paid, or might retake the property, and treat the payments up to that time made as payments for the use, wear, and tear of the machinery, but he cannot do both. The plaintiff has taken possession of the property as the owner thereof. What have the defendants had as the consideration of the note? They acquired no title or interest in the property, and could not until they paid the notes. They could not call the plaintiff to account for a disposition of the property, if he has made any, because they had no interest whatever in it, having made default in the payment of the notes, the vendor having exercised his right, under the contract, to take possession. The defendants have simply had for the notes the use of the property, and for that use they have paid the \$800, which the contract gives the vendor the right to so apply. The vendor is not entitled to the title and possession of the property, and to be paid for it also. *Seanon v. McLaughlin*, 165 Pa. 150, 32 L. R. A. 467; *Bailey v. Hervey*, 135 Mass. 172; *Earle v. Robinson*, 91 Hun, 363; *Campbell Printing-Press & Mfg. Co. v. Hickok*, 140 Pa. 290; *Scott v. Hough*, 151 Pa. 680; *Hine v. Roberts*, 48 Conn. 267; *Green v. Sinker*, 135 Ind. 435. See also *Vaughn v. McFadyen* (Mich.) 63 N. W. 135.

Judgment is affirmed.

The other Justices concur.

MISSOURI SUPREME COURT.

John C. O'KEEFE, *Resp't.*,

v.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, *Appl.*

(140 Mo. 558.)

A building that has lost its identity and specific character as a building and become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing and the lower floors are in such condition that they could be safely used for rebuilding, is a total loss within the meaning of Rev. Stat. 1890, § 5897, requiring full payment of insurance in case of total loss.

(July 6, 1897.)

A PPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to enforce payment of a fire-insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. *Fyke, Yates, & Fyke*, for appellant:

The evidence is uncontradicted that defendant demanded of plaintiff that he furnish to defendant, in accordance with the plain terms of the contract, verified plans and specifications of the property damaged, and that plaintiff refused so to do. This requirement of the contract is reasonable, valid, and binding.

Arnold v. Hartford F. Ins. Co. 55 Mo. App. 149; *Fawcett v. Liverpool, L. & G. Ins. Co.* 27 U. C. Q. B. 225.

The property insured was not a total loss. Such being the case it was at plaintiff's option under § 5899, Rev. Stat., to have the property repaired to the extent of such damage, or to have defendant pay him a sum of money equal to the damage done to the property.

The property not having been totally lost, and a difference having arisen between plaintiff and defendant as to the amount of damage, the defendant had the right under the plain terms of the contract to have the amount of damage fixed by appraisers.

Scottish Union & Nat. Ins. Co. v. Clancy, 71 Tex. 5; *Old Snucelito Land & Dry Dock Co. v. Commercial Union & Assur. Co.* 66 Cal. 253; *Gauche v. London & L. Ins. Co.* 10 Fed. Rep. 847; *Hamilton v. Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 84 L. ed. 419.

The instruction that "by a total loss it meant that the building has lost its identity and specific character as a building, and become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing," is misleading, and is not a proper definition of the term "total loss."

Royal Ins. Co. v. McIntyre, 90 Tex. 170, 35 L. R. A. 672; *Ampleman v. Citizens' Ins. Co.* 35 Mo. App. 308; *Ampleman v. North British & M. Ins. Co.* 35 Mo. App. 317.

NOTE.—On the question, What constitutes a total loss of a building insured? see also *Royal Ins. Co. v. McIntyre* (Tex.) 35 L. R. A. 672, and other cases cited in footnote thereto.

89 L. R. A.

The property insured was "his two-story and foundation brick, gravel-roof building, etc." The foundation was a part of the property insured, and formed an integral part of it, necessary to its construction.

Truedell v. Gray, 18 Gray, 318; 1 Bouvier, Law Dict. p. 195.

Messrs. *Wallace & Wallace* for respondent.

Grant, P. J., delivered the opinion of the court:

This is an action upon a policy of insurance issued by the defendant to the plaintiff on the 15th day of May, 1894, insuring plaintiff for one year against loss or damage by fire, to an amount not exceeding \$3,000, to his two story and foundation brick, gravel-roof building, with its additions, porches, steam, gas, and water pipes, plumbers' work and fixtures, steam-heating apparatus and connections and piping, stone and prismatic sidewalks adjoining, plate glass, skylights, and all permanent improvements therein. The policy contained this provision: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided. It shall be optional, however, with this company . . . to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice . . . of its intention so to do. If fire occurs, the insured shall furnish, if required, verified plans and specifications of any building destroyed or damaged. In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, and, failing to agree, shall submit their differences to the umpire; and the award, in writing, of any two shall determine the amount of such loss. The loss shall not become payable until after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisement has been required. No suit or action on this policy shall be sustainable until after full compliance by the insured with all the foregoing requirements." On June 8, 1894, a fire occurred, by which plaintiff claimed the building was wholly destroyed, in contemplation of the statute of this state, and defendant claimed that there was only a partial loss, and demanded an arbitration. The great burden of the testimony was

to the effect that the front, which consisted of iron pillars and brick superstructure, was rendered useless in the condition in which it was left. The pillars were warped, and the wall above them sprung out of plumb. The side walls of the lower story were so badly burned that the architects and carpenters testified that the building could not be repaired; that the old walls would have to be taken down, and the building rebuilt from the foundation up. It appeared, however, that a portion of one of the walls in the second story was not ruined by the fire, and the effort of defendant was to show that this wall could be shored up, and the burnt portion in the first story taken out and rebuilt; but the architects and builders testified that this would be much more costly than taking down the whole of the walls, and building them anew, and, even if done, would not be as good as it was before the fire. The joists were burnt, and the roof and window sills destroyed. The main contention is based upon the evidence that, so far as the witnesses could see, the foundation was not hurt much, if any. Two builders testified for defendant as to their estimates for rebuilding the house. One, Mr. Kelly, testified it could be repaired and replaced for \$1,738.45; the other, Mr. Huckle, estimated it at \$1,688.50; but neither testified it could be done without taking down all the old walls. Plaintiff offered testimony of builders, also, who estimated the loss, one at \$3,419.50, the other at \$3,752. The other defense set up in the defendant's answer—the failure of the plaintiff to furnish the defendant with plans and specifications of the building—grows out of the correspondence between the parties. The company wrote Mr. O'Keefe, under date of June 12, demanding an adjustment of the damages by appraisers. Mr. O'Keefe answered this under date of June 14, informing the company that there had been a total destruction of the building as such, and demanding the face of the policy. On July 27, Mr. O'Keefe furnished the company with proofs of loss, which were duly received, and not objected to. On August 13, the company wrote Mr. O'Keefe, acknowledging receipt of the proofs, giving notice that they were willing to repair the building or adjust the damages by appraisers. And on August 20, the company again wrote Mr. O'Keefe, as follows:

John C. O'Keefe, Esq.—

Dear Sir:

We hereby give you notice that we will repair the building, No. 1521 West Ninth street, Kansas City, Mo., insured under our policy 13,928, Kansas City, Mo., agency, and in this way make good the damage which occurred on the 3d day of June, 1894. You are hereby requested to furnish us with verified plans and specifications of this building for the purpose aforesaid.

This letter was replied to by the counsel for Mr. O'Keefe, informing the company that, if they would rebuild from the ground up, they could do so, but that the proposition to repair was impracticable, as no part of the old walls could be used, and their use had been forbidden by the city authorities.

1. The merits of this appeal hinge upon whether this was "a total loss" by fire, within 39 L. R. A.

the meaning of § 5897, Rev. Stat. 1889, or "a partial loss" only, and therefore falling within the provisions of § 5899, Rev. Stat. 1889. To ascertain the fact, the court directed the jury as follows: "By a total loss is meant that the building has lost its identity and specific character as a building and become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing." If this is a correct instruction on the law of the case, the finding of the jury must conclude the defendant. In *Havens v. Germania F. Ins. Co.* 123 Mo. 408, 26 L. R. A. 107, the court in banc defined "a total loss," within the meaning of a similar section, when applied to a building, to mean "totally [or wholly] destroyed as a building, although there is not an absolute extinction of all its parts. It matters not that some debris remains which may be useful or valuable for some purposes." Over thirty years ago, this court, in *Nave v. Home Mut. Ins. Co.* 37 Mo. 430, 90 Am. Dec. 394, held that a policy of insurance upon a building is an insurance upon the building as such, and not upon the material of which it was composed. In *Lindner v. St. Paul F. & M. Ins. Co.* 98 Wis. 526, it was ruled by the supreme court of Wisconsin that, where the identity of a building as such has been destroyed by fire, it is a total loss, though some of its materials may not have been entirely destroyed. In that case it appeared from the evidence of the adjuster that the foundation and cellar of the house were entire, and a portion of the sills stood upon the stone work, and it was argued that, because the foundation was intact and had not been broken into a shapeless mass, it was not "a total loss." But the court said this evidence would not prevent the case from being regarded as one of total loss. "It would not be expected that the foundation and cellar would be utterly destroyed." The court quoted with approval the language used in *Seyk v. Millers' Nat. Ins. Co.* 74 Wis. 72, 3 L. R. A. 523, that "it cannot be doubted that the identity and specific character of the insured buildings were destroyed by the fire, although there was not an absolute extinction of all the parts thereof. This was entire destruction of the buildings, within the meaning of the statute." So clear, indeed, did it seem to the court, that it held that the circuit court might have properly given a peremptory instruction that it was a total loss. To the same effect are the following decisions: *Oshkosh Pkg. & Provision Co. v. Mercantile Ins. Co.* 81 Fed. Rep. 200; *German Ins. Co. v. Eddy*, 38 Neb. 461, 19 L. R. A. 707; *Insurance Co. of N. A. v. Baehler*, 44 Neb. 549; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 108, 59 Am. Rep. 613; *Huck v. Globe Ins. Co.* 127 Mass. 806, 84 Am. Rep. 873; *Williams v. Hartford Ins. Co.* 54 Cal. 450. In *Corbett v. Spring Garden Ins. Co.* 85 Hun, 250, the court said: "There was sufficient to go to the jury upon the question whether the building had 'lost its identity and specific character as a building.' If it had, then there was a total destruction within the meaning and intent of the parties and the policy." See also *Royal Ins. Co. v. McIntyre* (Tex. Civ. App.) 34 S. W. 669. We hold the instruction was proper, and that the court committed no error in refusing to instruct for defendant that if the cellar walls

remained, and the lower floors were in such condition that they could be safely used in rebuilding, the building was not wholly destroyed. The escape of the stones in the foundation walls from complete extinction, if such a thing be possible, did not prevent the destruction of the building, as such, being total.

2. It follows as a necessary corollary that as the jury found there was a total loss, and the right to an arbitration was only stipulated for in case of a partial loss, there was nothing to arbitrate. An agreement to arbitrate in case of a total loss is repugnant to our statute and void. *Daggs v. Orient Ins. Co.* 136 Mo. 882, 85 L. R. A. 227; *Havens v. Germania F. Ins. Co.* 128 Mo. 403, 26 L. R. A. 107. Clearly, an

appraisement of property wholly destroyed would be an anomaly.

As to the remaining points, they seem to be without merit. The proofs were duly made out, and no objections were made to their sufficiency. The whole case depended upon the claim of plaintiff that the loss was total. If he was right, there was nothing to appraise, nothing to arbitrate. Under proper instructions, the jury sustained his claim, and their verdict concludes the fact.

The judgment is affirmed.

Sherwood and Burgess, JJ., concur.

Rehearing denied.

WASHINGTON SUPREME COURT.

STATE of Washington, *Resp't.*,

v.

A. F. WILLIAMS, *Appt.*

(.....Wash.....)

1. Three weeks delay in filing a brief
for appellant in a criminal case will not require the dismissal of the appeal when the delay was

NOTE.—*Right of a prisoner to appear unmanacled at his trial.*

- I. *In general.*
- II. *When justifiable.*
- III. *Upon his arraignment and sentence.*
- IV. *As a ground of reversal and review.*
- V. *Provisions of state Constitutions and statutes.*

As to the rights of persons charged with felony to appear in person, and with counsel, to be present at the trial and be confronted with witnesses, see note to *Gore v. State* (Ark.) 5 L. R. A. 832, and briefs in *Parker v. People* (Colo.) 4 L. R. A. 803; *French v. State* (Wis.) 21 L. R. A. 402.

The decision in the principal case, *STATE v. WILLIAMS*, is in keeping with the general rule established by the prior cases to the effect that manacles must not be placed upon a prisoner when on trial, unless it is necessary so to do in order to secure him or to prevent harm in cases where he is not to be trusted.

I. *In general.*

In the *Mirror of Justice*, lib. 5, chap. 5, § 4, it is said that it is an abuse that a prisoner should be loaded with irons or put in chains before he is attainted with felony. It does not, however, appear whether the time of actual trial is meant.

So in *Xen. Hell.* lib. 1, chap. 7, § 20, it would appear that the decree of Canons was peremptory, and ordained that anyone who wronged the Athenian people should be put in chains and defend himself in the general assembly.

It has ever been the rule at common law that a prisoner brought into the presence of a court for trial upon his plea of not guilty to an indictment for any offense is entitled to appear free of all manner of shackles or bonds. *People v. Harrington*, 42 Cal. 165, 166, 10 Am. Rep. 296.

In 3 Coke's Institutes, p. 34, it is said, if felons come to judgment to answer, etc., they shall be out of irons and all manner of bonds, so that their pain shall not take away any manner of rea-

son nor them constrain to answer, but at their free will. And in another place the same author says, and of prisoners we will that none shall be put in irons, but those which shall be taken for felony or trespass in parks or vivaries, or which be found in arerages upon account, and we defend that otherwise they shall not be punished nor tormented. Of this *omnes autem attachabiles licet vicecomiti in prisona custodire etc., non tamen ad puniend, sed ad custodiend*, etc. It is an abuse that prisoners be charged with irons, or put to any pain before they are attainted, and there is no difference in law, as to a priest and a layman, as to irons. So, where the law requires that a prisoner shall be kept in *salva et arcta custodia*, yet that must be without pain or torment to the prisoner.

2. The ancient right of one accused of crime under an indictment or information to appear in court unfettered is preserved by legislative adoption of the common law.

son nor them constrain to answer, but at their free will. And in another place the same author says, and of prisoners we will that none shall be put in irons, but those which shall be taken for felony or trespass in parks or vivaries, or which be found in arerages upon account, and we defend that otherwise they shall not be punished nor tormented. Of this *omnes autem attachabiles licet vicecomiti in prisona custodire etc., non tamen ad puniend, sed ad custodiend*, etc. It is an abuse that prisoners be charged with irons, or put to any pain before they are attainted, and there is no difference in law, as to a priest and a layman, as to irons. So, where the law requires that a prisoner shall be kept in *salva et arcta custodia*, yet that must be without pain or torment to the prisoner.

And in 2 Hale, P. C. 212, it is said that the prisoner, though under indictment of the highest crime, must be brought to the bar without irons and all manner of shackles or bonds, unless there be danger of escape, and then they may be brought with irons, although the author notes that at that day they usually came with their shackles on their legs for fear of an escape, but stood at the bar unbound until they received judgment.

In a note to the foregoing it is said, it appears to have been one author's opinion, that upon whatever occasion a prisoner be brought into court, he ought not to stand there *in vinculis* till after his conviction, when he comes to receive judgment, not even at the time of his arraignment (for that is the time our author is here discoursing of), yet in *Layer's Case*, 16 How. St. Tr. 94, a difference was taken at the time of arraignment and the time of trial; and accordingly the prisoner in that case stood at the bar in chains during his arraignment.

At the present day the doctrine would seem to be well established that the practice of shackling prisoners should never be resorted to except in cases where the circumstances show some real danger of escape, or perhaps of rescue. *Faire v. State*, 58 Ala. 74.

3. The constitutional right of an accused person to appear and defend in person includes the right to be unfettered unless some impelling necessity demands his restraint to secure the safety of others and his own custody.

4. The rights of an accused person to a fair trial are impaired by keeping manacles on other persons who are kept in court and in the presence of the jury when they have been found guilty of the crime of burglary with which he also is charged.

(October 22, 1897.)

In *State v. Kring*, 64 Mo. 591, Affirming 1 Mo. App. 438, it is said that without some good reason authorizing the criminal court to depart from the general practice in England and in the United States the shackles of the prisoner when brought before the jury for trial should be removed.

And the language of the court in *Rainey v. State*, 20 Tex. App. 455, 472, is identically the same.

So, in *Faire v. State*, 58 Ala. 74, 80, the court says that to shackle prisoners without cause is a revolting practice, and that it should be an extreme case to justify shackles or manacles on a prisoner undergoing trial.

The rule would seem to be based upon the reason that the condition of a prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties. *State v. Kring*, 64 Mo. 591, Affirming 1 Mo. App. 438.

Any order or action of the court, which, without evident necessity, imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf. *People v. Harrington*, 42 Cal. 185, 186, 10 Am. Rep. 296.

In *Lee v. State*, 51 Miss. 566, 574, it is stated that a strong reason for the rule might be found in the knowledge that, under some circumstances, shackles and bonds are degrading and pernicious in their effect upon the wearer, and, in the minds of others, but tend to contempt and prejudice; while, under other circumstances, they would create sympathy and favor, and that a trial might occur, wherein the shackles of the accused would have no influence on the minds of the jury or the public.

When the court allows a prisoner to be brought before the jury with his hands chained in irons, and refuses, on his application or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused as being, in the opinion of the judge, a dangerous man and one not to be trusted, even under the surveillance of officers. *State v. Kring*, 64 Mo. 591, Affirming 1 Mo. App. 438.

Again, it has been said that it is irregular to compel the prisoner to appear at the bar in irons upon the trial of his cause, for no better reason than that it would be inconvenient to remove them, or that their removal would cause a delay of a few hours in the trial. *Territory v. Kelly*, 2 N. M. 297, 302.

And the mere fact that it will take time and require the work of a blacksmith to remove them is no excuse. *State v. Smith*, 11 Or. 205, 207.

So in *Cranburne's Case*, in the year 1698, 5 How. St. Tr. 979, note, the prisoner, who had been previously arraigned, was brought to the bar in irons, and Chief Justice Holt ordered his irons to be removed upon the ground that the prisoner ought to stand and plead at ease when tried, but, it appears L. R. A.

A PPEAL by defendant from a judgment of the Superior Court for Whitman County convicting him of burglary. *Reversed.*

The facts are stated in the opinion.

Mr. John F. Dillon for appellant.

Mr. John W. Mathews for the State.

Reavis, J., delivered the opinion of the court:

Appellant was convicted in the superior court of Whitman county of the crime of burglary. The prosecuting attorney appears

pleading that there were no instruments in court with which the irons could be removed, the prisoner remained shackled until the court adjourned when the irons were required to be knocked off.

In the *Trial of Lilburne*, 4 How. St. Tr. 1308, the prisoner objected to the irons which had been placed upon his hands, and claimed that by the laws of England no prisoner for any crime whatsoever, who behaved himself civilly and peaceably in his imprisonment, ought to be put in irons or to any other pain or torment before he was legally convicted. The court ordered him to be released from his irons and from close imprisonment.

So, in the *Trial of Twenty-nine Regicides*, 5 How. St. Tr. 979, it was held that, when the prisoners came to the bar to be tried, their irons ought to be taken off, so that they be not put in any torture while they make their defense, be their crime never so great, and the court therefore ordered their irons to be removed.

Again, in *Vaughan's Case*, decided in 1693, 5 How. St. Tr. 980, note, when the prisoner who had been previously arraigned was brought to the bar his irons were ordered to be taken off.

And in *Fletcher's Case*, decided in the year 1746, 5 How. St. Tr. 981, note, the prisoner desired that his fetters might be taken off while he was on his trial, which desire the court granted.

In *Layer's Case*, 16 How. St. Tr. 94, in answer to a complaint on behalf of the prisoner, it is said: "As to the chains you complain of, it must be left to those to whom the custody of you is committed by law to take care that you may not make your escape; when you come to your trial then your chains may be taken off."

II. When justifiable.

In *Faire v. State*, 58 Ala. 74, it is said that it is the duty of the sheriff to keep the prisoner in safe custody that he may abide the judgment of the law; and his watchfulness, sanctioned and controlled by the court, will rarely err in the exercise of such power.

So, there is no absolute unbending rule that a prisoner on trial for crime shall in no case be fettered. *Faire v. State*, 58 Ala. 74, 80.

In *Faire v. State*, 58 Ala. 74, the court confessed that, inasmuch as there are cases in which it is permissible to try prisoners with shackles on them, it was unable to lay down any rule for the guidance of the primary courts, except to leave the question to their sound and enlightened discretion, although it is stated that no prisoner, while undergoing trial, shall be exposed to the discomfort or mortification of any description of shackles or bonds, unless his conduct in prison, or other satisfactory evidence, created a reasonable belief that such restraint is necessary to prevent his escape, or perhaps to prevent a rescue if surrounding circumstances give sufficient evidence of the danger.

There must, however, be some necessity for the shackles. *State v. Smith*, 11 Or. 205, 207.

In passing upon the right of a prisoner to appear unmanacled at his trial, the court, in *Faire v. State*, 58 Ala. 74, 80, said that, even in *People v. Harrington*,

on behalf of the state, and moves to dismiss the appeal because appellant's brief was not filed in due time. It appears that the time within which appellant's brief ought to have been filed expired on the 2d day of June, 1897, and that the brief was not filed until the 23d day of the same month. But the counsel who appeared for the defendant at the trial had removed from the state before the brief was filed. The defendant was at the time confined in jail, and, so soon as he learned that the brief was not filed within the proper time,

procured it to be filed. The question not being one of the jurisdiction of the appeal, the appellant's excuse for failure to file his brief within the proper time is deemed sufficient, and the motion to dismiss denied.

The first error assigned by appellant is the refusal of the court to grant a continuance on appellant's application because of the absence of a material witness for appellant. The affidavit, while rather general in its statement of the acts, seems to be sufficient to have entitled appellant to further time. But, as this

ton, 42 Cal. 165, 10 Am. Rep. 296, the language of the court forbids the construction that it would under all circumstances be error to proceed with the trial of the prisoner without removing his shackles, and also that some importance should be attached to the fact that in that case the decision of the court that the prisoner was entitled to appear for trial "free from all manner of shackles or bonds" was qualified by the emphatic language, "unless there is danger of his escape."

The rule applies to prisoners under indictment of the highest crime, unless there is danger of escape, and then they may be brought with irons. *Faire v. State*, 58 Ala. 74, 80, citing 2 Hale, P. C. p. 219; 4 Bl. Com. 322; *Lee v. State*, 51 Miss. 566, 574; *Matthews v. State*, 9 Lea, 128, 130, 42 Am. Rep. 687.

In *Faire v. State*, 58 Ala. 74, wherein the prisoner remained shackled for fear of an escape, and to prevent his carrying out certain threats, the court drew a distinction between that case and the practice as stated by Lord Chief Justice Holt, upon the ground that the remarks made by him were made on the trial of a case which was marked by no facts or circumstances rendering it necessary that the prisoner should be shackled, and were intended to express more a rule of judicial propriety than of municipal law, the justice then dealing with the custom which had become common and oppressive, and not with a case whose circumstances showed the necessity of bonds to prevent escape.

So, if the court is of the opinion that the retention of irons upon the limbs of the prisoner is a reasonable precaution to prevent an escape, or to insure the safety of the bystanders, and the orderly conduct of the prisoner, he may remain shackled. *Territory v. Kelly* 2 N. M. 297, 302.

And the court has power, at the commencement or during the progress of the trial, to make such orders as may be necessary to secure a quiet and safe one, but there must be some reason, based on the conduct of the prisoner at the time of the trial, to authorize so important a right to be forfeited. *State v. Kring*, 64 Mo. 591, Affirming 1 Mo. App. 438.

Again, in *Rex v. Rogers*, 3 Burr. 1812, the prisoners had broken open the jail after having murdered the jailer, and had become a terror to the neighborhood, and from a memorandum to the case it appears that they remained chained together during the whole proceeding.

Where it appeared from representations made by the sheriff, not under oath and inaudible to anyone save the court, and in a voice not to be heard either by the jury, the defendant, or his counsel, that the prisoner had told the sheriff that he would rather die than be hung or sent to the penitentiary, and that if the jury found him guilty he would not come out of the court-house alive, as he would escape or the officer would have to shoot him, and that from the character of the prisoner, and his conduct, the sheriff entertained serious apprehensions that he would attempt an escape and create a scene in the court room, if not secured, after the first day of the trial, clasps, connected by a chain 18 inches long by 1 1/2 inches in diameter, were placed on his ankles by order of

the court directing the necessary precautions to be taken, but not in the presence of the jury, and made as little apparent as possible, and that irons should not be put on his hands. The court stated that the judge and sheriff were sworn officers, and there did not seem to be a violation of the usages of the court, or of any right of the prisoner, for the court, in incidental matters connected with the conduct of its business, to act on the statement of its executive officer without requiring him to take the oath as to the truth of his representations, and that to require a public disclosure and trial of the facts, as a preliminary to the placing of irons on prisoners when on trial, would be much more likely to create prejudice against the prisoner than quietly to order the same, as was done in that case. *Faire v. State*, 58 Ala. 74.

In *State v. Lewis*, 19 Kan. 280, 283, 27 Am. Rep. 113, the defendant in custody, charged with burglary in the second degree, while awaiting trial, broke jail and escaped. He was subsequently arrested under a warrant issued by a justice of the peace and charged with breaking jail. He was taken before the justice for a preliminary examination without his handcuffs being removed, and waived a preliminary examination and was returned to jail. He was subsequently tried for burglary and acquitted, and later an information was laid against him, charging him with the breaking of jail and escaping, to which, upon arraignment, he pleaded, *inter alia*, that he was handcuffed and in the custody of the sheriff and policeman when he waived the preliminary examination, and that therefore such waiver was a nullity and the county attorney had no power to file such information. The court held that such plea was bad and sustained the demurrer thereto.

Where the proceedings had been temporarily suspended to allow the sheriff time to summon additional jurors, and to remove the prisoner to the dock in the rear of the court room and there handcuff him in order to prevent escape, and while there some of the jurors who had failed to answer upon the first call appeared and were passed upon by the prosecution and accepted by the prisoner's counsel before he had returned to his side, and there had been ample time for objection, all that occurred being within the view and hearing of the prisoner, and it was only intended that he should be fettered during the suspension of the proceedings in making up the jury, it was held that such proceeding was in conflict with the humane spirit of the law that required a prisoner to be unfettered during his trial, and therefore the verdict could not be reversed upon that ground. *Matthews v. State*, 9 Lea, 128, 131, 42 Am. Rep. 687.

So, in *Poe v. State*, 10 Lea. 673, 675, the prisoners, charged with murder in the first degree, were brought up for trial manacled together by the wrist, and after one witness had been examined, the prisoners' counsel moved for an order upon the sheriff to remove the manacles as being an unlawful restraint, prejudicial to their rights while on trial, but the trial judge declined to make the order upon the ground that the loose manner in which they were guarded required either the man-

question is not likely to arise upon a new trial, it is not necessary to further notice this objection than to observe that § 22, art. 1, of the state Constitution, guarantees to persons prosecuted for crime the right to have compulsory process to compel the attendance of witnesses in their

behalf, and under this constitutional guaranty the accused has the right to compulsory process to procure the physical attendance of the witness at the trial.

It appears that during the trial the defendant was brought into court, and kept there, in

ancles, or some other stringent orders to the guards which would be equally unpleasant to the prisoners, because one of the prisoners had been twice before the court on a similar charge, and had escaped from jail, and was therefore a fugitive from justice, while on another occasion he had escaped from his guard, although recaptured, and also for the reason that both prisoners while in jail had been furnished with arms of a dangerous character by unknown persons and with keys to unlock their handcuffs, and had also found means or implements by which to make their escape, the court regarding them as desperate men who, if unmanacled, could easily disarm the guard and effect their escape. This was held to be a matter within the discretion of the trial court, whose action could not be reversed unless it was shown that there was a clear case of abuse as to such discretion, the record in that case not showing any such abuse.

In *Faire v. State*, 58 Ala. 74, 98, there was a dissenting opinion by Chief Justice Brickell, in which he held that it was not a matter of discretion with the judge whether the prisoner should be brought to the bar or tried in fetters, although he admitted that there might possibly be a necessity for fettering a prisoner, and if such necessity was shown it might be the duty of the court to order it, and he deemed the action of the court reviewable, and thought the judgment of conviction should be reversed unless it clearly appeared that there was an immediate pressing necessity for the order.

Yet the mere fact that the prisoner had assaulted a person in court about three months before the term at which he was tried would not be sufficient to justify the court in assuming, on his trial for life, that he would be guilty of similar outrages, and thus order him to be shackled. *State v. Kring*, 64 Mo. 591, Affirming 1 Mo. App. 438.

In *State v. Stalcup*, 24 N. C. (2 Ired. L.) 50, the right of an officer arresting a prisoner under a state warrant to secure him by shackles was held justifiable, when, in the opinion of such officer, it was necessary so to do in order to secure his prisoner, but that case did not raise the question of the right to produce his prisoner on trial in such a condition. See *Rainey v. State*, 20 Tex. App. 455, 472, *infra*, IV.

III. Upon his arraignment and sentence.

In *King v. Walte*, 1 Leach, C. L. 28, 36, the prisoner was charged with a felony in the embezzlement of an East India bond committed to his care, and at the time of his arraignment desired that his irons might be taken off. The court informed him that it had no authority for that purpose until the jury were charged to try him, whereupon he pleaded not guilty, and being put upon trial his fetters were immediately knocked off.

So, in *Laver's Case*, 16 How. St. Tr. 94, it was urged by counsel that the prisoner's irons should be taken off before he pleaded. The court stated that there was no doubt that when the prisoner came up for his trial he was not to be *in vinculis* during his trial, but should be so far free that he should have the use of his reason and all advantages to clear his innocence, but that when he was only called upon to plead by advice of his counsel he was not to be then tried, and that when he came up for trial if he made complaint the court would take care that he should be in a condition proper to make his defense, the court making the distinction between arraigning the prisoner to plead and his trial.

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In that case also the court drew a distinction between the case of a prisoner on trial, and one subsequently brought before the court for sentence after trial, the court stating that none of the cases went any further than during the time of his trial, although, in that case, it was stated that if he had anything to say and thought he might not be able to do it so well while he was under irons the court would recommend it to the attorney general not to make a precedent of it that his irons might be taken off.

But even upon his arraignment it is held in American cases that unless there is danger of escape, he should not be brought in irons. *Faire v. State*, 58 Ala. 74, 80, citing 1 Bushop, Crim. Proc. § 731; *People v. Harrington*, 42 Cal. 165, 166, 10 Am. Rep. 296. See also *State v. Lewis*, 19 Kan. 280, 263, 27 Am. Rep. 113, *supra*, II.

IV. As a ground of reversal and review.

The rule would seem to be that, when the record affirmatively discloses the fact that there is no reason whatever for placing shackles or manacles upon the prisoner, against his protest, while undergoing trial, a question of law arises which may be reviewed on appeal, and the judgment reversed. *Territory v. Kelly*, 2 N. M. 297, 302.

Yet the fact that the court or sheriff deemed it necessary to shackle a prisoner in order to prevent his escape during trial is no ground for reversal. *Lee v. State*, 51 Miss. 568, 574.

When, however, the record discloses some valid or reasonable ground of apprehension that the prisoner may attempt to escape or injure the bystanders or the officers in charge, or will be otherwise disorderly or dangerous, it shall be left entirely to the discretion of the trial court to determine whether the prisoner should be ironed or not, and when the record is silent as to whether there is or is not any valid excuse for retaining the irons upon the prisoner during the trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in refusing to order the irons to be removed. *Territory v. Kelly*, 2 N. M. 297, 305.

In *State v. Smith*, 114 Mo. 406, 423, one of the grounds for a new trial was that the defendant was allowed to remain in shackles after the trial had begun. It was held that such a statement could not be supported by *ex parte* affidavits, and that the only way in which matters occurring in the presence of the court could be preserved was by incorporating them in the bill of exceptions.

It has been said that the accused has a right to be present during the trial and at the return of the verdict, and that when deprived of these privileges by being imprisoned in a jail or in any other improper manner the verdict returned against him should not be followed by a judgment or sentence of the court, but a new trial should be ordered if requested. *Rose v. State*, 20 Ohio, 83. In this case, however, it did not appear that the prisoner was manacled or shackled upon the first trial, and the case is therefore here cited only as an authority for showing that he must not be deprived of his privileges by being imprisoned in jail or "in any other improper manner," as the shackles placed upon the prisoner may be held to be an imprisonment as depriving him of his personal liberty; upon which see *People v. Harrington*, *infra*.

In *People v. Harrington*, 42 Cal. 165, 166, 10 Am. Rep. 296, the prisoner, indicted, tried, and convicted of the crime of robbery, appeared in shack-

manacles, until, upon protest of defendant's counsel, the manacles were finally removed, but after a considerable period of time had elapsed, and further, that during the progress of the trial, and when it was very dark out of

doors, at the state's request a view of the premises which were alleged to have been entered burglariously by the defendant was ordered by the court, and that, in the presence of the jury, manacles were placed upon the de-

les, but as there was no pretense of necessity for the manacles and chains during his trial to secure his presence to answer the judgment, the court held there was error and that his legal rights were materially prejudiced, and therefore reversed the judgment and remanded the case for a new trial.

In *State v. Smith*, 11 Or. 205, 207, the defendant had been convicted and sentenced for an assault with a deadly weapon and wounding an officer of the penitentiary having the charge and custody of the prisoner, and the fact that the prisoner was kept with irons on his feet during the trial, and that the court refused a motion made by his counsel to have them removed, upon the ground that they were put on at the penitentiary and could not be removed without much delay and it would require the work of a blacksmith to remove them, was assigned as error. The court stated that the case of *State v. Kring*, 1 Mo. App. 438, 84 Mo. 591, left nothing further to be said upon the question, and that the point was ruled the same way in *People v. Harrington*, 42 Cal. 165, 10 Am. Rep. 296, and reversed the judgment, such keeping of the prisoner in irons being a violation of the common law, no evident necessity appearing for such keeping.

So, in *People v. Harrington*, 42 Cal. 165, 10 Am. Rep. 296, it was contended, on behalf of the prisoner, that the action of the court in refusing to direct the manacles to be removed from his limbs while he was in court upon his trial, and in compelling him to be tried while his limbs were shackled with irons, without any apparent or pretended necessity, deprived him of a substantial legal right, and that the judgment should be reversed. The court stated that there was no question but that any action of the court, during the progress of a trial for felony, which deprived the defendant of a substantial legal right in the premises, or which to any extent, to his prejudice, withholds or abridges a substantial legal or constitutional privilege of a defendant, which is claimed by him on the trial, was a proper subject for review by the court on appeal.

Where, however, the prisoner, indicted for murder, after the verdict was brought into open court, and when the motion for a new trial was disposed of, and the court was about to pass sentence, broke out into manifestations of violence and struggled with the officers to break away from them, and was attempting to commit acts of violence upon them, when they placed a pair of handcuffs on his wrists and he ceased his struggles, the court held that what was done was deemed necessary to protect the sheriff and bailiffs from violence, and for the preservation of order in court, and had no influence in the finding of the verdict or upon the sentence, and was therefore no ground for a reversal of the judgment. *Upstone v. People*, 109 Ill. 169, 179.

So, where the irons had not remained on the prisoner during his trial or for any considerable portion thereof, but only for an inconsiderable time while a few of the jurors were being called and examined, and before any of them had been accepted and sworn, it was held that the prisoner's rights of defense were not prejudicially affected thereby to an extent that would justify a reversal of the judgment on that ground. *Territory v. Kelly*, 2 N. M. 297, 306.

Again, in *Rainey v. State*, 20 Tex. App. 455, 472, the prisoner was brought into court for trial chained in a gang with several other prisoners, and the court instructed the sheriff to remove his chains after he had been seated within the bar, and his

counsel took an exception to the action of the sheriff as illegal and calculated to prejudice him before the jury. The court regarded the sheriff's action as justifiable inasmuch as he deemed it unsafe to deal with the number of prisoners he had to bring out without chaining them together, and therefore affirmed the judgment of the court below, the chains being removed by the order of the court as soon as they were discovered.

As to when not a ground of reversal, see also *supra*, 11.; *Mathews v. State*, 9 Lea, 128, 131, 42 Am. Rep. 687; *Poe v. State*, 10 Lea, 573.

V. Provisions of state Constitutions and statutes.

In addition to the general provisions found in the declaration of rights of all the states of the Union relating to the rights of a prisoner upon his trial, the following special provisions and enactments are to be found in the Codes, statutes, and Constitutions of some states:

The Arizona Penal Code, *Ariz. Rev. Stat. ed.* 1887, § 1106, p. 758, provides that a person charged with a public offense shall not, before conviction, be subjected to any more restraint than is necessary for his detention to answer the charge.

A similar provision is contained in § 688, *Cal. Code Crim. Proc.* 4 Deering, Annotated Codes and Statutes, ed. 1886.

In *People v. Harrington*, 42 Cal. 165, 10 Am. Rep. 296, it was held that to require a prisoner during the progress of his trial by the court and jury to appear and remain with chains and shackles upon his limbs without evident necessity for such restraint for the purpose of securing his presence for judgment is a direct violation of the common-law rule and of the above section.

The Georgia Bill of Rights, art. 1, § 1, ¶ 9, *Code. ed.* 1895, vol. 2, § 5706, provides that no person shall be abused in being arrested, while under arrest, or imprisoned.

Idaho Rev. Stat. ed. 1887, p. 778, § 7357, provides, *inter alia*, that a person shall not be subjected before conviction to any more restraint than is necessary for his detention to answer the charge.

Indiana Const. art. 1, § 60 (1 Ind. Rev. Stat. 1896, *Horner's Anno. ed.*) provides that no person arrested or confined in jail shall be treated with unnecessary rigor.

Oklahoma Code Crim. Proc. § 21 (Stat. Okla. ed. 1893, § 4876, p. 980), provides that no person charged with a criminal offense shall be subject, before conviction, to any more restraint than is necessary for his detention to answer the charge.

Oregon Const. § 13, art. 1, provides that no person arrested or confined in jail shall be treated with unnecessary rigor.

R. I. Declaration of Rights, art. 1, of the Constitution, § 14, provides that, every man being presumed innocent until he is pronounced guilty by law, no act of severity which is not necessary to secure an accused person shall be permitted.

Tennessee Const. § 13, art. 1 (Declaration of Rights), provides that no person arrested and confined in jail shall be treated with unnecessary rigor.

And *Utah Declaration of Rights*, art. 1, § 9, provides, *inter alia*, persons arrested or imprisoned shall not be treated with unnecessary rigor.

A difference will be noticed in the wording of the section of the *Tennessee Constitution* and that of those of *Oregon*, *Utah*, and *Indiana*, inasmuch as in the former the words are "arrested and confined" while in the latter three the words are "arrested or confined."

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fendant, and he was ordered by the court to go with the jury to the place of the alleged burglary, and while so manacled he went with the jury a distance of three or four blocks from the court-house, and returned to the court, when the trial proceeded, and defendant was permitted to remain manacled until, at his request, the court ordered the manacles removed. It also further appears from the record that one Bates and one Helen, who were jointly charged with the same crime as the defendant, had been theretofore tried in the court, and found guilty; that, at defendant's request, Bates was called to testify as a witness for defendant, and when Bates was brought into the court-room to testify, at the request of the prosecuting attorney, Helen was brought into court to remain in the presence of the jury during the time that Bates was testifying; that after Bates had given his testimony, he and Helen were manacled together in the presence of the court and jury; and that defendant protested against Bates and Helen being allowed to remain in the court-room, in the presence of the jury, manacled, and requested the court to order the manacles removed. The court refused the request. It was the ancient rule at common law that a prisoner brought into the presence of the court for trial upon a plea of not guilty to an indictment was entitled to appear free of all manner of shackles or bonds; and, prior to 1722, when a prisoner was arraigned or appeared at the bar of the court to plead, he was presented without manacles or bonds, unless there was evident danger of his escape. 2 Hale, P. C. 219; 4 Bl. Com. 322; *Layser's Case*, 16 How. St. Tr. 4th ed. by Hargrave, 230, 231, 244, 245; *Waite's Case*, 1 Leach, C. L. 86. In J. Kelyng's Reports (pleas of the crown adjudged in the reign of Charles II.): "It was resolved that, when prisoners come to the bar to be tried, their irons ought to be taken off, in that they be not in any torture while they make their defense, be their crime never so great. And accordingly, upon the arraignment and trial of Hewler and others, who were brought in irons, the court commanded their irons to be taken off." The common law of England was expressly adopted by legislative enactment at the first session of the legislative assembly of this territory, and there is no doubt that the ancient right of one accused of crime under an indictment or information to appear in court unfettered is still preserved in all its original vigor in this state. In *State v. Kring*, 64 Mo. 591, the prisoner was convicted of mur-

der in the first degree. The plea of insanity was before the court, and the defendant had some three months before assaulted a person in open court. He was brought into the trial court manacled, and remained some time in that condition. The supreme court, in reversing the judgment of conviction, observed: "We have no doubt of the power of the criminal court, at the commencement, or during the progress of a trial, to make such orders as may be necessary to secure a quiet and safe one, but the facts stated by the court in this case, as shown by the record, that the prisoner had assaulted a person in court about three months before the term at which he was tried, would hardly authorize the court to assume that, on his trial for life, he would be guilty of similar outrages. There must be some reason based on the conduct of the prisoner at the time of the trial, to authorize so important a right to be forfeited. When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers. Besides, the condition of the prisoner in shackles may, to some extent, deprive him of the free and calm use of all his faculties." Section 22, art. 1, of our Constitution, declares that "in criminal prosecutions the accused shall have the right to appear and defend in person." The right here declared is to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner, to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty. When the witness Bates was manacled to Helen, and kept in court in the presence of the jury against the protest of defendant, defendant's right to a fair trial was impaired. It can hardly be conceived that there was any necessity for this incident to the trial. None appears in the record. 1 Bishop, *Crim. Proc.* § 955; Whart. Pl. & Pr. § 540; *People v. Harrington*, 42 Cal. 165, 10 Am. Rep. 296; *State v. Smith*, 11 Or. 205.

The case is reversed.

Scott, Ch. J., and Dunbar and Anders, JJ., concur.

NEBRASKA SUPREME COURT.

MODERN WOODMEN ACCIDENT ASSOCIATION, *Plff. in Err.*,

Celia V. SHRYOCK.

(.....Neb.)

*1. Statements contained in an appli-

*Headnotes by RYAN, C.

NOTE.—On the question whether death was caused by accident or disease, see note to *Fidelity & C. Co. v. Johnson* (Miss.) 30 L. R. A. 206.

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cation for the issue of a policy of insurance will not be construed as warranties unless the provisions of the application and policy, taken together, leave no room for any other construction.

2. Whether an accident or a disease caused the death of a party, whose life was insured against death by accident, should be submitted to and determined by a jury, unless, with reference to that proposition, the proofs are so convincing that by them all reasonable men, in

the fair exercise of their judgment, would be brought to adopt the same conclusions.

3. Where an accident insurance association introduced evidence of the statements of one of its members with reference to an accident which had happened to him some hours before the time of making such statements, it cannot complain because the same statements, made to other witnesses, were proved by the adverse party.

4. In an action for the recovery of the sum of \$3,000 insurance on a certificate issued by a fraternal benefit association to one of its members, it cannot be permitted to urge that the said certificate limits the amount payable to the proceeds of an assessment of \$2 on each member, and that there is therefore a question whether thereby \$3,000 could be realized, in view of the fact that the statute to which such association owes its existence forbids it to issue a certificate of over \$1,000 if it has not a membership of 2,000 in number.

5. The supreme court cannot assume that the rejection of written evidence was prejudicially erroneous when there is in the record before it no showing as to the nature of the evidence rejected.

(March 17, 1898.)

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. A. R. Talbot, for plaintiff in error:

A certificate of membership in a mutual life insurance company provided that, on the death of the wife of the plaintiff, an assessment should be made upon the policy-holders in the company for as many dollars as there were policy holders, and that the sum collected, not exceeding \$1,000, should be paid to him within ninety days from the filing of the proof of death. It was held that a declaration containing no allegation of a neglect to make the assessment provided for, and assigning no breach except of a promise to pay \$1,000, was fatally defective, and that the defect was not cured by the verdict.

Curtis v. Mutual Ben. Life Co. 48 Conn. 98.

A petition which does not aver that the defendant failed or refused to lay any such assessment, or that, having laid one and collected it, he failed and refused to pay the same to the plaintiff, is demurrable.

Taylor v. National Temperance Relief Union, 94 Mo. 35; *Smith v. Covenant Mut. Ben. Assn.* 24 Fed. Rep. 685; *Eggleston v. Centennial Mut. L. Assn.* 18 Fed. Rep. 14; *Bailey v. Mutual Ben. Assn.* 71 Iowa, 689; *Rainsbarger v. Union Mut. Aid Assn.* 72 Iowa, 191; *Neuman v. Covenant Mut. Ben. Assn.* 72 Iowa, 242; *Tobin v. Western Mut. Aid Soc.* 72 Iowa, 261; *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108; *Re La Solidarit Mut. Ben. Assn.* 68 Cal. 392; *Collins v. Banker's Acci. Ins. Co.* 96 Iowa, 216.

Under a policy promising indemnity in case death results solely because of bodily injuries effected by external, violent, and accidental means, and independently of all other causes, the burden of proof is on those claiming under the policy to show that the accident was the

sole cause of death, independently of all other causes.

Under such a policy, the insurer would not be liable if, at the time of the accident, insured was suffering from a pre-existing disease, and death would not have resulted from the accident in the absence of such a disease, but insured died because the accident aggravated the effects of the disease, or the disease the effects of the accident.

National Masonic Acci. Asso. v. Shryock, 86 U. S. App. 658, 73 Fed. Rep. 774, 20 C. C. A. 8; *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 378; *State v. Spencer*, 21 N. J. L. 196; *Com. v. Heath*, 11 Gray, 303; *Com. v. Pomeroy*, 117 Mass. 143; *People v. McCann*, 16 N. Y. 59, 69 Am. Dec. 642; *Brotherton v. People*, 75 N. Y. 159; *O'Connell v. People*, 87 N. Y. 877, 41 Am. Rep. 379; *Walker v. People*, 88 N. Y. 81; *Chase v. People*, 40 Ill. 352; *State v. Bartlett*, 43 N. H. 224; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360; *Plake v. State*, 121 Ind. 438.

In a contract of insurance of this character, although the injury might revive a slumbering disease or bring into new activity a dormant disease, yet, unless the injury was sufficient of itself to produce death, the disease is considered the proximate cause, and the insurance company is not liable.

National Masonic Acci. Asso. v. Shryock, 86 U. S. App. 658, 73 Fed. Rep. 774, 20 C. C. A. 8; *McCarthy v. Travellers' Ins. Co.* 8 Biss. 362; *Sharpe v. Commercial Travellers' Mut. Acci. Asso.* 139 Ind. 92; *Tennant v. Travellers' Ins. Co.* 31 Fed. Rep. 322; *Anderson v. Scottish Acci. Ins. Co.* 37 Scott. L. R. 20.

However severe an injury might be under this contract of insurance, if there was any disease or physical weakness which caused the death, although exaggerated and revived by said injury, it cannot be said that death was caused solely and independently by the injury and that a disease superinduced by the injury, cannot be a cause of death provided against in this contract of insurance.

McCarthy v. Travellers' Ins. Co. 8 Biss. 362; *Sharpe v. Commercial Travellers' Mut. Acci. Asso.* 139 Ind. 92; *Tennant v. Travellers' Ins. Co.* 31 Fed. Rep. 322; 2 Bliss, Life Ins. §§ 513, 518a, p. 1192; *Anderson v. Scottish Acci. Ins. Co.* 37 Scott. L. R. 20; *Dozier v. Fidelity & C. Co.* 46 Fed. Rep. 446, 18 L. R. A. 114.

Messrs. A. R. Talbot and T. S. Allen, for plaintiff in error, in support of petition for rehearing:

It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law, and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial.

Pleasants v. Fant, 89 U. S. 22 Wall. 116, 29 L. ed. 790; *Travellers' Ins. Co. v. Selden*, 42 U. S. App. 253, 78 Fed. Rep. 285, 24 C. C. A. 97.

If death was caused by bodily infirmity, although "induced" by this injury, then the plaintiff below could not recover under the laws.

McCarthy v. Travellers' Ins. Co. 8 Biss. 362; *Sharpe v. Commercial Travellers' Mut. Acc.*

Asso. 189 Ind. 92; Tennant v. Travellers' Ins. Co. 31 Fed. Rep. 332; Anderson v. Scottish Acct. Ins. Co. 37 Scott. L. R. 20; National Masonic Acct. Asso. v. Shryock, 36 U. S. App. 658, 73 Fed. Rep. 774, 20 C. C. A. 8; Travellers Ins. Co. v. Selden, 42 U. S. App. 253, 78 Fed. Rep. 285, 24 C. C. A. 92; Western Travellers' Asso. v. Smith, not reported, opinion by Sanborn, J., at the December, 1897, term.

Messrs. J. H. Broady and A. N. Sullivan for defendant in error.

Ryan, C., filed the following opinion:

This action was brought in the district court of Lancaster county by Cella V. Shryock, to recover the amount of insurance existing in her favor by the terms of a certificate of membership, issued to her husband, whereby his life was insured against death by accident within ninety days. There was a verdict and judgment as prayed, and for the reversal of this judgment the association prosecutes these proceedings in error.

In the petition it was alleged that May 6, 1892, in consideration of \$3 as a membership fee, paid by William B. Shryock for plaintiff, and of such future payments as might be required under defendant's articles of incorporation, the defendant had made and delivered to said William B. Shryock, its policy and certificate of insurance on the life of said William B. Shryock, in the sum of \$3,000, and that plaintiff was the wife of William B. Shryock, and was the beneficiary in said policy. It was further averred that on or about July 2, 1892, while said policy was in full force, said William B. Shryock received a personal injury in the city of Omaha, from which injury, shortly thereafter, the death of said William B. Shryock resulted. It was further alleged that due proof of the death of William B. Shryock had been made, but that defendant nevertheless had refused to pay or make an assessment for the payment of the amount due plaintiff or any part thereof. There was a prayer for judgment in the sum of \$3,000, with interest, which principal and interest equalled the sum for which the verdict was returned. The material portions of the answer were averments that William B. Shryock died of a disease not the result of any injury alleged to have been by him received; that there had been no compliance with the requirements of the policy as to proofs of injury; and that there had been no request for an assessment upon the members of defendant in good standing, under its rules, for the payment of the claim of plaintiff. It was further alleged that the defendant had never made an assessment upon its members for the payment of the claim set out in plaintiff's petition, and that defendant neither had nor would have in its possession any means wherewith to pay the same until such assessment should be levied and collected. There was in the answer the following language: "Further answering, the defendant alleges the fact to be that at the time of making the application for membership to the defendant, plaintiff's intestate, William B. Shryock, represented and warranted to the defendant, as a condition precedent, and as a basis upon which the policy sued on herein was issued, that he never had,

nor was subject to, fits, disorders of the brain, or never had or was subject to any bodily or mental infirmity; that relying upon said statements, representations, and warranty that said William B. Shryock did not then, or never did, have any bodily or mental infirmity, the defendant issued and delivered to him the certificate or policy of insurance sued on herein; but the defendant avers that, at the time of making said application and tendering to the defendant said statements and representations and warranties as aforesaid, said William B. Shryock did then have bodily and mental infirmities which would tend to shorten life, and which, in fact, did produce the death complained of in plaintiff's petition, and that by reason thereof there was a breach of said warranties and conditions precedent which made void the policy issued and sued upon herein, and although said William B. Shryock at that time represented and warranted to the defendant that he did not have any bodily or mental infirmity, yet the defendant charges the fact to be that at that time said William B. Shryock did have fatty degeneration of the heart, or heart disease, which would tend to shorten life, and from which weakness and defect of the heart he, the said William B. Shryock, died." There was a reply in denial of each affirmative matter pleaded in the answer. On the trial there was submitted to the jury certain special interrogatories, which, with the answer to each, were, as follows:

(1) Did William B. Shryock, on or about the 2d day of July, 1892, meet with an accident in the city of Omaha, Nebraska, whereby he received external and violent bodily injury?

A. Yes.

(2) Did William B. Shryock, prior to and at the time of his death, have fatty degeneration of the heart?

A. Yes.

(3) If you answer that William B. Shryock received an accidental, external, and violent bodily injury, did that injury alone cause his death?

A. Yes.

(4) If you answer that William B. Shryock, prior to and at the time of his death, had fatty degeneration of the heart, did that disease alone cause his death?

A. No.

(5) What was the cause of the death of William B. Shryock?

A. By violent bodily injury, he at the time having fatty degeneration of the heart.

There was some conflict in the evidence, but, as the jury accepted as true that which tended to sustain the theory of plaintiff, it is unnecessary to consider any other in determining whether or not there was sufficient to sustain the special findings above quoted. James M. Robinson was a witness for the defendant in the district court, and testified that on July 1 or 2, 1892, he met William B. Shryock about half past 5 in the afternoon; and, by appointment, still later in the evening. The testimony of this witness in part was as follows:

Q. Now, did he say anything to you up to that time about slipping and hurting his leg?

A. Yes, sir; he told me several times that his foot had slipped, and he had hurt his knee.

Q. He told you several times during the two hours you were with him?

A. Yes, sir.

Q. What did you say he said about that?

A. He said his foot had slipped, and that he had wrenched his knee, and that it was hurting him.

Q. What knee was that?

A. I think it was the left knee. I am not sure, but it was the same knee he had hurt before.

Q. The same knee that was broken before?

A. Yes, sir.

Q. What did he say at that time about having recently removed the splints or bandages that the doctor had on the knee?

A. He said he had been wearing a bandage, or a brace, or something, and that he had taken it off lately, or something to that effect. I don't know how recently he had taken it off.

William Darst, a witness for the plaintiff, testified that he saw William B. Shryock at the store of witness in Omaha about 8 o'clock in the evening of July 1, 1892; that Shryock looked to witness like a man about to faint, was pale and trembling, and complained that he had hurt himself; that in coming up from the depot he had slipped and partially fallen; and that it pained him terribly right over his right hip. He kept his hand rubbing his side, and acted as if he was sick in his stomach. He was spitting as if he was sick in his stomach. He remained over two hours from the time he came in. Usually witness closed up at 9 o'clock at night, but his reason for not closing at that time, July 1, 1892, was given thus in his own language: "The condition he came in my store, and seeing that he was in pain, I stayed around an hour later than usual, thinking he would get better; and in fact he did get better. I wanted him to rest." This witness accompanied Mr. Shryock to the Murray Hotel. William Anderson, clerk at that hotel, testified that William B. Shryock came to the hotel about 10 o'clock of the night of July 1, 1892, and witness, upon shaking hands with him, noticed that Shryock's hand was very cold. Upon being asked about his health, Shryock said he was not feeling well, and asked if witness could spare a boy to go out and get some capsules. These were procured, as was also some whisky, and he went to his room. Frank Wigginton, the boy who procured the capsules, testified that they were quinine capsules, and that he showed Mr. Shryock to his room. In the afternoon of July 2, 1892, Mr. Shryock was found dead in his bed in the room to which he had been conducted by Wigginton. A *post mortem* examination was held, and the result of their investigations, as detailed by the doctors who conducted the same was to the following effect: Dr. Rebert said he found a contusion or abrasion over the right hip of Mr. Shryock; that his heart was large and dilated, filled with dark fluid,—blood. The contusion was of recent occurrence. There was nothing in the condition of the remains that would indicate

that he would not have lived an indefinite time. The cause of his death was heart failure, induced by a shock and injury. The contusion indicated a fall, which might have caused the death of Mr. Shryock. The contusion was somewhat larger than the palm of a large hand. In relation to the opinion that Mr. Shryock might have lived an indefinite time, Dr. Rebert testified: "I mean by that, if no accident had occurred, no stage of sickness intervened, and in his ordinary, regular life, that in all probability his heart would have been capable of carrying on its functions for an indefinite length of time." Dr. Rebert further testified that while a fall, such as was indicated by the contusion to have taken place, would bring on heart failure, death might not follow before thirty-six hours. Dr. Lee testified that he took part in the *post mortem* examination described by Dr. Rebert and that there was found the abrasion or contusion described by Dr. Rebert. Dr. Lee also testified that they found an abrasion of the skin on the knee of Mr. Shryock, and that both the abrasion on the hip and that on the knee were of recent occurrence. He said that the death of Mr. Shryock was due to his getting injured, and not having sufficient vital capacity to recover from it; that, in the condition in which Mr. Shryock's heart was, it was possible for him to die the minute he sustained the injury, or he might have had sufficient vitality to live a few hours afterwards. On cross-examination Dr. Lee testified that the condition of Mr. Shryock was such that any shock or any blow would produce a shock which would so affect his heart that it would not have inherent strength enough to respond; consequently, a fainting would follow which he could not, and in this case did not, recover from. It seems to us that the special findings were in all respects supported by the testimony just quoted. There was no attempt to show that Mr. Shryock might not have been ignorant of any abnormal condition of that vital organ. There was, therefore, no fraudulent or wilful false representation as to the existence of such conditions as would have led to the rejection of the application for insurance, had their existence been known to the company.

In the membership certificate it was recited that it was issued in consideration of the warranties in the application, as well as in consideration of the payment of the premium. In his application, Mr. Shryock said: "I never had, nor am I subject to, fits, disorders of the brain, or any bodily infirmity." With reference to payment in case of death, the provision of the policy was as follows: "And the said association agreed to pay to Celia V. Shryock, wife, if living, . . . the sum of \$3,000, if the death of the certificate holder shall result from such injuries alone within ninety days from the date of said accident." Upon these provisions the insurance company founds two arguments. One is that the representation as to the physical condition of Shryock was a warranty, broken when made, because of the existence of fatty degeneration of his heart. The other is that the death of the insured was not attributable solely to the accident which caused the one or more abrasions observed by

the physicians. In respect to the alleged warranty the following language quoted from the syllabus in *Kettenbach v. Omaha Life Assn.* 49 Neb. 842, is applicable: "Statements contained in an application for a policy of insurance will not be construed as warranties unless the provisions of the application and policy, taken together, leave no room for any other construction. In construing a contract, for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject-matter of the contract, and the language employed, and will consider a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements." In line with these propositions it was held in the case just cited that, for representations to constitute a defense to an action on the policy, it is incumbent on the insurance company to prove the warranties were made as written in the application, that they were false in some particular material to the insurance risk, that they were made intentionally by the insured, that the insurance company relied and acted upon such statements; and these are questions of fact, and not questions of law. By its general verdict the jury settled this claim of warranty adversely to the contention of the insurance company, and its solution must control. *Travelers' Ins. Co. v. Melick*, 27 U. S. App. 547, 65 Fed. Rep. 178, 12 C. C. A. 544, 27 L. R. A. 629.

In support of its argument that the accident was not the proximate cause of the death of Mr. Shryock, there has been cited *National Masonic Acci. Assn. v. Shryock*, 86 U. S. App. 658, 73 Fed. Rep. 774, 20 C. C. A. 8. The action in the case just referred to was on a policy in another company than plaintiff in error, but in all other respects there were involved the same circumstances as are presented by this case. In view of the extended consideration of cases rendered necessary by the holding of the circuit court of appeals of the eighth circuit of the United States, as formulated by Sanborn, J., in the case last referred to, we have purposely hitherto refrained from citations of authorities. Of this, the most important question involved in the case under consideration, we believe the cases hereinafter referred to in the discussion of the opinion delivered by Sanborn, J., will be found to furnish a very satisfactory solution. From this opinion we quote the following language: "The certificate of membership in this accident association, on which this action is based, contained the covenant of this corporation to pay to the defendant in error the indemnity it promised in case the death of William B. Shryock resulted within ninety days from the date of any accident, solely because of bodily injuries effected by external, violent, and accidental means, and independently of all other causes; and it also contained an express agreement that the insurance promised thereby should not cover any death which resulted wholly or in part, directly or indirectly, from disease or bodily infirmity. The defendant in error alleged that

Shryock's death was caused by an injury to him which resulted from an accidental fall on the street. The association denied this allegation, and alleged that, if he was injured by such a fall, his death was not caused by that alone, but resulted wholly or in part from some disease of his heart. The burden of proof was upon the defendant in error to establish the facts that William B. Shryock sustained an accident, and that that accident was the sole cause of his death, independently of all other causes. If Shryock suffered such an accident, and his death was caused by that alone, the association agreed by this certificate to pay the promised indemnity. But if he was affected with a disease or bodily infirmity which caused his death, the association was not liable under this certificate, whether he also suffered an accident or not. If he sustained an accident, but at the time it occurred he was suffering from a pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with the disease or infirmity, but he died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, the express contract was that the association should not be liable for the amount of this insurance. The death in such a case would not be the result of the accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor. These propositions have been so lately discussed and affirmed by this court that we content ourselves with their statement. *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547, 65 Fed. Rep. 178, 181, 27 L. R. A. 629, 12 C. C. A. 544, 547; *United States Mut. Acci. Assn. v. Barry*, 181 U. S. 100, 111, 112, 38 L. ed. 60, 64, 65; *Freeman v. Mercantile Mut. Acci. Assn.* 156 Mass. 351, 353, 17 L. R. A. 758; *Anderson v. Scottish Acci. Ins. Co.* 27 Scott. L. R. 20, 28; *Smith v. Accident Ins. Co.* L. R. 5 Exch. 302, 305; *Standard Life & Acci. Ins. Co. v. Thomas*, 12 Ky. L. Rep. 715; *Marble v. Worcester*, 4 Gray, 395, 397; *National Ben. Assn. v. Grauman*, 107 Ind. 288, 290.

In the opinion from which the above-quoted language was taken it was said that "the sufficiency of the evidence in this case to warrant the verdict is not before us for consideration, because the record before us discloses the fact that only a portion of the evidence presented to the court below is contained in the bill of exceptions." While this language was used, there was, nevertheless, in the opinion, such a statement of the facts as showed that, for some purposes, the bill of exceptions was in fact used.

We shall now review the authorities cited in the opinion to sustain the propositions that the insurer was not liable if, at the time of the accident, the insured was suffering from a pre-existing disease, and death would not have resulted from the accident in the absence of such disease, but the insured died because the accident aggravated the effects of the disease, or the disease the effects of the accident. The opinion in *Travelers' Ins. Co. v. Robbins*, 27 U. S. App. 547, 12 C. C. A. 544, 547, 65 Fed. Rep. 178, 181, 27 L. R. A. 629, was written

by Sanborn, J., and in it were recited the following conditions of the policy sued on to wit: "This insurance does not cover disappearances; nor suicide, sane or insane; . . . nor accident, nor death, . . . resulting wholly or partly . . . from . . . disease or bodily infirmity, hernia, fits, vertigo, sleep-walking, . . . intentional injuries (inflicted by the insured or any other person)." The action of Melick, the administrator, was brought on the policy, and in the petition it was alleged that the death of the intestate, Dr. Robbins, was caused by an accidental gun shot wound in the foot. The answer denied this allegation, and alleged that death was caused by the intentional self-inflicted injury of Dr. Robbins in cutting his own throat with a scalpel. We quote from the opinion this language: "There was evidence that the doctor accidentally sent a bullet through the fleshy portion of his foot, on June 1, 1890; that the wound thus caused became very painful, confined him to his bed, caused a fever, and gradually reduced his strength, until he died, on June 18, 1890; that this gun-shot wound was just such an injury as would naturally produce tetanus or lockjaw; that the doctor and his physicians feared that disease from the first, and that they had used chloral and chloroform to relieve the pain and ward off this disease; that in the early morning of June 18, 1890, while the deceased was alone in his room, he was seized with tetanus; that this disease causes the most excruciating pains that human beings ever suffer; that it is fatal in a vast majority of cases; that it produces spasms or convulsions, and sometimes causes death by a spasm of the larynx, which prevents the passage of air through the trachea to or from the lungs; that the doctor was found dead in his bed on June 18, 1890, with a scalpel in his right hand, and his trachea and both his jugular veins cut; that the tetanus was sufficient to produce the death and the throat cutting was sufficient to produce it." In this connection there was a reference to the evidence tending to establish each theory as to the proximate cause of death, after which there was this language: "Under this state of the evidence it is assigned as error that the court below refused to instruct the jury to return a verdict for the insurance company, and it is contended that the question whether the shot wound which caused the tetanus, or the throat cutting was the proximate cause of the death, was a question of law for the court. In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475, 476, 24 L. ed. 256, 259, Mr. Justice Strong, who delivered the opinion of the court, said: 'The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. . . . In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally, and probably, connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time.' This opinion of the supreme court is a complete answer to the contention of the plaintiff in error here. *Union*

P. R. Co. v. Callaghan, 12 U. S. App. 541, 56 Fed. Rep. 988, 6 C. C. A. 205, 208. It is urged that this question was for the court, and that the court was bound to declare that the cutting was the proximate efficient cause of the death in this case, because the evidence was uncontradicted that the cutting was later in time than the shot wound, and was sufficient to cause the death. This position might be maintained if the cutting was not itself produced by the shot wound, and if the evidence was uncontradicted that the death would not have occurred as soon from the tetanus in the absence of the cutting. But the argument begs the primary question in the case, whether the cutting was a cause of the death at all. If it neither caused nor hastened the death of the insured, then it was in no sense a cause of it, and, however new or sufficient it may have been to have caused it, it could not relieve the insurance company from a death whose sole cause was the accidental injury. This question was peculiarly one of fact. The insurance company had agreed to pay the promised indemnity from any death that resulted from the accidental shot wound alone. The question was, What did in fact cause the death,—the shot wound, the cutting, or both? Nor would this case be withdrawn from the effect of this rule if the evidence upon this question was undisputed, for the question is always for the jury where a given state of facts is such that reasonable men may fairly differ upon it. It is only when all reasonable men, fairly exercising their judgment, must draw the same conclusion from an admitted state of facts, that it becomes the duty of the court to withdraw a question of fact from the jury." Later than the above language was used, Sanborn, J., speaking for the court in this case, said: "The objection that the findings of the jury [adverse to the theory of the insurance company] are contrary to the weight of the evidence cannot be considered by this court. In an action at law, this is a court for the correction of the errors of law of the court below only. There was, as we have already held, sufficient evidence to warrant the submission of the question of the proximate cause to the jury in this case. The court below committed no error in weighing this evidence; that duty was performed by the jury and not by the court; and hence there is no ruling of the court in that regard for us to review; and it is not our province to review and correct the findings of the jury on questions of fact properly submitted to them. *Gulf, C. & S. F. R. Co. v. Ellis*, 10 U. S. App. 640, 54 Fed. Rep. 481, 4 C. C. A. 454, 456; *Lincoln v. Sun Vapor Street-Light Co.* 19 U. S. App. 431, 59 Fed. Rep. 756, 8 C. C. A. 253, 257, 258."

The case cited next in *National Masonic Acci. Assn. v. Shryock*, 36 U. S. App. 658, 73 Fed. Rep. 774, 20 C. C. A. 3, was *United States Mut. Acci. Assn. v. Barry*, 131 U. S. 100, 33 L. ed. 60, in which the association sought the reversal of a judgment which had been rendered against it. On the trial in the lower court there had been embodied in an instruction the following language: "If, for example, the deceased sustained injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered

condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the death could be properly attributed to the original injury. In other words, if these results followed the injury, as its necessary consequence, and would not have taken place had it not been for the injury, then I think the injury could be said to be the proximate or sole cause of death; but if an independent disease or disorder supervened upon the injury, if there was an injury,—I mean a disease or derangement of the parts not necessarily produced by the injury,—or if the alleged injury merely brought into activity a then existing, but dormant, disorder or disease, and the death of the deceased resulted wholly or in part from such disease, then it could not be said that the injury was the sole or proximate cause of death." We have found no language other than that above quoted which tends to sustain the proposition in support of which it was cited. This was so very favorable to plaintiff in error, however, that by that party it was not presented for consideration, and consequently was neither approved or disapproved in the appellate court. What was decided is fully stated in the syllabus, which was in this language: "A certificate or policy issued by a Mutual Accident Association stated that it accepted B as a member in division AA of the association; 'the principal sum represented by the payment of \$2 by each member in division AA,' not exceeding \$5,000, to be paid to the wife of B in sixty days after proof of his death from sustaining 'bodily injuries effected through external, violent, and accidental means.' B and two other persons jumped from a platform 4 or 5 feet high to the ground; they jumping safely and he jumping last. He soon appeared ill, and vomited, and could retain nothing on his stomach, and passed nothing but decomposed blood and mucus, and died nine days afterwards. In a suit by the widow to recover the \$5,000, the complaint averred that the jar from the jump produced a stricture of the duodenum, from the effects of which death ensued. At the time of the death the association could have levied a two-dollar assessment on 4,803 members in division AA. Held: (1) It was not error in the court to refuse to direct the jury to find a special verdict, as provided by the statute of the state. (2) The issue raised by the complaint as to the particular cause of death was fairly presented to the jury. (3) The jury were at liberty to find that the injury resulted from an accident. (4) The policy did not contract to make an assessment, nor make the payment of any sum contingent on an assessment or on its collection; and the association took the risk of those who should not pay."

In *Freeman v. Mercantile Mut. Acci. Assn.* 156 Mass. 351, 353, 17 L. R. A. 763, the insured who died of peritonitis, localized in the region of the liver, and induced by a fall, had previously had peritonitis in the same part, and the previous disease had produced effects which rendered him liable to a recurrence of it. In an action upon the policy by the widow of the insured, the judge charged the jury that, upon the question whether peritonitis, if

that caused his death, was to be deemed a disease, and the proximate cause of death, within the meaning of the policy, depended upon the question whether or not, before and at the time of the fall, he was suffering with the disease. If he was, then, although the disease was aggravated and made fatal by the fall, he could not recover; but if, owing to the existing lesions caused by the disease, he not having the disease at the time, peritonitis was started, the defendant was answerable, although, if there had been a normal state of things, the fall would not have occasioned such a result. On appeal these instructions were approved, but in our opinion they fail to sustain the radical proposition in support of which they were cited in *National Masonic Acci. Assn. v. Shryock*, 36 U. S. App. 658, 78 Fed. Rep. 774, 20 C. C. A. 3.

The case of *Anderson v. Scottish Acci. Ins. Co.* 27 Scott. L. R. 20, 23, was one in which a suit had been brought upon a policy which provided that, to recover under it an accident must be the direct cause of death, and that within three months, and that the company would not be liable for death arising from natural disease, although accelerated by accident. Upon appeal it was held that it had not been proved that the accident had caused the death at all, and the court expressly reserved its opinion as to acceleration.

In *Smith v. Accident Ins. Co.* L. R. 5 Exch. 302, 305, the suit was on a policy against certain accidents, in which there was an express provision that the company did not insure against erysipelas, or any other disease, or secondary cause or causes arising within the system of the insured before or at the time of or following such accidental injury, whether causing such death directly or jointly with such accidental injury. The insured on Saturday accidentally cut his foot against the side of an earthenware pan. On the following Thursday erysipelas was caused by the wound, and but for the wound he would not have suffered from it. It was held by a majority of the court that the insurer was protected by the condition, and was not liable. In the discussion of this case great stress was laid on the proposition that the policy expressly excused the company from liability on account of erysipelas which might supervene as the result of an accident.

The following is the entire report of *Standard Life & Acci. Ins. Co. v. Thomas*, 12 Ky. L. Rep. 715: "In this action upon an accident insurance policy to recover for the death of the insured, the evidence showed that the insured fell on the 12th of June, bruising his side; that he was taken sick in a few days thereafter, and died on the 2d of July. The physicians testified that he died of typhoid fever, which did not result and could not have resulted, from the fall. A nurse of long experience testified that the insured did not have typhoid fever. Held,—that the evidence preponderates so entirely in favor of the theory that the insured died of a disease not brought on by the accident, the court should have set aside a verdict in favor of plaintiffs."

The syllabus in *Marble v. Worcester*, 4 Gray, 395, 397, correctly reflects all that was involved and decided in that case. It was as

follows: "If a horse drawing a vehicle, though driven with due care, becomes frightened and excited by reason of the striking of the vehicle against a defect in the highway, frees himself from the control of his driver, turns, and at the distance of 50 rods from the defect, knocks down a person on foot in the highway, who is using reasonable care, the city or town bound to keep the highway in repair are not responsible for the injury so occasioned, though no other cause intervene between the defect and the injury. Thomas, J., dissenting."

In *National Ben. Assn. v. Grauman*, 107 Ind. 288, 290, the applicability of the case is indicated by the following paragraph of the syllabus: "Where the risk is limited to a case of death proximately caused by physical injuries of which there shall be some visible external sign, the complaint must make such a case; but the fact that the injury produced apoplexy does not render it any less the cause of death."

This completes a review of all the cases cited in support of the second paragraph of the syllabus in *National Masonic Acct. Assn. v. Shryock*, 36 U. S. App. 658, 73 Fed. Rep. 774, 20 C. C. A. 8, and it has failed to convince us of the correctness of the principle in said paragraph embodied. In our opinion, the question of what is the proximate cause of death, in an action like that now under consideration, is a question of fact, to be determined by the jury from a consideration of the evidence, and the determination of this question should not be withdrawn from the jury, unless from an admitted state of facts, all reasonable men, fairly exercising their judgments, must draw the same conclusion. These propositions are sustained by the authorities cited in *Travelers' Ins. Co. v. Robbins*, 37 U. S. App. 547, 65 Fed. Rep. 178, 181, 12 C. C. A. 544, 547, 27 L. R. A. 629, as well as by the adjudication of this court. *Suiter v. Park Nat. Bank*, 35 Neb. 372; *Habig v. Layne*, 38 Neb. 743; *Chicago, B. & Q. R. Co. v. Hildebrand*, 42 Neb. 33; *Chicago, B. & Q. R. Co. v. Landauer*, 38 Neb. 642. Whether the injury in this case was the proximate cause of the death of Shryock was purely a question of fact, for it involved the determination upon evidence of the relations between alleged causes and effects, and nothing more. It cannot be said that the evidence was so clearly in support of one theory that no reasonable man, fairly exercising his judgment, could have refused his assent thereto. As to the proximate cause of the death of Mr. Shryock, the special findings of the jury must be deemed conclusive, and in this condition we leave this branch of the case.

There was some contention that the statements of Mr. Shryock made a few hours afterwards, as to the cause of the injury to him, were not a part of the *res geste*, and therefore should not have been admitted in evidence. We have already quoted from the testimony of Mr. Robinson, a witness for the

defendant in the district court, and a reference to this quotation will show that this witness, in response to interrogatories propounded by the defendant, repeated these statements of Mr. Shryock; consequently, we cannot say that it was prejudicial error to permit the reiteration of these same statements by witnesses examined in behalf of plaintiff. It was insisted that there should have been a demand for an assessment under the terms of the policy before suit brought, and that only a court of equity could grant relief. In the policy there was a provision that the association did not agree to pay to any certificate holder or beneficiary a greater sum than would be realized by said association from one assessment of \$2 each upon all assessable holders of certificates, assessable at the date of the action. It is provided in § 110, chap. 48, Comp. Stat., with reference to fraternal benefit associations, that any such association shall not be permitted to issue a certificate to exceed the sum of \$1,000 until it shall have at least 2,000 members. The certificate in this case was for the sum of \$3,000. The association, therefore, could only insist that it had less than 2,000 members by showing affirmatively that it had been transacting business in violation of the terms of the statute which authorized its existence. This could not be tolerated. As \$2 *per capita* on a membership of 2,000 would realize more than the amount of the claim of Mrs. Shryock, there was no necessity for invoking the powers of a court of equity for an accounting and assessment.

It is urged that the court erred in refusing to permit the introduction of the written testimony of Dr. Leonhart given on a former trial. As this proposed testimony was not embodied in the bill of exceptions, it cannot be assumed that its rejection operated to the prejudice of the association.

It is not considered necessary to state at length the evidence in relation to an alleged oral instruction to the jury. After a prolonged deliberation, the jury was brought into the court room, that it might be ascertained whether any assistance could properly be rendered towards bringing about an agreement upon a verdict; and the court, on finding this to be impossible, sent the jury back to its deliberation, requesting, however, that, if possible, the members should try to come to an agreement. No sufficient reason for concluding that this was prejudicial has been advanced, and we can conceive of none.

The questions involved in these proceedings have been, in the main, considered as general propositions, whether they arose upon the introduction of testimony or upon the giving or refusal to give instructions. We have considered all the assignments of error, and have found none to the prejudice of the plaintiff in error.

The judgment of the District Court is therefore affirmed.

Rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BELLEVILLE STONE COMPANY of New Jersey, *Plff. in Err.*,

Henry MOONEY.

(.....N. J.)

"The plaintiff was employed by the defendant to work in a quarry. It was a part of the system under which the quarry was operated that the foreman should supervise the preparation of each blast, and light the fuse to fire it, giving warning by a cry of "Fire," so that the workmen in the quarry might run out of danger. The plaintiff was injured by a piece of rock thrown out from a blast, because the foreman had, through negligence, failed to give timely warning. Held, that the giving of warning was embraced in the duty, owed by an employer to his employees, that the place where he sets them to work shall be kept safe; that the failure of the foreman to perform this duty care-fully was imputable to the defendant as employer; and that such failure was not one of those obvious dangers of which the plaintiff as employee assumed the risk.

(February 28, 1896.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Essex County Circuit in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Howard W. Hayes and Joseph Coult for plaintiff in error.

Mr. Samuel Kalisch, for defendant in error:

The defendant company was grossly negligent in two respects: (1) In failing to provide proper places of shelter for its employees against the flying rocks resulting from a blast; (2) that the system adopted by the company in firing the blasts did not give the employees ample time to reach a place of safety, and that such a system was a negligent one, amounting to criminal carelessness.

1 Beven, Neg. p. 747; *Sword v. Cameron*, 1 Dunlop, B. & M. Sc. Sess. Cas. 498; *Barton's Hill Coal Co. v. Reid*, 8 Macq. H. L. Cas. 266.

The testimony of both the plaintiff and Kerr showed that as soon as Kerr was extricated from the chair they both fled as fast as they could from the place of danger for a place of safety.

It is not negligent *per se* for one person to risk his life or place himself in a position of great danger, in an effort to save the life of another or to rescue him from a sudden peril or great bodily harm.

Booth, Street Railways, § 882; *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 816, 18 L. R. A. 190; *Eckert v. Long Island R. Co.* 48 N. Y. 602, 8 Am. Rep. 721; *Donahoe v. Wabash, St.*

*Headnote by DIXON, J.

NOTE.—As to negligence in blasting with respect to the safety of other persons, see *Blackwell v. Moorman* (N. C.) 17 L. R. A. 729, and note; also *Mitchell v. Prange* (Mich.) 34 L. R. A. 182. 89 L. R. A.

L. & P. R. Co. 83 Mo. 560, 53 Am. Rep. 594; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692.

The plaintiff cannot be charged with neglect, because he ran into the engine house for shelter, because it clearly appears that at the time he sought refuge there he was in imminent peril, a situation created by the negligent act of the defendant.

Booth, Street Railways, § 883.

Where the negligence of the principal and that of a fellow servant together produce injury, the principal is liable therefor.

Faulmier v. Erie R. Co. 84 N. J. L. 151; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266; *Avilla v. Nash*, 117 Mass. 818; *Lane v. Atlantic Works* 111 Mass. 136; *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 206, 37 Am. Rep. 491; *Elmer v. Locke*, 135 Mass. 675; *Booth v. Boston & A. R. Co.* 73 N. Y. 88, 29 Am. Rep. 97; *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 1 L. R. A. 698; *Boyce v. Fitzpatrick*, 83 Ind. 526.

The acts of the foreman were the acts of the defendant company.

Van Steenburgh v. Thornton, 58 N. J. L. 161; *Nord Deutscher Lloyd S. S. Co. v. Ingebregeten*, 57 N. J. L. 400; *Comben v. Belleville Stone Co.* 59 N. J. L. 226.

DIXON, J., delivered the opinion of the court:

The plaintiff was struck by a piece of rock thrown out by a blast in the quarry of the defendant, and brought this suit to recover compensation for the injury. At the time he was in the employ of the defendant at the quarry, and was engaged as an attendant upon another workman who was painting a high derrick, and whom the plaintiff raised or lowered so as to facilitate his operations. The blasting was in charge of a foreman, whose duty it was to superintend the preparation of the blast, to light the fuse, and to warn the workmen, by crying "Fire," in time for them to run out of danger. On the occasion in question this warning was not given soon enough to enable the plaintiff to lower the painter to the ground and escape to a place of safety. Under the charge of the trial court, and the verdict of the jury, we must regard it as established that the plaintiff's injury resulted from the neglect of the foreman to give timely warning, and without any contributory negligence on the part of the plaintiff. This presents the real question of law in the case, which is whether the negligence of the foreman in this respect is imputable to the defendant, the common master of the foreman and the plaintiff. As was said by counsel for the defendant, the judgment must stand or fall on the answer to that inquiry. Under the cases of *Nord Deutscher Lloyd S. S. Co. v. Ingebregeten*, 57 N. J. L. 400, and *Comben v. Belleville Stone Co.* 59 N. J. L. 226, two views are suggested,—one, on behalf of the plaintiff, that the giving of proper warning was an essential part of the duty, owed by the employer to the workman, of taking reasonable care that the place where the workmen were engaged should be kept safe, and therefore if, through negligence, the proper

warning was not given, the employer's duty was not performed; the other, on behalf of the defendant, that the giving of the warning was only incidental to the foreman's work in preparing the blast and lighting the fuse, in which work the foreman was clearly a fellow servant of the plaintiff, engaged in a common employment, and therefore his negligence in that incidental service was not chargeable upon the common master. On reflection, it will be perceived that the giving of warning bore no direct relation to the foreman's work in preparing and firing the blast. The object of that work was the removal of rock, and such object would be attained as well without the warning as with it, if we leave out of consideration the safety of the workmen. Quite different are the conditions where a person using a tool or machine is obliged to see that the implement remains fit for use. In such case the duty to examine is auxiliary and incidental to the duty to use, and, when a servant owes the latter duty to his master, he owes the former also. A failure to perform carefully this incidental duty of examination may result in damage to a fellow servant, but the common master is not responsible for such damage, because the duty neglected was not one owed by him outside of that duty. There may have been a similar duty of inspection owed by the master to his servants, but the duties themselves are distinguishable from each other. In the present case, however, as already pointed out, the duty to give warning was not in any such sense subservient to the blasting of rock. On the other hand, when we consider the general duty owed by an employer to his employees, to exercise reasonable care that the place where he sets them to work shall be kept safe (*Van Steenburgh v. Thornton*, 58 N. J. L. 160), the propriety of including therein the duty of giving warning, in such circumstances as

those now before us, becomes at once apparent. The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by the workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen, and proper warning given, the quarry became an unsafe place for the workmen, but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place should be kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast. In selecting the person who was to fire the blast as the person to give the warning, the defendant probably chose the man best able to perform that duty; but, as the defendant's responsibility extended beyond the selection of an agent, and included the warning itself, it must answer for negligence in the giving of warning, no matter how fit was the chosen agent. Nor will the doctrine that servants assume the obvious risks of their employment save the defendant in this case, for that doctrine is not applicable to risk arising from negligence in the discharge of the master's duty to his servants. No doubt the plaintiff took the risks of the system under which he knew the quarry was worked. He would not be heard to complain that places of refuge close at hand were not provided, or that other possible precautions, which he saw were not in use, were omitted. But he had a right to expect that the precaution which the defendant had provided for the security of the quarrymen should be carefully observed, and he did not assume the risk of a negligent observance.

The judgment under review is affirmed.

NORTH CAROLINA SUPREME COURT.

W. H. GOOCH, *Appt.*,

v.

G. H. FAUCETTE.

(.....N. C.)

1. **The common law** is presumed, in the absence of proof, to prevail in a sister state which was once under the jurisdiction of England.
2. **A contract of another state** valid where it was made will not be enforced in a state in which it is forbidden by public policy.
3. **A note to pay a bet on a horse race** run in another state where such notes are presumed valid, and where the original note of which this is a renewal was given, will not be enforced in North Carolina, even if it is deemed a Virginia contract, since it is contrary to the public policy of the state.

(March 22, 1898.)

NOTE.—For effect of public policy to defeat action on a contract valid in the place where it was made, see also *Pope v. Hanks* (Ill.) 28 L. R. A. 568, 39 L. R. A.

A PPEAL by plaintiff from a judgment of the Superior Court for Granville County in favor of defendant in an action brought to enforce payment of a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edwards & Royster, for appellant:

The transactions at the conclusion of the race amounted in law to a delivery of the defendant's horse to Morton, whereby the property in the horse passed from the defendant Faucette to Morton.

Allman v. Davis, 24 N. C. (2 Ired. L.) 13; *Waldo v. Belcher*, 33 N. C. (11 Ired. L.) 612; *Morgan v. Perkins*, 46 N. C. (1 Jones, L.) 171.

When money or a horse won at cards is actually paid or delivered it cannot be recovered back.

Hodges v. Pitman, 4 N. C. (2 Taylor's Law Repos. 394) 276; *Wood v. Wood*, 7 N. C. (3 Murph.) 172; *Forrest v. Hart*, 7 N. C. (3 Murph.) 458; *Hudepeth v. Wilson*, 18 N. C. (2 Dev. L.) 372, 31 Am. Dec. 814; *Dunn v. Holmoway*, 18 N. C. (1 Dev. Eq.) 322; *Teagus v.*

Perry, 64 N. C. 39; *Bell v. Parker*, 3 Dana, 51, 28 Am. Dec. 55; *Scott v. Duffy*, 14 Pa. 18.

As the original note was executed in Virginia the law of that state will control.

Arrington v. Gee, 27 N. C. (5 Ired. L.) 590; *Davis v. Coleman*, 29 N. C. (7 Ired. L.) 424; *Anderson v. Doak*, 32 N. C. (10 Ired. L.) 295; *Drewry v. Phillips*, 44 N. C. (Busbee, L.) 81; *Satterthwaite v. Doughty*, 44 N. C. (Busbee, L.) 814, 54 Am. Dec. 554; *Houston v. Potts*, 64 N. C. 38.

The presumption of law is that the common law prevails there.

Griffin v. Carter, 40 N. C. (5 Ired. Eq.) 417; *Brown v. Pratt*, 56 N. C. (3 Jones, Eq.) 204; *Jones v. Reddick*, 79 N. C. 292; *Cade v. Davis*, 96 N. C. 140.

When the defendant pleads the illegality of the contract sued on, under *lex loci contractus*, he must prove what that law is.

8 Am. & Eng. Enc. Law, 1st ed. p. 1021.

The law of other states are facts, and to be proved as facts are proved.

Hooper v. Moore, 50 N. C. (5 Jones, L.) 180; *Alexander v. Torrence*, 51 N. C. (6 Jones, L.) 260.

Messrs. T. T. Hicks and A. A. Hicks, for appellee:

A note given to secure money won at cards or horse racing is void.

See N. C. Code, §§ 2841, 2842; *Calvert v. Williams*, 64 N. C. 168; *Wood v. Wood*, 7 N. C. (3 Murph.) 172; *Bettis v. Reynolds*, 34 N. C. (12 Ired. L.) 345, 55 Am. Dec. 417; *Warden v. Plummer*, 49 N. C. (4 Jones, L.) 524.

The laws of another country, when relied upon, must be proved as facts; and otherwise, it will be presumed that they are the same as the laws of the former, in which suit is brought.

1 Dan. Neg. Inst. 4th ed. p. 905; *Savage v. O'Neil*, 44 N. Y. 801; *Monroe v. Douglass*, 5 N. Y. 452; *Legg v. Legg*, 8 Mass. 99.

Comity between the different states does not require a law of one state to be executed in another when it would be against the public policy of the latter state, or which is in violation of its own laws.

Pope v. Hanke, 155 Ill. 617, 28 L. R. A. 568; *Armstrong v. Best*, 112 N. C. 63, 25 L. R. A. 188; *Story, Conf. L.* §§ 38, 327; *Bishop, Contr. (enlarged ed.)* § 1871; *Trasher v. Everhart*, 3 Gill & J. 244; *Flagg v. Baldwin*, 38 N. J. Eq. 224, 48 Am. Rep. 308.

Faircloth, Ch. J., delivered the opinion of the court:

C. H. Morton and defendant agreed to have a horse race, and it was also agreed that the winner should have the other's horse. The race was run, and Morton was the winner, and they valued defendant's horse at \$100, and, instead of delivering the horse, he gave his note to Morton for \$100. All this occurred in the state of Virginia. Subsequently the defendant renewed said note for principal and interest, and gave the note sued on, which was assigned to plaintiff after maturity. The renewal took place in North Carolina. Without deciding whether the renewal was a North Carolina contract, we will treat it as a Virginia contract, according to plaintiff's contention. The defendant pleads and relies upon Code, 39 L. R. A.

§§ 2841, 2842. These sections declare that all wagers, bets, or stakes, depending upon any race, lot, or chance, etc., shall be unlawful, and all contracts, etc., on account of money or property so wagered, bet, or staked, shall be void. It does not appear whether there is any statute in Virginia denouncing betting on races as illegal. The statute law of another state is a question of fact, to be proved like any other fact. In the absence of such proof, in those states once under the jurisdiction of England, from which they severed their connection it is presumed that the common law prevails. *Griffin v. Carter*, 40 N. C. (5 Ired. Eq.) 418; *Cade v. Davis*, 96 N. C. 139. This presumption arises from the rules of comity among the states. This is not a right of either state, but is permitted and accepted by the states from mutual interest and convenience, from a sense of the inconvenience which would otherwise result, and from a moral necessity to do justice in order that justice may be done in return. Without this rule the law of one state can have no force in another. But there is no comity among the courts of different states. They administer the law in the same way and by the same reasoning by which all other principles of the municipal law are ascertained and guided. It is the duty of every state to look to the interest of its own subjects. Comity, being voluntary and not obligatory, cannot supersede all discretion on the subject. Vattel, at page 61, says: "It belongs exclusively to each nation [state] to form its own judgment of what it prescribes to it,—what is proper or improper for it to do; and it will examine and determine what it can do for another without neglecting the duty which it owes to itself." No state can demand the recognition of its laws in another, if they are deemed by the latter to be impolitic or unjust, of bad morals, or injurious to the rights and interests of its citizens or against its public policy. In *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 589, 10 L. ed. 274, 308, Chief Justice Taney said: "And courts of justice have always expounded and executed them [contracts] according to the laws of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests." *Story, Conf. L.* p. 32. § 38, says: "In the silence of any positive rule, . . . courts of justice presume the tacit adoption of them [foreign laws] by their own government, unless they are repugnant to its policy, or prejudicial to its interest." Many other authorities to the same effect might be cited. *Trasher v. Everhart*, 3 Gill & J. 244; *Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568. There is a difference between the right and the remedy. The courts will look to the *lex loci contractus* to construe the contract, but will not look there for the remedy. *Bishop, Contr. (enlarged ed.)* § 1871.

We are now to the question whether gaming, betting on horse races, etc., are contrary to public policy and injurious to the interests of the citizens of the state. If so, as we have

said above, it is not obligatory on the state to recognize, nor the duty of the courts to enforce, such forbidden contracts. The statute (Code, § 2841), having existed in force nearly a century, affords pregnant proof that our legislature and people have considered that the acts prohibited would be dangerous to the public policy and interest of the state. "The vice aimed at is not only injurious to the person who games, but wastes his property, to the injury of those dependent on him, or who are to succeed to him. It has its more public aspect, for if it be announced that a trustee has been false to his trust, or a public officer has embezzled public funds, by common consent the first inquiry is whether the defaulter has been wasting his property in gambling." *Flagg v. Baldwin*, 33 N. J. Eq. 219, 48 Am. Rep. 308. The habit of gaming and betting is very seductive, and when indulged in, seems to seriously disturb the reason and prudence of the actors. We know, as public information, that many dealers in speculative stocks, depending on future contingencies, have found rest in insane asylums, leaving helpless families behind to be cared for by the state. In the case before us the charm for betting induced the defendant to give his note expressly "without offset," and without the "benefit of exemptions." We do not feel it to be our duty to enforce contracts fraught with such consequences and expressly forbidden by our own state law and policy, in deference to the presumed law of the *lex loci*, recognizing such contracts as valid. By the common law contracts of wager were not considered objectionable. When, however, the subject tended to encourage acts contrary to sound morals, the courts refused to enforce such contract. *Gilbert v. Sykes*, 16 East, 150. And when the act was against public policy or public duty, the court withheld its hand. *Atherfold v. Beard*, 2 T. R. 610. The case of *Flagg v. Baldwin*, 33 N. J. Eq. 219, 48 Am. Rep. 308, is one in point. The contract for speculation in stocks upon margins was executed in the state of New York, where it was presumed to be lawful and enforceable, and it was sought to be enforced in the courts of the state of New Jersey. The statute in the latter state is in substance, and almost verbatim, the same as ours. The subject was thoroughly and ably considered in the opinion, and it was held that such contracts could not be enforced in New Jersey, because it would violate the plain public policy of the state on the subject of gambling and betting, and the court said: "In this respect,

such contracts are excepted from the rule of comity which requires the enforcement by the courts of one state of contracts made in another, if valid by the *lex loci contractus*." Such contracts as we have before us are unlawful and void, and are beyond the protection of law or the right of appeal to courts of justice. This court respects the usury laws of other states, but there is no likeness between our statutes forbidding usury and gaming, betting, etc. The former only affects the individual, for his benefit and protection, and the statute does not avoid the contract, but only forfeits the interest. We have examined the case of *Scott v. Duffy*, 14 Pa. 18, and find it does not apply here. The defendant in error loaned the plaintiff money in New Jersey to bet on an election, and he recovered it in a Pennsylvania court. The court said the loan did not arise out of the bet, or any bet, or to carry any specific bet into execution. The loan was independent of, and before, any bet was made. The lender neither played nor bet. Honor and good faith required that it should be repaid, and it did not appear that any statute in either state prevented it.

Affirmed.

Clark, J., concurring:

The note sued on was executed in this state. It was given in renewal of one executed in Virginia, the consideration of which was a bet lost upon a horse race. It is held that, against a judgment upon a note given since 1868, in renewal of one executed before that date, the debtor is entitled to claim his homestead. *Wilson v. Patton*, 87 N. C. 318; *Arnold v. Estis*, 92 N. C. 162. These are cited, and the reason given for them, in *Blanton v. McDowell County Comrs.* 101 N. C. 532: Because the creditor "must enforce the contract sued on, with the incidents attaching to it when it was made, under the then existing laws,"—*i. e.*, laws existing at the time of the renewal. The same rule is applicable as to laws existing at the place of renewal. The first note was only evidence of the original contract; the new note is given in this state, but upon the original consideration (*Hyman v. Devereux*, 63 N. C. 624); and, when the attempt is made to enforce such new contract in our courts, we are confronted with Code, § 2841, which provides that all bets and wagers are unlawful, and all contracts on account of any money so bet or wagered are void. Of course, no action can be maintained upon a contract whose consideration makes it void.

PENNSYLVANIA SUPREME COURT.

Joel J. BAILY *et al.*, *Appts.*,
v.
City of PHILADELPHIA *et al.*

(184 Pa. 564.)

1. A lease of city gas works is not an

NOTE.—As to lease by municipal corporation of railroad owned by it, see *Sun Printing & Pub. Assn. v. New York* (N. Y.) 37 L. R. A. 788.
39 L. R. A.

interference with the executive functions of the department of public works, within the prohibition of act June 1, 1893, art. 16, although by that statute the gas works are under the direction, control, and administration of that department.

2. The 'supplying of gas for lighting

As to power of municipality to sell waterworks, see *Huron Waterworks Co. v. Huron* (S. D.) 80 L. R. A. 848, and *note*.

purposes is not a municipal duty, either inherent or under the Pennsylvania act of 1885, which regulates the exercise of the municipal power on this subject.

3. No delegation of any municipal power, legislative or other, which involves municipal duty, is made by a lease of city gas works.

4. A provision of an ordinance leasing city gas works that the city will not in any way interfere with, limit, restrict, or imperil the exclusive right thereby vested in the gas company, does not create a monopoly against public policy, where the franchise of the lessee is derived from the legislature and not from the city, and it merely makes the privilege exclusive so far as the city is concerned.

5. The inability of a common council to bind the discretion of its successors for a term of years in respect to a municipal or governmental function does not extend to a lease of city gas works in respect to which the city acts in a business capacity only.

6. No contract between a city and the holder of its bonds is created, with respect to the continued application of the revenues of gas works to a sinking fund, by an ordinance which, merely for the protection of the city, imposed on the trustees of the gas works the obligation of paying money into the sinking fund, where no pledge was made to the loan holders.

(February 21, 1886.)

APPEAL by plaintiffs from a decree of the Court of Common Pleas No. 4, for Philadelphia County refusing an injunction to restrain defendant from executing a lease of the city gas works. *Affirmed.*

The facts are stated in the opinion.

Messrs. John C. Bell, Peter Boyd, George Tucker Bispham, and Joseph L. Caven, for appellants:

The ordinance is an interference with certain executive functions which are expressly committed by the act of June 1, 1885, to the department of public works, and with which councils are forbidden to interfere.

The act provides:

"Waterworks and gas works owned and controlled by the city, the supply and distribution of water and gas . . . the lighting of streets, alleys, and highways . . . shall be under the direction, control, and administration of the department of public works."

Where a city is equipped with the ownership of gas works, and where during a course of more than half a century it has, directly or indirectly, supplied light to the dwellings and places of business of its citizens from such works, it has assumed an obligation to continue the performance of that duty, although from its nature and character it was not one which it might have been compelled originally to undertake.

Eric City v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87.

The city while it surrenders the direction, administration, and control of the supply and distribution of gas to its citizens, nevertheless assumes to discharge its duty to supply light in its streets and in private houses, not through the agency pointed out by the Bullitt bill, to wit, the department of public works, 39 L. R. A.

but partly through the agency of a contract with a private corporation and partly through the agency of city officials not connected with the department of public works.

The particular mode in which the city is to exercise its authority may be pointed out by the legislature; and while, in the absence of any particular method being indicated, the municipality may possibly adopt any mode whatever, yet if a particular means or channel through which the power is to be exercised is prescribed by the legislature, that channel must be followed.

See *White v. Meadville*, 177 Pa. 643, 34 L. R. A. 567.

The business (so called) is not private; it is carried on in the performance of a public power, and in the exercise of a municipal function conferred and created by the legislature.

Strawbridge v. Philadelphia, 2 Pennyp. 419.

The ordinance assumes in respect to the public lighting to delegate a public legislative power, and in respect to the private lighting to confer a monopoly on the grantee; and in both cases to bind the discretion of councils for a long term of years.

A public legislative power cannot be delegated.

Dill. Mun. Corp. § 96; Schenley v. Com., Allegheny, 36 Pa. 29; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 182, 72 Am. Dec. 730; *McKeesport v. Citizens' Pass. R. Co.* 2 Super. Ct. (Pa.) 249, and cases cited; *St. Louis, Murphy v. Clemens*, 43 Mo. 395; *Matthews v. Alexandrit*, 68 Mo. 115, 30 Am. Rep. 776; *Oakland v. Carpentier*, 18 Cal. 540; *Lord v. Oconto*, 47 Wis. 386; *State, Columbus v. Hauser*, 63 Ind. 155; *Thompson v. Schermerhorn*, 6 N.Y. 92, 55 Am. Dec. 885; *Clark v. Washington*, 25 U. S. 12 Wheat. 50, 6 L. ed. 547.

The power to light the streets of a city is such a power, *i. e.*, a public legislative power.

Strawbridge v. Philadelphia, 2 Pennyp. 419; *Garrison v. Chicago*, 7 Biss. 480; *Minneapolis Gaslight Co. v. Minneapolis*, 36 Minn. 159.

The lease executed under the ordinance is a delegation of such power, and is therefore void.

Gale v. Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80; *Brenham v. Brenham Water Co.* 67 Tex. 542.

A municipal corporation cannot divest itself of the legislative discretion conferred upon it by law. It cannot surrender its legislative discretion by contract, nor bind itself not to exercise it whenever it may become necessary.

15 Am. & Eng. Enc. Law, title, *Municipal Corporations*, p. 1045; *Cooley, Const. Lim.* p. 250. See *Brick Presby. Church v. New York*, 5 Cow. 540; *Coates v. New York*, 21 How. Pr. 251; *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *Garrison v. Chicago*, 7 Biss. 480; *Goazler v. Georgetown*, 19 U. S. 6 Wheat. 593, 5 L. ed. 389; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. Rep. 585; *Brenham v. Brenham Water Co.* 67 Tex. 542; *State, Atty. Gen., v. Cincinnati Gaslight & C. Co.* 18 Ohio St. 262; *State v. Milwaukee Gas Co.* 29 Wis. 460, 9 Am. Rep. 598; *Fry, Petitioner*, 15 Pick. 245; *Indianapolis v. Indianapolis Gaslight & C. Co.* 66 Ind. 396.

If the terms of the lease are carried out, the United Gas Improvement Company has the exclusive right to occupy the streets for the purpose of laying and extending mains; no other company can possibly use the streets of the city for those purposes; the present mains cannot be extended unless the United Gas Improvement Company shall deem it necessary; and neither the city nor the citizens can obtain gas from any other source.

Contracts of this kind are void on the ground of public policy.

1 Am. & Eng. Enc. Law, p. 1277; 2 Dill. Mun. Corp. 4th ed. § 692. See also §§ 693-696; *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 832; *State, Atty. Gen., v. Cincinnati Gaslight & C. Co.* 18 Ohio St. 262; *Grand Rapids Electric Light & P. Co. v. Grand Rapids Edison E. L. & Fuel Gas Co.* 33 Fed. Rep. 659; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Brenham v. Brenham Water Co.* 67 Tex. 542; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Illinois, St. L. R. & Canal Co. v. St. Louis*, 2 Dill. 70.

A court of equity strives to prevent illegal acts, not simply to redress them.

Western Sav. Fund Soc. v. Philadelphia, 81 Pa. 175, 72 Am. Dec. 780; *Baird v. Rice*, 68 Pa. 492.

The ordinance impairs the obligation of the city's contract with certain holders of its bonds.

Western Sav. Fund Soc. v. Philadelphia, 81 Pa. 190, 72 Am. Dec. 780.

Messrs. Ernest Lowengrund, James Alcorn, and John L. Kinsey, for appellees: Section 2 of the act of March 11, 17-9 (2 Sm. L. 462), incorporating the city of Philadelphia, authorizes the taking and holding of lands, tenements, chattels, and effects, etc., and explicitly empowers the municipal authorities the same to "grant, bargain, sell, alien, and convey, mortgage, pledge, charge, and encumber or demise and dispose of at their will and pleasure."

Com., Philadelphia Police Pension Fund Assn., v. Walton, 182 Pa. 378; *Gloninger v. Pittsburgh & C. R. Co.* 139 Pa. 13.

Municipal and other corporations enjoy the right as an incident to their being to alien property not essential to their corporate existence, by sale or lease, unless in terms forbidden so to do, or restrained by clear considerations of policy.

2 Dill. Mun. Corp. 4th ed. §§ 575-580; *Burton's Appeal*, 57 Pa. 213; *Gloninger v. Pittsburgh & C. R. Co.* 139 Pa. 13; 1 Morawetz, Priv. Corp. 2d ed. § 367; *Green's Brice, Ultra Vires*, 2d ed. 66-69.

The city acted, both in taking and subsequently in managing the works, not as a municipal, but as a private, corporation.

Western Sav. Fund Soc. v. Philadelphia, 81 Pa. 175, 72 Am. Dec. 780; *Wheeler v. Philadelphia*, 77 Pa. 338; *Lehigh Water Co.'s Appeal*, 102 Pa. 515; *White v. Meadville*, 177 Pa. 648, 84 L. R. A. 567; *Indianapolis v. Indianapolis Gaslight & C. Co.* 66 Ind. 396; *Atlantic City Water Works Co. v. Atlantic City*, 89 N. J. Eq. 867; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 658, 29 L. ed. 519; *Cooley, Taxn.* 2d ed. 688; *Garrison v. Chicago*, 7 Biss. 480.

89 L. R. A.

It is freely open to municipal communities, both in this state and elsewhere, to choose whether they shall employ their own or other agencies for the supply of gas or water.

White v. Meadville, 177 Pa. 648, 84 L. R. A. 567; *Freeport Water Works Co. v. Prager*, 129 Pa. 605; *Tiedeman, Mun. Corp.* § 144a; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Parkersburg Gas Co. v. Parkersburg*, 80 W. Va. 435; *Indianapolis v. Indianapolis Gaslight & C. Co.* 66 Ind. 396; *Garrison v. Chicago*, 7 Biss. 480.

In the absence of a distinct repealing clause in the later statute, that effect will never be given to it, unless the two acts have in view the same object, and are absolutely inconsistent, otherwise both will stand.

United States v. Clafin, 97 U. S. 546; 24 L. ed. 1082; *Rawson v. Rawson*, 52 Ill. 62; 23 Am. & Eng. Enc. Law, tit. *Statutes*, 482; *Com., Graham, v. DeCamp*, 177 Pa. 112; *Hendrix's Account*, 146 Pa. 235; *Rymer v. Luzerne County*, 142 Pa. 108, 12 L. R. A. 192.

The object and intent of the Bullitt bill are the administrative government of cities of the first class, and its manifest purpose was to reform existing abuses in the executive department of the only city of that class.

Com., Graham, v. DeCamp, 177 Pa. 112.

To give to an act thus conceived and made a law the effect contended for by the complainants in this case would work the widest and most flagrant perversion of its real scope and purpose.

Questions concerned with the acquisition and disposal of municipal property, its sale, leasing, or pledge, and regarding the source and method of a city's gas and water supply, or which deal with other matters of similar importance and permanent effect, are legislative, and not executive, in their nature.

1 Dill. Mun. Corp. §§ 116, 466; 2 Dill. Mun. Corp. §§ 575-580; *Tiedeman, Mun. Corp.* § 144a.

According to the process of reasoning contended for by appellants, the rights of councils to legislate upon any of these subjects would be superseded.

In *Philadelphia, Mack, v. Dibeler*, 147 Pa. 261, it was held that the councils of the city possess the right to direct what streets shall be paved and in what manner, and during the decade in which the act of 1885 has been operative in this city, the invariable and undisputed course of practice in the management of the municipal affairs has been in accordance with this doctrine and wholly inconsistent with the theory of appellants.

It was not beyond the power of the city to derive the benefit of a more favorable contract based upon the possession by the lessee of an exclusive right to lay pipes in the streets and to furnish gas to the city and its inhabitants.

Newport v. Newport Light Co. 84 Ky. 166; *Montgomery Gaslight Co. v. Montgomery*, 87 Ala. 245, 4 L. R. A. 616; *Grant v. Davenport*, 86 Iowa, 396; *Walla Walla Water Co. v. Walla Walla*, 60 Fed. Rep. 957; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485; *Le Claire v. Davenport*, 13 Iowa, 210.

A contract with a water company giving it the exclusive privilege to supply water in a

city for a period of thirty years, with a right of purchase of the water works by the city at the end of ten years is not unreasonably long in duration, nor void as against public policy.

Fergus Falls Water Co. v. Fergus Falls, 85 Fed. Rep. 586; *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Indianapolis v. Indianapolis Gaslight & C. Co.* 66 Ind. 896; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *Brown v. Duplessis*, 14 La. Ann. 854.

The trust existing in the trustees is a private one, and the city of Philadelphia is to be regarded as a private corporation, so far as relates to its contract with the loan-holders. The distinction between public duties and private business is wide and obvious.

Western Sav. Fund Soc. v. Philadelphia, 81 Pa. 189; *Wheeler v. Philadelphia*, 77 Pa. 336; *Girard L. Ins. Co. v. Philadelphia*, 88 Pa. 393; *Strawbridge v. Philadelphia*, 2 Pennyp. 419; *White v. Mendrille*, 177 Pa. 643, 34 L. R. A. 567; *New Orleans Gaslight Co. v. New Orleans*, 42 La. Ann. 188; *Higgins v. San Diego*, 118 Cal. 524; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Illinois Trust & Sav. Bank v. Arkansas City*, 40 U. S. App. 257, 76 Fed. Rep. 271, 22 C. C. A. 171, 84 L. R. A. 518.

A taxpayer's bill will not lie to prevent the city from entering into a contract whereby exclusive privileges are granted, as in this case.

Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Rep. 759; *Grant v. Davenport*, 36 Iowa, 396; *Dodge v. Council Bluffs*, 57 Iowa, 560; *Searle v. Abraham*, 73 Iowa, 507; 2 Beach, Inj. § 1228; *Waco Water & Light Co. v. Waco* (Tex. Civ. App.) 27 S. W. 625; *State, People's Gaslight Co., v. Jersey City*, 46 N. J. L. 297; *East St. Louis v. East St. Louis Gaslight & C. Co.*, 98 Ill. 415, 38 Am. Rep. 97; *Grand Rapids Electric Light & P. Co. v. Grand Rapids Edison E. L. & Fuel Gas Co.* 38 Fed. Rep. 659; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; 2 Dill. Mun. Corp. 4th ed. §§ 914-922; *Craft v. Jackson County Comrs.* 5 Kan. 518; *Starin v. Edson*, 112 N. Y. 206; *Merriman v. Yuba County Supers.* 72 Cal. 517; *Droz v. East Baton Rouge*, 86 La. Ann. 307; *Kilbourne v. St. John*, 59 N. Y. 21, 17 Am. Rep. 291.

Public wrongs may not be redressed, nor public duties enforced, at the suit of private parties having no special interest therein.

Saylor v. Pennsylvania Canal Co. 188 Pa. 167; *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.* 50 Pa. 91, 88 Am. Dec. 584; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *Cumberland Valley R. Co.'s Appeal*, 62 Pa. 218; *Larimer & L. Street R. Co. v. Larimer Street R. Co.* 137 Pa. 533; *King v. Bristol Dock Co.* 12 East, 429; *Bigelow v. Hartford Bridge Co.* 14 Conn. 565, 36 Am. Dec. 502; *Dwenger v. Chicago & G. T. R. Co.* 98 Ind. 153; *Harvard College v. Stearns*, 15 Gray, 1; *Truesdale v. Peoria Grape Sugar Co.* 101 Ill. 561; *Quincy v. Bull*, 106 Ill. 337; *Newport v. Newport Light Co.* 89 Ky. 454.

The contract of lease under the ordinance 39 L. R. A.

of November 12, 1897, is not a delegation of municipal authority, nor does it interfere with the police powers.

The granting of an exclusive franchise to supply gas or water is not a relinquishment of police power, nor of the control in regard to public health, etc.

Stein v. Bienville Water Supply Co. 34 Fed. Rep. 145; *National Waterworks Co. v. Kansas*, 28 Fed. Rep. 921; *Elliott, Roads & Streets*, 384, note 2.

The right to transport gas or water follows as a mere incident from the power to manufacture or supply the same.

Carothers v. Philadelphia Co. 118 Pa. 468; *Warren Gaslight Co. v. Pennsylvania Gas Co.* 161 Pa. 510; *Quincy v. Bull*, 106 Ill. 337.

The court will not interfere by injunction with the discretion of the mayor and councils as exercised in the enactment of this ordinance, or in the execution of the contract provided for therein.

Interstate Vitriified Brick & Pav. Co. v. Philadelphia, 164 Pa. 477; *American Pavement Co. v. Wagner*, 139 Pa. 623; *Douglass v. Com., Senior*, 108 Pa. 559; *Findley v. Pittsburg*, 82 Pa. 352; *Com., Snyder, v. Mitchell*, 82 Pa. 343; *Chandler v. Gardner*, 2 Pa. Co. Ct. Rep. 407; *Brown v. Philadelphia*, 17 Phila. 298; *Wheeler v. Rice*, 83 Pa. 232; *Semmes v. Columbus*, 19 Ga. 471; *Wells v. Atlanta*, 43 Ga. 57; *Anderson v. O'Conner*, 98 Ind. 168; *Brush v. Carbondale*, 78 Ill. 74; 1 Dill. Mun. Corp. 4th ed. §§ 94, 95, 475; 2 Dill. Mun. Corp. § 832 *et seq.*, and cases cited.

Mitchell, J., delivered the opinion of the court:

The gas works are the property of the city of Philadelphia, not as a municipality, but as a business corporation. However much the idea that the city is not required by its municipal duty to supply its citizens with light in the streets and public places may seem to fall below the modern conception of a city, yet it is beyond question, on settled legal principles, that in the performance of that function the city acts under authority merely, and not under municipal obligation. This was the rule of the common law, and no statute in reference to the city of Philadelphia has altered it. Hence the city may change its mode of action, or cease to act altogether, in its discretion, and the discretion is purely legislative. The courts have no power to interfere unless the proposed action contravenes some express statute or violates some binding contract. These principles are elementary, and need not be enlarged upon since they are conceded by the learned counsel for appellants, and the corollary admitted, that the lease now sought to be enjoined would have been clearly within the power of the city prior to the act of June 1, 1885 (Pub. Laws, 37), commonly known as the "Bullitt Bill." The argument of the appellants is arranged under three heads, and may be conveniently considered in that order.

First, that the ordinance for the lease of the gas works is an interference with the executive functions of the department of public works, and therefore within the prohibition of the act of June 1, 1885. Of that act this court has already declared that "the subject with

which it deals is the administrative government of cities of the first class, and its manifest purpose was to reform existing abuses in the executive department of the only city of that class." *Com., Graham, v. De Camp*, 177 Pa. 112. The particular provisions of the act which are relied on by the appellants are article 1, § 1: "There shall be the following executive departments: . . . Department of public works." Article 4, § 1: "The department of public works shall be under the charge of one director who shall be the head thereof. . . . Gas works owned and controlled by the city, the supply and distribution of gas, . . . the lighting of streets, alleys, and highways, . . . shall be under the direction, control, and administration of the department of public works." And article 16: "Councils shall by general ordinances provide for the proper and efficient conduct of the affairs of the city by the mayor and several departments, and the boards thereof; but they shall not pass any ordinances directing or interfering with the exercise of the executive functions of the mayor and departments, boards, or heads or officers thereof." These provisions do not take away nor in any degree lessen any municipal authority previously lodged in the city, still less any merely business corporate power. They merely regulate the operation of its executive and legislative functions as to such public property of the enumerated classes as the city may at any time have. The prohibition to councils in article 16 is against interference with "the exercise of the executive functions" of the departments. The lease or sale of the gas works is not an executive function. If it was, it would belong to the director of public works, as the head of the department. But no one would contend that the director has any power to make a sale or such a lease. This is a parting with the title and possession of the city which can only be done by a legislative act. As a legislative act, it is within the clear power of the city. The right to change the property which is the instrument through which the city exercises its powers is inherent in its ownership, whether municipal or merely corporate, unless prohibited by contract or by the terms of a trust upon which it was acquired. But, to avoid all doubts, the right of alienation is given in express words in the charter of 1789, all the powers granted in which were preserved by the consolidation act (act Feb. 2, 1854, § 6; Pub. Laws, 25), and which appears to be still in force. *Com., Philadelphia Police Pension Fund Assn., v. Walton*, 182 Pa. 378. And the right is not taken away by the act of 1885, which, as already said, merely regulates the mode of exercise of executive, and incidentally of legislative, functions without changing the rights which appertain to those functions.

But it is urged that, although the city may sell and change the specific property, it cannot abdicate the function, and must therefore substitute other property, through which its control and operation of the franchise may be continued; and the analogy is relied on of a trustee with a power to sell, who may by virtue thereof change the subject-matter, but cannot destroy the trust. This brings us back again to the preliminary question, on which

the whole case rests, whether supplying the public places and private citizens with gas for lighting purposes is a strictly municipal function, or merely a power conferred on the city as a corporation. If the former, it is a duty as well as a power, and cannot be abandoned; if the latter, it is an authority only, and may be exercised or not, at the city's option. Although the appellants start out with the concession that the lease in question would have been within the city's powers prior to the act of 1885, yet the elaborate and ingenious argument for them rests upon the contention that the lighting of the city, at least since that act, is a municipal duty, and, though presented in different aspects and from different points of view, the argument constantly comes back to this contention, for without it there is confessedly no ground for the case to rest upon. But, for reasons already stated, we are of opinion that the act of 1885 made no change in the city's municipal powers, either inherent or statutory, but merely regulated their exercise so far as related to executive officers, and incidentally to such purpose restrained what had become legislative usurpation. Under that act, so long as the city owns and operates the gas works, it must do so through the department of public works; but there is no compulsion upon the city to continue the manufacture and sale of gas at all, or to do it through its own officers, if in its legislative judgment it is no longer expedient to do so.

The second proposition of the appellants is that the ordinance assumes in respect to the public lighting to delegate a public legislative power, and in respect to the private lighting to confer a monopoly on the grantee, and in both cases to bind the discretion of councils for a long term of years. It is manifest that this proposition in the use of the phrase, "public legislative power," comes back, as already indicated, to the contention that public lighting is a municipal duty. It is true that it is a legislative power, in the sense that it is the exercise of the will of the owner with respect to ownership of the property. If such ownership was coupled with a municipal duty, such duty could not be escaped by lease or other form of delegation. But the gas works, as already discussed, are held by the city as a business corporation. If the use of gas should be so far superseded as to make its manufacture and sale unprofitable, there is no compulsion on the city to continue it or to embark in any new venture for the supply of a different light; and if the management and operation of the works can be more profitably or more conveniently carried on by a lessee, instead of by the city's own immediate servants, the city, in making a lease, is determining a business question in its legislative corporate capacity, just as any private corporation might do, but is not delegating any municipal power, legislative or other, which involves municipal duty. In regard to the conferring of a monopoly, the appellants cite the provision in the lease that "the city of Philadelphia agrees that during the term of this contract it will do nothing, by ordinance or otherwise, which will in any way interfere with, or limit, restrict, or imperil,

this exclusive right hereby vested in the said United Gas Improvement Company, its successors or assigns," and claim that this creates a monopoly which is void on the ground of public policy. To this objection it would be a sufficient answer that, as already held, the city in this matter is acting in its business, not its governmental, capacity, and the owner of business property, even though a municipal corporation, may, in dealing with it, make such terms as, in its discretion, it deems best for its interest. When the owner of a business sells it, with its goodwill, etc., he may agree, as part of the consideration to the purchaser, not to go into the same business again as a rival, within an agreed territory, or for an agreed time. The city of Philadelphia, selling its gas-making plant and goodwill, may do the same thing. But in the provision of the lease now under consideration the city does not assume to grant any franchise. It could not do so if it would. What the city does is to covenant that it will do no act in derogation of the right of the lessee under the grant to operate the gas works and supply the city and the citizens with light therefrom. The franchise of the lessee to furnish light is not derived from the city, but from the legislature, and whether it is exclusive or not at present, or shall be exclusive or not in the future, does not and will not depend on the city, but on the legislature. All that the city does is to agree that it will do no act itself whereby the privileges granted by it to the lessee, and intended to be exclusive so far as it is concerned, shall be limited or interfered with. This was clearly within its power in dealing with its business property. Whether the legislature may hereafter impose upon the city a municipal duty in regard to lighting which may conflict with its present contract is a question we need not consider until the case shall arise, with proper parties in interest to such a question.

It is further argued that the lease undertakes to bind the discretion of councils for a long term of years. This again comes back to the contention that lighting the city is a strictly municipal or governmental function, as to which councils cannot bind their successors. But, as already held, the city is acting in its business capacity only, and the contract binds it in that capacity. All contracts which contemplate things to be done after the immediate present must, to that extent, bind and limit the power of the contracting party. This principle has already been adjudicated in its application to the city of Philadelphia and the gas works in the cases of *Western Sav. Fund Soc. v. Philadelphia*, 81 Pa. 175, 72 Am. Dec. 730, 31 Pa. 185; *Wheeler v. Philadelphia*, 77 Pa. 838.

The last proposition of the appellants is that the ordinance impairs the obligation of the city's contract with certain holders of its bonds. This was the ground of decision in *Western Sav. Fund Soc. v. Philadelphia*, 81 Pa. 175, 72 Am. Dec. 730. But the cases are not at all alike in the facts. In *Western Sav. Fund Soc. v. Philadelphia*, the ordinance of 1841 distinctly pledged the revenues of the gas works to the creditors for security of payment of the bonds, and provided for the man-

agement by trustees for that purpose. The ordinance of 1868, under which Mr. Campbell, one of the complainants, is a bondholder, has no such provision. The loan was made to the city, and upon the city's general credit, without any pledge of its revenues from the gas works or any other specified source. On the contrary, the ordinance gave express notice in § 4 that the terms and provisions of the ordinance of 1841 should not apply in any way to this loan. Section 3 of the ordinance requires the retention by the trustees of the gas works of a certain per cent of the amount of the loan, annually, and its payment into the city treasury; whereupon the city undertakes to apply part of it to the payment of the interest on the loan, and to pay the other part into the sinking fund. These provisions are not part of the contract between the city and the loanholders, but are terms imposed by the city on the trustees of the gas works as conditions on which the city will raise the money for the latter's use. Without these terms the city would have had to meet the bonds at their maturity out of general taxation, and could not have looked for repayment from the revenues of the gas works unless at the option of the trustees. By these terms the city guarded itself from this risk, and secured repayment to itself from the revenues of the department for whose use it had borrowed the money. But the requirements of this section were for the protection of the city only, and involved no pledge to the loanholders. They loaned on the general credit of the city, and perhaps also on the faith of the sinking fund pledged for the payment of this and other loans. But there is no averment that the sinking fund has not been kept up by appropriation from the city treasury from time to time, as required by law. Without such averment and proof, it does not appear that any obligation of the loanholders' contract has been impaired. None of the grounds on which the court is asked to interfere can be sustained, and the injunction was rightly refused.

Decree affirmed, at costs of appellants.

Sarah STEARNS, Appt.,

v.

ONTARIO SPINNING COMPANY.

(184 Pa. 519.)

1. **Recovery cannot be had for an injury inflicted by the head of an ax falling from a door in the fifth story of a building into the area way below, if it flew from the handle while it was being used by a competent person who had used due care in inspecting the instrument, and found no defect in it.**
2. **The mere happening of an accident is not sufficient to show negligence as between persons having no contract relations with each other, if other evidence shows due care under the circumstances.**

NOTE.—As to presumption of negligence from occurrence of accidents, see *note to Barnowski v. Helson* (Mich.), 15 L. R. A. 33.

For later cases on this subject, see also briefs in the above case of STEARNS v. ONTARIO SPINNING Co.

(February 7, 1898.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. *Affirmed.*

The facts are stated in the opinion.

Messrs. William F. Harrity, James M. Beck, and Alfred R. Haig, for appellant:

Stearns was not an employee of the defendant. This fact distinguishes the present case from—

Wojciechowski v. Spreckels' Sugar Ref. Co. 177 Pa. 57; *McKenna v. Martin & William H. Nizon Paper Co.* 176 Pa. 306; *Brunner v. Blaisdell*, 170 Pa. 25.

Where a certain course of action has been pursued by any person without injury to others, and he, upon changing that course, injures another, the thing (unexplained) speaks for itself that such person has been negligent; or if something unusual happens with respect to the defendant's property, or something over which he has the control, which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant's act, the occurrence being unusual is said (in the absence of explanation) to speak for itself that such act was negligent.

Smith, Negligence, 2d Eng. ed. 419, 420, *Whittaker's* 2d Am. ed. 1896, 522, 523; 16 Am. & Eng. Enc. Law, ed. 1891, p. 449; 1 *Shearm. & Redf. Neg. ed.* 1888, § 59.

Where the thing which causes the injury is shown to be under the management of the defendants, and the accident is such as in the ordinary course of things does not happen when those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care, and the burden is upon the defendants of establishing their freedom from fault.

Shaffer v. Lacock, 168 Pa. 497, 29 L. R. A. 254; *Houser v. Oumberland & P. R. Co.* 80 Md. 146, 27 L. R. A. 154; *Graham v. Badger*, 164 Mass. 42; *Doyle v. Boston & A. R. Co.* 145 Mass. 886; *Dixon v. Pluna*, 98 Cal. 884, 20 L. R. A. 698; *Cahalin v. Cochran*, 1 N. Y. S. R. 588; *Clare v. National City Bank*, 1 Sweeny, 539; *Byrne v. Boadle*, 2 Hurlst. & C. 722; *Scott v. London & St. K. Docks Co.* 8 Hurlst. & C. 596; *Huey v. Gahlenbeck*, 121 Pa. 288; *Stringert v. Ross Twp.* 179 Pa. 614.

In the present case, the defendant's ax head fell from the handle and caused the death of the plaintiff's husband—a fact which it is impossible to dispute. If it had been fastened securely to the handle it would not have slid off.

McCullough v. Shoneman, 105 Pa. 169, 51 Am. Rep. 194; *Boyd v. Insurance Patrol*, 118 Pa. 269; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 580; *Vincett v. Cook*, 4 Hun, 818; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418; *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12; *Kearney v. London, B. & S. C. R. Co.* L. R. 5 Q. B. 411, L. R. 6 Q. B. 759; *Manning v. West End Street R. Co.* 166 Mass. 230; *Cummings v. National Furnace Co.* 60 Wis. 608; *Briggs v. Oliver*, 4 Hurlst. & C. 403; 39 L. R. A.

Lyons v. Rosenthal, 11 Hun, 46; *Kelly v. Cohoes Knitting Co.* 84 Hun, 154; *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224; *Trenton Pass. R. Co. v. Cooper* (N. J.) 88 L. R. A. 637; *St. Louis, I. M. & S. R. Co. v. Neely*, 68 Ark. 636, 37 L. R. A. 616; *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474; *Washington v. Missouri, K. & T. R. Co.* 90 Tex. 88; *Barnowsky v. Helson*, 89 Mich. 523, 15 L. R. A. 88; *The Majestic*, 166 U. S. 375, 41 L. ed. 1039.

The falling of an iron bar or hot cinders from an elevated railroad raises a presumption of negligence.

Hogan v. Manhattan R. Co. 6 Misc. 295; *Brooks v. Kings Co. Elev. R. Co.* 4 Misc. 288; *Wiedmer v. New York Elev. R. Co.* 41 Hun. 284.

Or the falling of ice or snow from a roof of unusual construction, near the street.

Shephard v. Creamer, 160 Mass. 496.

Or the falling of a cistern wall in course of construction.

Mulcairns v. Janesville, 67 Wis. 24.

Or the falling of an elevator.

Gerlach v. Edelmeyer, 15 Jones & S. 392.

Or the fall of a keg from a window on plaintiff.

Corrigan v. Union Sugar Refinery, 98 Mass. 577, 96 Am. Dec. 685.

Or that defendant's steer ran into plaintiff while on the highway.

Ficken v. Jones, 28 Cal. 618.

A pipe on a public wharf fell on plaintiff and injured him. It was held he could recover.

Dunn v. Ballantyne, 5 App. Div. 483.

Lumber piled on highway fell on child causing death. It was held the administrator could recover.

Earl v. Cronck, 131 N. Y. 613, 32 N. Y. S. R. 13, 40 N. Y. S. R. 847.

While tying his shoe on doorstep, a brick fell from the house on plaintiff's head. It was held the owner of the premises was liable.

Murray v. McShane, 52 Md. 217, 36 Am. Rep. 867. See also *Kaples v. Orth*, 61 Wis. 581; *Skelton v. Larkin*, 82 Hun, 388; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 653, 32 L. R. A. 700; *Thomas v. Western U. Teleg. Co.* 100 Mass. 156.

The fact that gas escapes from defendant's pipes is prima facie evidence of some neglect.

Smith v. Boston Gaslight Co. 129 Mass. 318; *Koelsch v. Philadelphia Co.* 152 Pa. 855, 18 L. R. A. 7; *Prichard v. Consolidated Gas Co.* 2 Super. Ct. (Pa.) 179; *Hoehle v. Allegheny Heating Co.* 5 Super. Ct. (Pa.) 21.

The mere fact that water ran from defendant's hydrant into the plaintiff's apartment is sufficient proof of negligence.

Warren v. Kauffman, 2 Phila. 259.

The absence of guard rails from a bridge is prima facie evidence of negligence in a case where a man falls therefrom at night or where a frightened horse plunges over the side of such a bridge.

Hays v. Gallagher, 72 Pa. 136; *Yoders v. Amwell Twp.* 172 Pa. 447; *Bitting v. Maratawny Twp.* 177 Pa. 218.

It is not the law that men are responsible for their negligence only to the extent of the injuries which they knew would result from

it. If it were, there could be no recoveries except for malicious wrongs.

Pittsburgh v. Grier, 22 Pa. 54, 60 Am. Dec. 65; *Yoders v. Amwell Twp.* 172 Pa. 447.

The mere fact that a similar accident never before happened does not necessarily repel the charge of negligence.

Quill v. Empire State Teleph. Co. 13 Misc. 435; *White v. Boston & A. R. Co.* 144 Mass. 404; *Edgerton v. New York & H. R. Co.* 39 N. Y. 227; *Seybolt v. New York. L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75; *Stokes v. Saltonstall*, 38 U. S. 18 Pet. 181, 10 L. ed. 115; *New Jersey R. & Transp. Co. v. Pollard*, 89 U. S. 22 Wall. 841, 22 L. ed. 877; *The City of Panama*, 101 U. S. 453, 25 L. ed. 1061; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141; *Dunlap v. The Reliance*, 2 Fed. Rep. 249; *Eagle Packet Co. v. Defries*, 94 Ill. 598, 34 Am. Rep. 245; *Robinson v. New York C. & H. R. R. Co.* 9 Fed. Rep. 877; *The Garden City*, 26 Fed. Rep. 766; *Lusby v. Atchison, T. & S. F. R. Co.* 9 Fed. Rep. 877; *Mitchell v. Marker*, 22 U. S. App. 825, 10 C. C. 806, 25 L. R. A. 83, 62 Fed. Rep. 189; *Spear v. Philadelphia, W. & B. R. Co.* 119 Pa. 61; *Flinn v. State*, 24 Ind. 236.

Mr. John G. Johnson, for appellee:

The evidence disclosed nothing wrong with either the tool or with the method of its use.

Shaffer v. Haish, 110 Pa. 575.

In consequence of what is inevitable, the head may, and at times does, fly off the handle of the ax, without negligence.

It would be a new departure from principles of law well settled, both in Pennsylvania and in other states of this Union, by reversing the judgment of the lower court, to hold that a man properly using an ax, in apparently good condition, is liable for injury occasioned by the slipping off of its head.

No presumption of negligence ever arises from the mere unexplained happening of an accident, but only from the attendant circumstances.

Higgs v. Maynard, 1 Harr. & R. 581, 12 Jur. N. S. 705; *Huey v. Gahlenbeck*, 121 Pa. 238; *Cosulich v. Standard Oil Co.* 122 N. Y. 118; *Kendall v. Boston*, 118 Mass. 234, 19 Am. Rep. 446; *Doyle v. Wragg*, 1 Fost. & F. 7; *Searles v. Manhattan R. Co.* 101 N. Y. 661; *Chicago, M. & St. P. R. Co. v. Harper*, 128 Ill. 384; *Huff v. Austin*, 46 Ohio St. 386; *Brunner v. Blaisdell*, 170 Pa. 25.

Proof of the fact that such a head did fly off, through a doorway, did not establish an accident of such an unusual character as to raise an inference of negligence. Had it been otherwise, any inference of negligence was prevented by the proof, adduced by the plaintiff, of the circumstances surrounding the accident which showed no negligence.

Pennsylvania R. Co. v. MacKinney, 124 Pa. 462, 2 L. R. A. 820; *Wojciechowski v. Spreckels' Sugar Ref. Co.* 177 Pa. 57; *Huey v. Gahlenbeck*, 121 Pa. 238; *Brunner v. Blaisdell*, 170 Pa. 25; *McKenna v. Martin & William H. Nixon Paper Co.* 175 Pa. 306; *Baker v. Hagey*, 177 Pa. 128; 2 Thomp. Neg. p. 1227; *Cosulich v. Standard Oil Co.* 122 N. Y. 118; *Huff v. Austin*, 46 Ohio St. 386; *Kendall v. Boston*, 118 Mass. 234; *Searles v. Manhattan R. Co.* 101 N. Y. 661.

89 L. R. A.

Fell, J., delivered the opinion of the court:

The plaintiff's testimony showed that her husband, while lawfully in an area way in the building in which he was employed, was struck on the leg by an ax head, and thereby received a wound from the effects of which he died; and that the ax head fell from an open doorway in the fifth story of the building which was occupied by the Ontario Spinning Company, the corporation defendant. The plaintiff then called Clement, an employee of the defendant, who testified that at the time of the accident he was using the ax in question in cutting or breaking the iron bands on a bale of cotton; that he had used the same ax for about two years, that he had never had any trouble with it; that he had frequently examined it, to see whether it was in good condition, that on this occasion, while he had not made any particular examination, "it seemed to be in first-class condition"; that he had noticed nothing wrong with it; that immediately before the accident he had been using it for about two minutes, and had cut ten bands from a bale of cotton; and that, when he raised it to strike again, the head flew off the handle, and out of the open doorway behind him. The doctrine of *res ipsa loquitur* applies where, under the circumstances shown, the accident presumably would not have happened if due care had been exercised. Excepting where contractual relation exists between the parties, as in the case of carriers of passengers and some others, negligence will not be presumed from the mere happening of the accident and a consequent injury, but the plaintiff must show either actual negligence, or conditions which are so obviously dangerous as to admit of no inference other than that of negligence. The burden which is thus thrown upon the defendant is not that of satisfactorily accounting for the accident, but merely that of showing that he used due care. It is therefore unnecessary in this case to consider whether proof of the accident and its attendant circumstances were sufficient to put the defendant to its defense, for, if any presumption of negligence had been raised by the previous testimony, it was a presumption of fact only, and was entirely rebutted by the testimony of Clement, the defendant's employee, who was the last witness called by the plaintiff. His evidence showed that he was a competent man and that he had used due care, and it was at the same time entirely consistent with the happening of the accident as described by the other witnesses. For to those who are familiar with the construction of the ordinary ax, such as the one in this case was shown to have been, it is readily conceivable that the head and handle may part although apparently securely joined; and to those who are familiar with their use it is known that they sometimes do so without previous warning. What, then, was there to submit to the jury? The defendant, as we have said, was not bound to account for the happening of the accident. He had been relieved by the plaintiff of the burden, if any there was, of showing the exercise of due care. The plaintiff's whole testimony not only failed to show negligence on the part of the defendant, but rebutted any presumption of negligence which may

have arisen, and affirmatively proved its absence.

We are of the opinion that the nonsuit was properly entered, and *the judgment is affirmed.*

RHODE ISLAND SUPREME COURT.

ROYCE, ALLEN, & COMPANY

v.

Charles H. OAKES.

(..... R. I.)

1. **The failure of a servant or agent to pay over on demand money which he has collected for his principal will not sustain an action of trespass on the case, but the only remedy is by assumpsit or debt.**
2. **An allegation that the neglect to pay over money collected for an employer was with the intent to defraud does not change the neglect into a tort.**

(March 14, 1898.)

ON DEMURRER to the declaration in an action charging defendant with having collected money for plaintiff and fraudulently refused to pay it over. *Sustained.*

The facts are stated in the opinion.

Messrs. M. Van Slyck and Charles C. Mumford, for defendant, in support of the demurrer:

The count charges the crime of larceny under R. I. Gen. Laws, chap. 279, § 16, but does not allege that complaint has been made as required by R. I. Gen. Laws, chap. 233, § 16.

Embezzlement is the fraudulent appropriation of such property as the statute makes the subject of embezzlement, under the circumstances in the statutes pointed out, by the person embezzling, to the injury of its owner.

2 Bishop, Crim. L. § 325.

While it is true that a demand and refusal alone do not constitute an embezzlement under many statutes, that rule does not apply when the statute makes a "fraudulent conversion," embezzlement, or statutory larceny.

State v. Leonard, 6 Coldw. 307; *State v. Taberner*, 14 R. I. 272, 51 Am. Rep. 382.

Mr. Irving Champlin for plaintiff, *contra*.

Tillinghast, J., delivered the opinion of the court:

Since the rendition of the former opinion in this case, sustaining the demurrer to the second count in the declaration (20 R. I. pt. 2, p. 3), the plaintiffs have amended said count so as to allege, in substance, that on the 15th day of January, 1894, they authorized and empowered the defendant, who was in their employ for hire, and acting as their agent and servant in this behalf, to collect and receive for them, from divers debtors of theirs, various sums of money, amounting, in all, to the sum of \$1,714.60, and thereupon to deliver the same to the plaintiffs. And they aver that the de-

fendant thereafter, in pursuance of said authority, collected said sum of money, and that thereupon it became his duty to pay over the same to the plaintiffs; but that, not regarding his duty in that behalf, although duly requested, intending and contriving to injure and defraud the plaintiffs, he neglected and still neglects to pay said money to them. And the plaintiffs declare that said refusal was negligent, fraudulent, and in violation of his duty, and that by reason of the premises they are deprived of the possession and benefit of said money. To this amended count the defendant has demurred, on the grounds (1) that the cause of action, if any, set forth therein, is an action of contract, and not an action sounding in tort; and (2) that the injury alleged to have been suffered by plaintiffs has been suffered by reason of the commission of the crime of larceny, and that it does not appear that any criminal complaint has been made therefor.

We think the demurrer should be sustained on the first ground. The amended count differs from the former one, which we held amounted to a charge of embezzlement, in that it does not allege a fraudulent conversion of the money by the defendant to his own use, but simply alleges a breach of duty in not paying over the same to the plaintiffs after demand made therefor. In other words, when stripped of its formalities, it simply shows a case where a servant or agent has collected money for his principal and neglected to pay it over on demand,—that is, a case of money had and received by the defendant to the plaintiffs' use,—and hence the plaintiffs' remedy, and their only remedy, is by assumpsit or debt. It is true, as contended by plaintiffs' counsel, that the action of trespass on the case is an exceedingly broad and comprehensive form of action, and that it lies, in general, where a legal injury is suffered for which the common law has provided no adequate remedy. 26 Am. & Eng. Enc. Law, p. 699, and cases in note 5. But, in a case like the one set out in said count, the common law has provided an adequate remedy in an action of assumpsit; and to permit the plaintiffs to maintain their action of trespass on the case would, in effect, be to abolish the distinction between actions sounding in tort and those sounding in contract, and enable a plaintiff in any case, where money has been had and received by another to his use, to sue in a tort action for its recovery.

In *Orton v. Butler*, 2 Chitty, 343, the same thing was attempted under a declaration the third count of which was nearly identical with the count now in question, except that there the plaintiff stated a stronger case by alleging a conversion of the money received, as the plaintiffs originally did in the case at bar. In

NOTE.—For some authorities as to a cause of action on the case, see *note* to *Chambers v. Baldwin* (Ky.) 11 L. R. A. 547.

39 L. R. A.

For such cause of action on account of inducing a person to break a contract, see *note* to *Boysen v. Thorn* (Cal.) 21 L. R. A. 233.

sustaining the demurrer to the third count, Abbott, J., said: "The law has provided certain specific forms of action, suited to the recovery of damages, for certain peculiar injuries. We have a smaller variety of forms in our law than is to be found in the civil law. We have not many, but it is of importance that those we have should be preserved, and that parties should not be permitted by their own invention, to convert that which from the earliest times has been considered as peculiarly the subject of assumpsit or debt, into an action of tort. We are to look with jealousy at any innovation of that kind, so that nothing like a precedent shall be established, tending to destroy those sound distinctions which have been established by the wisdom of our ancestors." Best, J., added: "I am of the same opinion. This is a departure from all precedents; and, even if I were satisfied that it might not be attended with inconvenience, still I think we ought not to permit any innovation upon the ancient forms of proceeding, which are to be considered as part of the settled law of the land. As well might we alter the doctrine of descents as to freehold property as alter the long established forms prescribed for the recovery of debts. We are not at liberty to do so. There is a broad distinction between causes of action arising *ex contractu* and *ex delicto*. This is one arising *ex contractu*; there is no wrong stated, but merely a breach of contract; and the plaintiff is not at liberty to convert a mere matter of contract into a tort. The consequences of a departure from the ancient forms have been well pointed out in argument. In addition to those may be mentioned that, by altering the remedy, the defendant would be deprived of his plea of tender, and also of the advantage of paying money into court. But, if no such consequences were to follow, I think we ought to adhere to those ancient forms, which have been perfected by the wisdom of ages, and confirmed in their utility by the experience of many centuries."

It has never been understood by the bar in this state that a tort action could be maintained for money had and received, even though the person receiving the same has negligently and fraudulently refused to pay over the same to the person to whose use it was received, or has even converted it to his own use, except, at any rate, as provided by statute, after the commencement of a criminal prosecution. R. I. Gen. Laws, chap. 283, § 16. On the contrary, the understanding has always been that assumpsit and debt are the only actions that can be employed in such cases; and we think this position is clearly in accordance with the well-settled rules relating to common-law actions. The authorities cited by plaintiff's counsel do not, in our judgment, sustain his position. They are mostly cases of negligence for failing to discharge some common-law duty arising from a contract, and hence are proper subjects for trespass on the case. 1 Chitty, Pl. 151, 152. The celebrated and familiar case of *Coggs v. Bernard*, 2 Ld. Raym. 909, is an example. *Dickon v. Clifton*, 2 Wils. 319, was case for undertaking to carry and deliver some malt for the plaintiff, and for so carelessly discharging his duty that the malt was embezzled

and lost. *Elsee v. Gatward*, 5 T. R. 143, was tort for negligence in regard to the use of new material, instead of old, in the repair of certain buildings, contrary to plaintiff's order, which the court held to amount to a misfeasance, and hence a good foundation for the action. *Brown v. Boorman*, 11 Clark & F. 1 (see 8 Q. B. 511), is a case where the plaintiff employed defendant as a broker to sell and deliver oil for cash, but, not regarding his duty, he sold and delivered the oil without obtaining payment therefor; and the court held that case was a proper remedy, although the duty imposed upon the defendant arose out of an express contract. That decision gave rise to the supposition that every action for a breach of contract might be considered as an action of tort. But in the subsequent case of *Courtenay v. Earle*, 10 C. B. 78, the court effectually disposed of that impression, Williams, J., saying that the judgment in the former case by no means warranted such a conclusion, and that the court did not intend to overrule the case of *Corbett v. Packington*, 6 Barn. & C. 268. In the last-mentioned case, one count in the declaration stated that the plaintiff, at the request of the defendant, had caused to be delivered to him certain boars, pigs, etc., to be taken care of by the defendant for the plaintiff, for reward, and that, in consideration thereof, the defendant undertook and agreed with the plaintiff to take care of the boars, etc., and to redeliver the same on request; and it was held, on motion in arrest of judgment, that this was a count in assumpsit, and could not be joined with counts in case. Jervis, Ch. J., in referring to *Brown v. Boorman*, in the case of *Courtenay v. Earle*, 10 C. B. 78, said: "If the case of *Brown v. Boorman* were an authority to the full extent to which it has been pressed by [counsel] no doubt the third and fourth counts here might well be joined with counts in tort. But, upon examination, that case will be found to proceed upon this principle,—that, where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast. And, if that be so, the case is reconcilable with the other cases with which it has been supposed to conflict." In *Burnett v. Lynch*, 5 Barn. & C. 589, cited by plaintiffs, an action of tort was sustained where it appeared that defendant was the assignee of a lease with covenants for certain repairs, which defendant neglected to make. *Godefroy v. Jay*, 7 Bing. 418, was tort against an attorney who undertook to defend an action, and so negligently conducted himself with reference thereto that judgment was signed against the defendant. See also *Zell v. Arnold*, 2 Pennr. & W. 292; *M'Call v. Forsyth*, 4 Watts & S. 179; *M'Cahan v. Hirst*, 7 Watts, 175, cited in *Reese v. Reese*, 49 Pa. 322, 88 Am. Dec. 503.

These cases, and others of like character which are cited, are clearly distinguishable from the case at bar, which is not based upon negligence proper, as that term is understood in the foregoing cases and in analogous cases, nor upon any common-law duty arising out of a contract, but upon a simple neglect to pay

over money when due, as that term is ordinarily used and understood in declarations in actions of debt or assumpsit. The case of *Ashley v. Root*, 4 Allen, 504, seems to be an authority in support of the plaintiffs' position. But, in view of the fact that, in Massachusetts, the common-law distinction between actions of contract and actions of tort has been abolished by statute, so far, at any rate, as to allow the two forms to be joined in the same action, as it appears that they were in the writ in that case, the writ averring that the action was "an action of contract or an action of tort, both being for one and the same action," we do not think the case is entitled to that weight which it would be if decided by a court where the common-law distinction between such actions prevails, as it does with us. But, if that case was decided upon common-law principles, and not by reason of the statutory modification referred to, as it would seem to have been, then we have to say that the decision does not commend itself to our judgment as one which we should follow. All of the cases, save one, cited by the court in support of the opinion, are really cases of negligence, and, as we have above suggested, such cases are not analogous to a case of money had and received to the plaintiff's use which the defendant neglects to pay over. The very instructive case of *Courtenay v. Earle*, 10 C. B. 78, cited by the court in *Ashley v. Root*, 4 Allen, 504, does contain some general language which, if taken apart from the facts of the case, tends to support the decision; but when taken, as it must be, in connection with the question before the court, we do not think it does. The declaration in that case contained counts which, as construed by the court, merely alleged a promise to pay money upon a good consideration, unconnected with any common-law duty, and alleging, for breach, the nonpayment thereof. It also contained a count in trover. The defendant demurred on the ground of misjoinder, and the demurrer was sustained. A careful study of the case shows that it is not only not an authority in support of *Ashley v. Root*, but is quite clearly to the contrary. *Reeside v. Reeside*, 49 Pa. 822, 88 Am. Dec. 508, cited by plaintiffs, is different from the case at bar, in that the declaration there alleged that certain money was intrusted to the

defendant by the plaintiff, who was the executrix of a will, to be used by him in paying the debts of the estate, and to return the balance, if any, to her. The declaration also alleged that the defendant accepted and received said money for the purposes of the trust, and entered upon the professional employment of the settlement of the estate, but, notwithstanding his duty in the premises, he fraudulently appropriated the money to his own use. The court, by Agnew, J., held that the declaration was good, saying that, "where a duty arises out of an implied undertaking to do an act requiring skill or fidelity that a breach of the duty may be the subject of an action of assumpsit upon the implied promise, or of an action upon the special case for the tort. . . . The breach of duty, and not fraud, is the foundation of the action. If, therefore, this were a case where the agent, having received the money of his principal to perform a certain trust, had wholly omitted to perform his duty, and converted the money to his private use, the entire breach of duty no doubt would expose him to an action in form *ex delicto* or to an action of assumpsit for money had and received to the use of the plaintiff." From the cases cited in support of the opinion, it would seem that the court treated the duty of the defendant regarding the money intrusted to him as a common-law duty, arising out of a contract for professional skill, and hence that the breach thereof would give rise to an action of tort. The reasoning of the court is not entirely satisfactory. But, even admitting that the decision is correct, the facts set up in the declaration were so different from the case at bar that we cannot treat it as strongly militating against the position we have taken.

Finally, we do not think that the mere fact that the plaintiffs in the case at bar allege in their declaration that the neglect complained of was with the intent to defraud changes such neglect into a tort. *Hove v. Cooke*, 21 Wend. 29. If this were so, we see no reason why any debtor might not be sued in a tort action, if the plaintiff should see fit to allege that he had fraudulently neglected to pay his debt, and thus revive imprisonment for debt. *Demurrer sustained*, and case remitted to the common pleas division for further proceedings.

SOUTH CAROLINA SUPREME COURT.

CITY COUNCIL OF GREENVILLE, *Respt.*,
v.

G. C. ORMAND, *Respt.*,
and

Thomas F. DUNLAP, Admr., etc., of R. J.
Dunlap, Deceased *et al.*, *Appts.*

(.....S. C.....)

1. The absence of the sureties on a note at the time of its attempted negotiation will not preclude testimony as to what then took place

NOTE.—A more liberal rule as to the construction of a surety's contract is found in *King County v. Ferry* (Wash.) 19 L. R. A. 500.
89 L. R. A.

being given by one who, after the refusal of the payee to discount it, advanced money on the note, which was committed by the sureties to the maker's hands for negotiation.

2. A contractor for city work cannot state from memory the state of his accounts with the city at a certain time when books showing such facts are accessible.

3. Sureties cannot testify to instructions to the maker as to the disposition of the notes against the holder unless he is shown to have knowledge of them.

4. Rejection of evidence is immaterial error if the complaining party has had the full benefit of it from another witness.

5. Sureties are released from their liabilities on a note made to raise money by discount by the fact that the nominal payee who was to make the discount never gave or received anything for the note, but merely indorsed in blank without recourse when a third person advanced the money on it.

6. The objection that the amount of the judgment is in excess of the verdict cannot be taken for the first time on appeal.

(Pope, J., dissents from proposition 5.)

(October 27, 1897.)

A PPEAL by defendants Dunlap *et al.* from a judgment of the Common Pleas Circuit Court for York County in favor of plaintiff in an action brought to enforce payment of certain promissory notes. *Reversed.*

The portions of the record referred to, but not set out in the opinion, are as follows:

William E. Beattie, duly sworn, says: "I am cashier of the National Bank of Greenville, and have been such cashier about eleven years. I have no recollection of discounting, as cashier of said bank, two notes dated May 7, 1892, each in the sum of two thousand dollars, payable on demand after date, negotiable and payable at said bank, and signed by Ormand & Goforth, R. J. Dunlap, L. R. Williams, and L. K. Armstrong. I would not be positive unless I could see the notes. I made an examination of the books of the bank from May 7, 1892, to September 1, 1892, and found no record of having discounted such notes. I know of no other W. E. Beattie, cashier, except myself. The parties named have never at any time owed me personally anything. If the bank had discounted the notes, they would have a registered number on the back of the note, together with the name of the maker, the date of maturity, and the amount due. I have no recollection of transferring two such notes as described, payable to W. E. Beattie, cashier, to the city council of Greenville, South Carolina. I have no recollection of the city council of Greenville paying witness personally, or as cashier, or paying to the said bank, any sum or sums of money in consideration of the transfers of the said two notes, if such transfers were made." Cross-examination: "Our bank does a very large amount of business during the year. I can't remember every transaction which occurs in the bank. The president discounts notes as well as myself. The bank did a very large amount of business with the city council of Greenville, involving a large number of transactions, aggregating over one hundred thousand dollars, during the year 1892. I will not say that I did not assign notes to the city council of Greenville, such as those mentioned in my direct examination, but simply that I do not remember having done so. I sometimes have transactions in which notes are assigned by me without recourse, such having been made payable to my order; for example, where the printed form of our bank has been used, in which the amount of the note is made payable to my order as cashier." Redirect examination: "I have no recollection of the bank of which I am cashier having furnished Ormand & Goforth money on two

such notes as described. Personally, I furnished none. I have no recollection of ever having received value for transferring such notes made on the bank's printed form, payable to my order as cashier; that is, where the notes were not discounted by the bank.

[Signed] W. E. Beattie."

Hamlin Beattie, sworn, says: "I am president of the National Bank of Greenville, and have held such position for twenty-one years. The president and cashier of our bank discount notes. I have no recollection of discounting, as president of said bank, two notes dated May 7, 1892, each in the sum of \$2,000, payable to W. E. Beattie, cashier, on demand after date, negotiable and payable at said bank, and signed by Ormand & Goforth, R. J. Dunlap, L. R. Williams, L. K. Armstrong. I have no recollection of furnishing Ormand & Goforth any money on such notes. I do not know of any other W. E. Beattie, except the cashier of my bank. If two such notes as described were transferred to the city council of Greenville, I have no recollection of any money having been paid the bank or myself for such notes. I think I must have transferred these—two such notes—to the city council of Greenville, and that the cashier joined in the transfer. I cannot now explain how we, the bank, had control of the said notes.

[Signed] Hamlin Beattie."

South Carolina, York County. Personally appeared Lawson K. Armstrong, who, being duly sworn, says: That he is sick and unable to come to Yorkville to day. (2) That when Mr. Goforth came to him to sign the notes, he stated to him that they were to borrow money he had arranged to get from the Greenville National Bank to enable them (the contractors) to run their commissary, and to buy their dynamite at wholesale prices; and that this would enable them to work through; that he signed solely for the purpose of borrowing money from the party named in the note, and no other.

[Signed] Lawson K. Armstrong.

Sworn to and subscribed this 19th day of November, 1896, before me.

[Signed] H. E. Johnson, Magistrate.

The judge's charge was as follows:

"Mr. Foreman and Gentlemen: This is an action brought by this plaintiff against these defendants upon two notes,—to recover on two notes for \$2,000 each, I believe (anyhow they are set out in the complaint), and interest. The plaintiff alleges that these notes were signed by the defendants, and that, for value, they came into their hands; that they paid the money for them, and no part thereof has been paid, and that they are now entitled to recover. The defendants admit the execution of the notes: all say that they signed it; but deny that these plaintiffs can recover; and set up certain defenses. They are largely—almost purely—of a legal nature. All of the defendants except Ormand, the surviving partner, allege that they were sureties on the notes: that is, that they signed the notes as sureties for Ormand & Goforth, and by reason of certain conditions which they had at the time with Ormand & Goforth, and which conditions were known to the city of Greenville, the

plaintiff here, when they traded for the notes, that they are not bound to pay the city of Greenville. Well, now, on the trial of the case, the plaintiff has introduced certain testimony here, and the defendants have also attempted to introduce certain testimony. The bulk of that testimony, under the authority I have as judge here, I have ruled out; so, under the testimony before you, you are to find your verdict. And if you believe the testimony of the plaintiff that these notes were executed by Ormand & Goforth as principals, and that these other defendants signed as sureties; that the note was a negotiable note (that is, a note not sealed), made payable to W. E. Beattie as cashier, and Beattie indorsed that note, and the city of Greenville advanced the money for the value of the note,—then I charge you, as matter of law, that the city of Greenville is entitled to recover the full amount they have asked for here. Now, you have heard the testimony. It is for you to say whether you believe they signed as sureties; that Ormand & Goforth signed the note as principals, and these other gentlemen signed as sureties (they admit that, there is no dispute about that), then I charge you, as matter of law, if Ormand & Goforth, or either of them, carried that note to the city of Greenville, and there Mr. W. E. Beattie indorsed the note on the back (and there is no dispute over that), and the city of Greenville advanced the money for them,—then I charge you as matter of law the city of Greenville is entitled to the amount sued for here, and interest on it. The defendants have asked me to charge you: (1) As between the payor and payee of notes like the ones in suit, it is competent to inquire into the question of consideration, and, if none was given, the note would not be collectible by the payee. I refuse to charge you that. I charge you that, if this was a negotiable instrument,—and I charge that it is,—and it was carried to the city of Greenville, and Beattie indorsed on the back of it, as they admit he did, and the city of Greenville took up that note by paying money, they are entitled to recover. (2) The same is true as between the payor and any party to whom the payee may have transferred the notes, if such party knew that the payee had given no consideration for it. I refuse to charge you that. If the city of Greenville is a purchaser for value, they are entitled to recover. (3) If the payee of such notes, without having given any consideration to the payor, transfers it to a third party, who is acquainted with that fact, he would have no title, unless he could show that the payor, with the knowledge of such transfer, had himself taken the consideration from such third party. I refuse to charge you that. If you believe that these parties signed that note,—these sureties,—and put it in the hands of Ormand & Goforth, the principals of it, and they carried it to the city of Greenville, and got Beattie to indorse, and the corporation of the city of Greenville paid for it, they are entitled to recover. (4) If, as a matter of fact, the payor, who, with the knowledge of such transfer, had taken the consideration from such third party, was principal, and the other payors were sureties, and such third party knew these relations to exist, the note would not

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be binding against the sureties unless the principal was authorized by them so to act; and it would devolve upon such third party to show such authority from the sureties. I refuse to charge you that. Maj. Hart: We ask your honor to charge upon this point that the city of Greenville knew that Mr. Beattie had paid nothing for the notes, as Mr. Bostick testifies. Mr. Bostick, the city treasurer, says he knew that Beattie had paid nothing for them. The Court: I charge you, before the defendants can prevent a recovery, it would be incumbent upon them to show by testimony that the city of Greenville knew of the conditions that the sureties had made with the principal, if there were any conditions at all. The burden is not on the city of Greenville to show what these conditions were, at all. But, if these sureties made a condition with the principals, Ormand & Goforth, in order to prevent the city of Greenville from recovering, it is incumbent upon the defendants to show that the city of Greenville actually had knowledge of what those conditions were. You can take the record, and find a verdict. The form of your verdict will be 'We find for the plaintiff so many dollars,'—writing it out, and signing your name as foreman; or, if you find for the defendants, 'We find for the defendants.' Maj. Hart: May it please your honor, the testimony of Mr. Bostick, the fiscal agent, shows that he knew that the bank hadn't paid any money, and that he knew that Dunlap, Williams, and Armstrong were sureties on the note when he received it. Now, we want an instruction that, if the jury believe the testimony of Mr. Bostick, the city council of Greenville had notice. The Court: Gentlemen, you know what the rules of court require,—that these propositions of law have to be handed up before argument. It is a safe rule. The judge gets his mind set upon the propositions of law sent up, and when he is asked to charge propositions on the spur of the moment he has no time to digest them at all. I charge you, gentlemen of the jury, if you believe Bostick was the treasurer and fiscal agent of the city of Greenville, any notice to Bostick would be notice to the city of Greenville."

The exceptions are as follows:

"Thos. F. Dunlap, administrator, etc., L. R. Williams, and L. K. Armstrong, defendants in the above-entitled action, make the following exceptions to the rulings of his honor on the admissibility of testimony excepted to at the time; and to his charge to the jury, and his refusals to charge upon request; and accordingly each of them excepts to the judgment entered upon the verdict against the defendants."

"I. Rulings on testimony: (1) Allowing witness Bostick to testify to the acts and statements of the principal and the plaintiff's treasurer and the bank's cashier on the occasion of the bank's transfer of the notes in suit, the sureties not being present; and ruling that the sureties would be bound by whatever the principal debtor did in reference to the transfer. (2) Not allowing witness Ormand to testify from memory the state or result of the contractors' account with the plaintiff at the time of the transfer (that the contractors owed the city \$1,500), because of the absence of the con-

tractors' account, in which witness admitted on the stand the various items of the account had been entered. (8) Not allowing witness Ormand, or witness Armstrong, or witness Williams to testify to conversations between principals and sureties as to the purpose for which the notes were to be made, and the conditions upon which the sureties signed them; and ruling (as applicable to the point in issue) that, when the sureties signed the notes, and turned them over to the principal, 'that put it in his power to put it in the hands of an innocent purchaser, and it don't make any difference what the agreement was between the maker and the surety, unless the purchaser had notice of it he is not bound by it.' 'My idea about it is, it don't make any difference whether Beattie took up this note or the city of Greenville; that these sureties are liable.' And, in this connection, excluding the deposition of witness Armstrong. (4) Excluding the depositions of W. E. Beattie and Hamlin Beattie, respectively, offered to prove that the bank payee never discounted the notes, and so never had any transferable title. (5) Not allowing witness Williams, surety, to testify that he had never authorized anyone to make any other disposition of the notes except that stated at the signing.

"II. Charge and refusal to charge: (1) Refusing to charge: 'First. As between the payor and payee of a note like the ones in suit it is competent to inquire into the question of consideration, and, if none was given, the note would not be collectible by the payee;' and charging instead: 'That, if this was a negotiable instrument,—and I charge that it is,—and it was carried to the city of Greenville, and Beattie indorsed on the back of it, as they admit he did, and the city of Greenville took up that note by paying money, they are entitled to recover.' (2) Refusing to charge: 'Second. The same is true as between the payor and any party to whom the payee may have transferred the note, if such party knew that the payee had given no consideration for it;' and charging instead: 'If the city of Greenville is a purchaser for value, they are entitled to recover.' (3) Refusing to charge: 'Third. If the payee of such a note, without having given any consideration to the payor, transfers it to a third party, who is acquainted with that fact, he would have no title unless he could show that the payor, with the knowledge of such transfer, had himself taken the consideration from such third party.' and charging instead: 'If you believe that these parties signed that note,—these sureties,—and put it in the hands of Ormand & Goforth, the principals of it, and they carried it to the city of Greenville, and got Beattie to indorse, and the corporation of the city of Greenville paid for it, they are entitled to recover.' (4) Refusing to charge: 'Fourth. If, as matter of fact, the payor who, with knowledge of such transfer, had himself taken the consideration from such third party, was principal, and the other payors were sureties, and such third party knew these relations to exist, the note would not be binding against the sureties unless the principal was authorized by them so to act; and it would devolve upon such third party to show such authority from the sureties;' and charging

instead: 'Before the defendants can prevent a recovery, it would be incumbent upon them to show by testimony that the city of Greenville knew of the condition that the sureties had made with the principal, if there were any conditions at all.'

"III. Because the judgment entered on the verdict was excessive, being for \$36 more than the jury found."

¶ **Mr. C. E. Spencer**, for appellants:

The payee's indorsement as such transferred nothing to plaintiff.

Plaintiff knew of payee's want of title.

Knowing this, it was not necessary to rely on the indorsed words "without recourse," even if the effect would be to give notice of defect in that very title the validity of which the indorser of a negotiable note vouches.

1 Dan. Neg. Inst. §§ 670, 700, 769, 789.

This knowledge put plaintiff in payee's shoes. It destroys the transferee's better title, which he would take but for the knowledge.

1 Dan. Neg. Inst. §§ 789, 795.

Bona fides is required of the transferee; he must in good faith acquire the paper from his predecessor, and without notice of defect of title.

1 Dan. Neg. Inst. §§ 770, 789.

Plaintiff has utterly failed to show that appellants are bound to the transfer through agency, or estoppel, or otherwise.

Ormand's alleged presence could not bind them.

James v. Benson, 155 Pa. 489; *Weyman v. Perry*, 42 S. C. 420.

Mr. James F. Hart, also for appellants:

W. E. Beattie, cashier, having paid nothing for these notes, and they never having been in the possession of the bank, nor ever having been delivered to or claimed by the bank, no title or property in them ever accrued to the bank.

Inasmuch as Beattie, cashier, knew that the bank had acquired no title or ownership to the notes, the act of the president and cashier of the bank in writing and signing a purported indorsement without recourse, was, as to the parties, a nullity, and as if the notes were without such writing and signing.

1 Dan. Neg. Inst. §§ 174, 677, 679, 735, and cases cited.

The indorsement and transfer being, as between the plaintiff and the sureties, a nullity, no suit can be maintained by the plaintiff against them or any other party behind the broken link in the title.

1 Dan. Neg. Inst. § 705; *Guinnell v. Herbert*, 5 Ad. & El. 436; *Pease v. Dwight*, 47 U. S. 6 How. 197, 12 L. ed. 399; *Agawam Bank v. Sears*, 4 Gray, 95.

If not a nullity, the city council had become a joint maker, and a cosurety to the notes by its indorsements after they were issued.

Baker v. Scott, 5 Rich. L. 310.

The indorsement of plaintiff's name as a cosurety was done after the note had been issued, but before it had been presented to the bank for discount, and without the knowledge of the sureties, and was erased after notes were pretensively transferred to it. This discharges the other sureties.

Hamilton v. Hooper, 46 Iowa, 515, 26 Am.

Rep. 161; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Shipp v. Suggett*, 9 B. Mon. 5.

If this indorsement did not have the effect to discharge the sureties, its subsequent erasure without their consent would certainly discharge them. And especially where the party had its name erased as a comaker and inserted as payee.

Aldrich v. Smith, 37 Mich. 468, 26 Am. Rep. 536; 2 Dan. Neg. Inst. §§ 1387-1390.

The two notes did not possess in the hands of the plaintiff the character and attributes of negotiable paper.

1 Dan. Neg. Inst. § 724, and cases cited.

Messrs. Finley & Brice also for appellants.

Mr. Joseph A. McCullough, for respondents:

The testimony of the witness Bostick as to the acts and statements of G. C. Ormand, the principal maker, on the occasion of the transfer and delivery of the notes in suit to the plaintiff, was competent as a part of *res gesta* of the delivery of the notes.

Fowler v. Allen, 32 S. C. 236; *Sullivan v. Williams*, 43 S. C. 489.

When a surety becomes a party to a promissory note payable to a particular person, with the design of raising money to be used by the principal for a certain purpose, and the note is not discounted by the payee, but is discounted by another, and the money is applied to the purpose intended, it is generally held that the surety is liable for the note.

1 Brandt, Suretyship & Guaranty, § 94; 2 Randolph, Com. Paper, § 917; 1 Dan. Neg. Inst. §§ 792, 793; Tiedeman, Com. Paper, § 301; *Parker v. Sutton*, 103 N. C. 191; 3 Randolph, Com. Paper, § 1808; *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142; *Keith v. Goodwin*, 31 Vt. 268, 73 Am. Dec. 347.

An immaterial diversion is where an accommodation bill or note is made for the purpose of loaning the parties credit generally, or where the substantial design for which the instrument was given is not departed from, or where the agreement for which the instrument was given and which is broken, is not one of substance and is unimportant. An immaterial diversion cannot avail as a defense.

Norton, Bills & Notes, p. 177; *Bank of Rutland v. Buck*, 5 Wend. 66; *Kasson v. Smith*, 8 Wend. 437; *Spencer v. Ballou*, 18 N. Y. 327; *Woodhull v. Holmes*, 10 Johns. 321; *Schepp v. Carpenter*, 51 N. Y. 602; *Powell v. Waters*, 17 Johns. 176.

The note sued on in this case being payable to "W. E. Beattie, cashier or order," and being by him indorsed in blank, is in legal effect a note payable to bearer.

16 Am. & Eng. Enc. Law, pp. 479, 480; *Jones v. Shapera*, 13 U. S. App. 481, 57 Fed. Rep. 457, 6 C. C. A. 423; Norton, Bills & Notes, p. 18; *Putman v. Crymes*, 1 McMull. L. 9, 36 Am. Dec. 250; *Hanks v. Dunlap*, 10 Rich. Eq. 139.

All the makers of a note are principals, and their relation to each other as sureties cannot affect their liability to the payee.

Banks v. Searles, 2 McMull. L. 857; *Carpenter v. Onks*, 10 Rich. L. 17; *Cockrell v. Milling*, 1 Strobb. L. 444; *Johnston v. McDonald*, 41 S. C. 81.

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Messrs. Wilson & Wilson also for respondents.

Pope, J., delivered the opinion of the court:

The above entitled action came on for trial before his honor, Judge Watts, and a jury, at the November, 1896, term of the court of common pleas for York county, in this state. After a verdict in favor of the plaintiff, and the entry of a judgment thereon, all the defendants except G. C. Ormand, as survivor of Ormand & Goforth, appealed therefrom. In order that the grounds of appeal may be understood, it seems to me that some reference to the pleadings, the testimony, and the charge of the circuit judge will become necessary. The complaint of plaintiff alleged that the defendants were indebted to it by reason of two promissory notes, executed in 1892, in the aggregate sum of \$4,000, and interest thereon at the rate of 8 per cent per annum from the 10th day of May, 1892, until paid, and costs. The answer admitted the execution of the two notes in question, but denied any liability to pay said notes—First. Because they deny that plaintiff is the lawful owner and holder of said two several notes, or either of them, by indorsement, transfer, or otherwise. They allege that neither W. E. Beattie, cashier, nor the National Bank of Greenville, acquired any title to the said notes, or either of them, and that plaintiff had notice of want of title at the time of said alleged transfers, if any were made, and that plaintiff paid no consideration therefor. Second. Because they allege that W. L. Goforth and G. C. Ormand were the principal makers and payors of said two notes, respectively, and that R. J. Dunlap and the defendants L. K. Armstrong and L. R. Williams were and are sureties thereto; and that plaintiff and W. E. Beattie, cashier, knew the relations of the several parties signing the two said notes. Third. Because they allege that the said R. J. Dunlap, now deceased, and the defendants L. R. Williams and L. K. Armstrong, as sureties, signed the two several notes, payable to W. E. Beattie, cashier, for the purpose of enabling the principal makers, Ormand & Goforth, to borrow money from W. E. Beattie, cashier of the National Bank of Greenville, for the purpose of completing in a speedy and economical manner the sewerage work undertaken for said plaintiff, then well advanced, and for the completion of which the said sureties had undertaken by their bond. And it was not the purpose of said sureties, or either of them, in making said notes, to permit the same to be negotiated to any other person or corporation or for any other purpose, than as herein set forth. And these defendants allege that the plaintiff, without authority from these defendants, took possession of said two notes without advancing to the principal makers the cash for the same, and gave said Ormand & Goforth credit on account for the value of said notes; and these defendants are informed and believe that the said two notes were misapplied by plaintiff to a previously existing indebtedness by Ormand & Goforth to said city council (the plaintiff), for which these defendants were in no wise liable, and of which they were then ignorant, and to other purposes not contemplated by said contract of suretyship. Fourth.

Because the defendants deny that they, or either of them, are indebted to plaintiff in any sum whatever upon said notes, or either of them; and because the plaintiff is largely in excess of the said two notes and interest on the same indebted to the said Ormand & Goforth by reason of work and labor done under this contract with the plaintiff in the construction of the sewerage system. I do not quote more from the answer of this fourth defense, so far as the indebtedness of the plaintiff to Ormand & Goforth for work done in the construction of the sewerage system is concerned, for the reason that this element seems to have been in some way eliminated from the action at the trial thereof.

The testimony is not voluminous. The following is a copy of one of the notes in question. The two were practically identical:

\$2,000.00. Greenville, S. C., May 7, 1892.

On demand after date, we, or either of us, promise to pay to W. E. Beattie, cashier, or order, negotiable and payable at the National Bank of Greenville, S. C., without offset, the sum of two thousand dollars, for value received. Interest after maturity at the rate of eight per cent per annum until paid. Ormand & Goforth.

R. J. Dunlap.
L. R. Williams.
L. K. Armstrong.

Indorsements: "Without recourse on this bank. Hamlin Beattie, President. Without recourse. W. E. Beattie, Cashier."

F. J. Bostick, a witness for the plaintiff, testified, in substance, as follows: "As clerk and treasurer of the city of Greenville, I was present in my office during the morning of the 11th May, 1892. There were present several members of the city council; also the sewerage contractors, Ormand & Goforth. I am not positive both of said contractors were present. I am certain one of them was present. I think Mr. Ormand was. The two notes now in question were in the hands of members of the city council when I entered my office. The mayor and myself were instructed to indorse these notes. We did so, and I was then instructed to carry the two notes over to the Greenville National Bank, and tender them to the bank officials. Mr. Ormand went with me. When we tendered the notes at the bank, Mr. Beattie, as its president, said, 'The city council is now in funds, and let the city lend the money on these notes to Messrs. Ormand & Goforth.' Mr. Beattie then said that there was no need for the mayor and clerk and treasurer to indorse these notes. And he then, and also the cashier, wrote the words on each note which appear on the same above their official signatures. I then took the notes back to my office, and the mayor then erased his name, and I erased mine. The city council then ordered me to pay Ormand & Goforth \$2,500 at that time, and \$1,500 afterwards. In all, I paid Ormand & Goforth \$4,000. This money has never been paid back to the city council of Greenville. Mr. Ormand was present all the time." On

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his cross examination he explained that the money was paid by his checks on the Greenville National Bank. The checks were produced and identified by the witness as having been obtained from the Greenville National Bank. This witness also testified that when the bank officers put their indorsement on the two notes nothing was paid to them, and that the witness knew that the bank had not advanced any money on these two notes. He also testified that he knew that Mr. Williams, Mr. Dunlap, and Mr. Armstrong were sureties on the two notes. G. C. Ormand was sworn as a witness for the defense. He testified that he was a member and survivor of the firm of Ormand & Goforth; that said firm had contracted to construct, and did construct, the sewerage system for the city of Greenville; that said firm began work about July 31, 1892. He also testified that he arranged with Dunlap, Armstrong, and Williams to sign the two notes. It was offered to read depositions made by Hamlin and W. E. Beattie, and also that of Lawson K. Armstrong. The court declined to allow the same read, on the ground of irrelevancy. Such testimony appears copied in the "case."

As the requests to charge appear in the grounds of appeal, it will be well to report the charge of the presiding judge and the grounds of appeal. We will now consider the grounds of appeal. The first imputes error to the circuit judge in allowing the witness F. J. Bostick to testify as to what occurred when the witness and G. C. Ormand went with the notes to the National Bank of Greenville, to attempt their negotiation with said bank, when its cashier, W. E. Beattie, was named as the payee therein, and when the defendant sureties were not present. It is certainly true that all the makers of these two notes placed the notes in the hands of G. C. Ormand as their agent to negotiate the same with the National Bank of Greenville. The defendants so admit in their answer, and such facts, except as to Ormand's agency, appear in the notes themselves. Why was it not competent for this witness, who was present as an interested person, to detail what occurred then in connection with the attempt at the negotiation of these notes? In fact the admissions of this witness as to what occurred then is made the basis of the principal defense the defendants rely upon. The testimony was relevant to the issues raised by the pleadings themselves, but, apart from the pleadings, when notes such as the present are in issue, any testimony in the line marked out by the terms of the notes is competent.

As to the second exception, relating to the competency of certain testimony, as pointed out in the language of the exception offered, by the witness Ormand. The judge was clearly right here. Ormand testified that books were kept by his firm, which showed the condition of the account of said firm with the city council of Greenville at all times, and that his knowledge was derived from such books, but that he was unable to state from his memory the condition and details of such account; also it did not appear that such books were not in existence. Such books were the best and proper evidence as to these matters. It

was not error to deny this witness any right to speak of this account from memory as to the same.

As to the third exception. The witnesses Ormand, Armstrong, and Williams could not testify as to conversations of the makers of these notes at the time they were signed, unless it was first proved that the plaintiff, or some one or more of its agents, were told of these conversations between the makers. There was no effort to prove any such knowledge on the part of the city council or its agents.

As to the fourth exception, in relation to the depositions of Hamlin, Beattie, and W. E. Beattie relating to no consideration passing when they, as officers of the bank, wrote their indorsements without recourse upon the two notes. The defendants had the right to this testimony, but it was immaterial error, because the plaintiff, through its witness F. J. Bostick, fully admitted that nothing was paid to the bank at the time these indorsements were made by its officers.

Fifth exception, as to the admission of the deposition of Williams, one of the sureties to the two notes. The circuit judge committed no error in refusing to allow this deposition to be read in testimony. It related to the conversation alleged to have occurred between the makers when they signed the two notes, and no notice of such conversation was brought home to the city council or its agents.

We come now to the alleged errors of the circuit judge in his charge and refusals to charge. It is settled law that the charge of the judge must be restricted to the issues raised by the pleadings and the testimony in the cause. That portion of the Constitution of the state which requires that judges "shall declare the law" means that circuit judges shall declare the law involved or necessary in causes then on trial, and not that judges shall declare the whole of the law embracing all cases, civil and criminal. What were the issues tendered by the pleadings and raised at the trial? First. That the plaintiff could not hold the defendants to any liability on the two notes sued on, because the notes were on their face made negotiable by the National Bank at Greenville, but were not so negotiated. Second. Because the indorsement by the president and cashier of the Greenville National Bank, being without value, was a nullity, and did not and could not carry title to the notes to the city council of Greenville. Third. Because, even if such indorsement of said bank was valid, the city council were not holders for value, by reason of the fact that there was no value paid by the plaintiff for such notes. Fourth. Because the city council could not be holders for value, as against the sureties, by reason of the fact they took said notes with full notice of the conditions expressed in the face of said notes. Fifth. Because the city council of Greenville could not be the legal holders of said notes, because of a condition made by the makers of the notes at the time they signed the same, although not expressed on the face of the notes. Sixth. Because the city council had notice of the fact that the defendants, except Goforth, were sureties only, and therefore it was incompe-

tent for Ormand & Goforth to vary the terms of said notes without the approval of said sureties; and, having done so, the city council of Greenville, as against said sureties, had no right to the position of holders of these notes.

I confess, at the outset, that this action, or rather the appeal therefrom, has occasioned me profound concern, for, on the one hand, the rights of holders for full value of negotiable notes are concerned; and on the other hand the rights of indorsers, who claim that their contract should be restricted by the terms actually employed by them in the notes which represent their contract, are involved; and, if I fail to mete out the law merchant in this cause, it is not by reason of the want of careful, protracted, and patient reflection on my part. The cases of *Fowler v. Allen*, 82 S. C. 229, and *Sullivan v. Williams*, 48 S. C. 489, establish the doctrine in this state that, when the makers—including sureties—intrust a negotiable note to one of the makers to carry out the terms of the contract, he is made the agent of such makers. Now, I wish to be understood correctly just here. I do not mean that any general agency is thus created; that such an agent can do anything and everything, but such agent can do everything within the contemplation of the contract as expressed therein. Now, it is admitted on all hands that the firm of Ormand & Goforth were intrusted with these notes after the parties had signed the same. What was the admitted purpose of these notes? The defendants, in their answer, say it was their "purpose of enabling the principal makers, Ormand & Goforth, to borrow money from W. E. Beattie, cashier of the National Bank of Greenville, for the purpose of completing in a speedy and economical manner the sewerage work undertaken for said plaintiff, then well advanced, and for the completion of which the said sureties had undertaken by their bond." (Italics mine.) The contract for the sewerage work was begun about April 1, 1892, and completed in September, 1892. It is not claimed that there was any diversion of any of these funds arising from the negotiation of these two notes. It is true, in this connection, that the defendant sureties in their answer did claim that the notes did not yield to Ormand & Goforth any money, but that the sum was given as a credit on Ormand & Goforth's account with the city council of Greenville on the sewerage contract; but the testimony was absolutely convincing in the cause that \$4,000 was paid in cash by the city council of Greenville to Ormand & Goforth on these two notes; so, in the charge of the judge, there was no request from defendants in reference to the fact that money was not paid by the city council of Greenville to Ormand & Goforth on these two notes. Thus they left it as a fact to be determined by the jury whether the city council paid value for the notes; and by the verdict of the jury it was established that the city council did pay value for the notes. And it will appear by reference to the requests to charge that the defendant sureties made their battle on the ground that they alone contracted in their notes for the sum to be negotiated at the Greenville National Bank, and by no other person or corporation. We have already

seen that there was no material diversion of the funds which it was agreed between the makers should be realized by the negotiation of this note, and that the \$4,000 named in the two notes was actually paid to Ormand & Goforth by the city council. It remains, then, to determine if the surety defendants are released by the fact that the officers of the bank at Greenville did not actually pay any money or receive any money. To test this matter practically, what would have been the result if the city council of Greenville had paid the \$4,000 without the notes ever having been carried to the National Bank of Greenville? I think, under the authority of *Pease v. Dwight*, 47 U. S. 9 How. 190, 12 L. ed. 399, the city council of Greenville could maintain this action under that decision. It was held that the statute of 3 & 4 Anne, chap. 9, would be answered in case of a note reciting in its body that "Walter Chester and Pease, Chester, & Co., or order" were the payees, if only Pease, Chester, & Co., with which firm Walter Chester was in no wise connected, indorsed said note, and Walter Chester refused to indorse said note. The principle affirmed was that, inasmuch as the plaintiff *Dwight*, who had paid full value for the note upon the indorsement of it by one of the payees, to wit, Pease, Chester, & Co., this decision was made to answer the old requirements as to ownership of commercial paper payable by "order," which requirements were very strict in the matter of the indorsement of such paper, to enable one as indorsee to maintain his action. But now, under the changes wrought by our Code of Procedure, it is not necessary that a holder for value of such paper should have the same indorsed to him; for, if he is the legal owner and holder of such note, he not only may sue, but he alone can sue, except in cases of certain trusts. It seems to me that, when the indorsement in blank without recourse appeared upon these two notes by the said National Bank of Greenville, although they neither received nor paid a dollar therefor, it did not interfere with the rights of the surety makers of the note. If the bank had discounted the paper in due course of business, it was in the power of the bank the next minute to transfer such paper to anyone else, so that their indorsement in blank was without actually discounting the paper itself to enable a third party (as the city council of Greenville) to pay every dollar to the makers, Ormand & Goforth, to thereby become the lawful owners and holders of said paper. Now, I admit that the city council of Greenville could not have acquired those notes except by the payment of the \$4,000, as contemplated by the makers; in other words, they could not have taken that paper, and applied it to the payment of any balance due to them by Ormand & Goforth under this contract to construct a sewerage system for the city. It seems to me that the case of *Powell v. Waters*, 17 Johns. 176, where A made a note payable to B, or order, was indorsed by B for the purpose of being discounted at a bank, and negotiated to a third person with a full knowledge of the circumstances, and the holder was allowed to recover, is fully up to the point involved in this case. I am inclined to hold that the use of the name of the cashier

of the bank as payee, and also the making of the note negotiable at such bank, merely put it in the power of these sureties to prevent any diversion of such notes to any other purpose than raising the \$4,000. This was effected in the case of *Dogan v. Dubois*, 2 Rich. Eq. 85. It appears in that case that one Dubois was in business at Union, in this state, and desiring to raise \$2,000 in cash, he applied to William Rice to indorse a note for that amount at a bank in the city of Columbia, South Carolina. When Dubois applied to Rice, the note already had the name of John Gist as payee and indorser thereon. Rice paid \$2,000 in cash, and carried the note to the bank, when, upon his indorsement, the bank cashed the note for him. Before the maturity of this note, Dubois applied to Glenn and Shelton to indorse a new note, also payable at the bank for a like sum, to renew the first note, on which John Gist and Rice appeared as indorsers. They did so, Glenn being first indorser, and Shelton second indorser. This note was sent by Dubois to Rice, who was then in Columbia, with \$20 in cash, directing said Rice to carry the note to the bank for discount in substitution of the first note. Before Rice could apply to the bank with this second note, Glenn became alarmed as to Dubois, and at once wrote to the bank, refusing to stand as indorser on the note and also making demand upon Rice for the note he had indorsed, and in Rice's hands, as aforesaid. Rice refused to deliver the note. Afterwards Rice did. It was found by a jury that John Gist's name on the note was a forgery, and Rice had to pay the first note to the bank. Thereupon Glenn had received a mortgage from Dubois to protect him as indorser. Dubois' general creditors attached his property, and obtained judgments for their respective debts. Glenn and the executors of Rice made this agreement: That Glenn would confess a judgment for the \$2,000 note, and that the executors of Rice would satisfy the same of record at once, but Glenn was to execute the transfer of the mortgage Dubois had given him to such executors. This agreement was fulfilled. The general creditors of Dubois, whose claims had been reduced to judgment, claimed that such assignment of the mortgage by Glenn to the executors of Rice was null and void, as Glenn had not in fact any claim against Dubois, and therefore Dubois's mortgage to Glenn was a nullity. The court held that Glenn, as an accommodation indorser on Dubois's note made payable at the bank and in the hands of Rice, as Dubois's agent for that purpose, had a perfect right to withdraw from his engagement as such accommodation indorser at any time before the note was negotiated at the bank, and also that the note was in the hands of Rice purely as the agent of Dubois to be negotiated at the bank to renew the old note, and that Rice could not direct it to any other purposes. The court adjudged that no rights in Glenn, as to the mortgage of Dubois to him, had any existence. It will be seen that in the case just considered no consideration passed from Rice to Dubois on the second note; hence this decision does not antagonize the position I have taken in the case at bar; but this case is authority for the position that an accommodation indorser may

withdraw his name from a note at any time before the note is actually negotiated. I make this observation to dispose of any question, if it had been made (and it was not), that the city council had no right to withdraw their intended indorsements as accommodation makers of these notes. No actual negotiation of such notes for value had been made when the mayor and city clerk erased their names as accommodation indorsers. But no such question is raised in this case, and therefore this decision is unwarranted. I cannot agree that the circuit judge committed any error in his charge as pointed out in the exceptions here presented.

The last exceptions related to the matter of an increase in the amount of the judgment over the verdict rendered. This court, in law cases, is confined, to the correction of errors of law in the court below. I see no evidence in the "case" for appeal that any such question has been presented to or passed upon by the circuit judge. This seems to me, therefore, the first time any court had its attention called to this matter. I must decline to consider it, but without prejudice to any application to the circuit court for a correction in the amount of the judgment in excess of the verdict. The foregoing presents my own views of the merits of this appeal, and I think the judgment of this court should be, it is the judgment of this court that the judgment of the circuit court be affirmed. But the majority of the court think otherwise, and therefore, as the organ of the court, I announce its judgment that *the judgment of the Circuit Court be reversed*, but I dissent from that judgment.

McIver, Ch. J.:

I dissent. It must be remembered that this appeal involves only the rights of sureties, who, as is well settled, are entitled to stand upon the terms of their contract as expressed in the paper evidencing such contract. Here, by the express terms of the notes, which constitute the only evidence of the contract which the plaintiffs are seeking to enforce, the appellants bound themselves to pay to W. E. Beattie, cashier, or order, negotiable and payable at the National Bank of Greenville, South Carolina, a specified sum of money. This obligation, by its terms, rendered appellants liable to pay to said Beattie, or to any person to whom he might legally transfer such obligation, the sum of money specified therein, and did not create any liability to pay the same to any other person. When the plaintiff brought this action to enforce performance of the contract of appellants, it must not only show that appellants executed said notes (as to which there is no evidence), but it must also show that the same have been duly transferred to the plaintiff by the payee named in said notes, or some subsequent lawful transferee thereof; and as to this it seems to me that the plaintiff has failed to make out its case. The undisputed testimony introduced by the plaintiff itself shows that the plaintiff never acquired a legal title to the notes. Beattie never acquired a legal title to these notes, as he expressly refused to accept them; and, if he acquired no legal title, I do not see how he could transfer any title to the plaintiff through its treasurer, Bostwick, who was the agent of plaintiff in the trans-

action; and notice to the agent was notice to the principal. The plaintiff cannot, therefore, claim to be an innocent holder for value, without notice. If plaintiff had acquired these notes in the regular course of business, without notice, then the result would perhaps be different. Of course, if Ormand & Goforth received the money specified in the notes from the plaintiff, as the testimony seems to show, then they would be liable upon that ground; but not so as to appellants, who are mere sureties, and can only be held liable on their contract as they made it. They could not be held liable to Beattie, because he never accepted the notes, and never made any contract with them, and they cannot be held liable to any person to whom he transferred the notes without authority, who had notice of such want of authority.

Gary, A. J.:

As I do not concur in the opinion of Mr. Justice Pope, I will state briefly the grounds of my dissent. After the notes were signed by Ormand & Goforth as principals and R. J. Dunlap, L. R. Williams, and L. K. Armstrong as sureties, they were indorsed by W. W. Gilreath, mayor, and T. J. Bostwick, clerk and treasurer, of the city of Greenville, by authority of the city council of Greenville. The plaintiff thus became a cosurety with other sureties who had signed the notes. At the time the city council of Greenville indorsed the notes as aforesaid, it knew that R. J. Dunlap, L. R. Williams, and L. K. Armstrong were sureties on said notes. When Hamlin Beattie, as president, and W. E. Beattie, as cashier, of the National Bank of Greenville, indorsed the notes in the manner set forth in the opinion of Mr. Justice Pope, the city council of Greenville was a cosurety with other sureties. It was after the notes were indorsed by Hamlin Beattie and W. E. Beattie as aforesaid that the city council of Greenville erased its indorsements upon the notes. As the plaintiff was a cosurety with the other sureties at the time it alleges in the complaint that it became the lawful owner and holder of said notes, his honor, the presiding judge, was in error in charging the jury: "If you believe the testimony of the plaintiff that these notes were executed by Ormand & Goforth as principals, and that these other defendants signed as sureties; that the note was a negotiable note (that is, a note not sealed), made payable to W. E. Beattie as cashier, and Beattie indorsed that note, and the city council of Greenville advanced the money for the value of the note,—then I charge you, as matter of law, that the city council of Greenville is entitled to recover the full amount they have asked for here." Under this charge the jury had the right to render a verdict in favor of the plaintiff for the full amount mentioned in the notes, although they might have believed from the testimony that the plaintiff was liable to a cosurety. Furthermore, whatever other rights the plaintiff may have acquired in the notes, it did not become the lawful owner and holder thereof by the indorsement of the officers of the national bank of Greenville, as alleged in the complaint, for the following reasons: The notes were executed for the purpose of raising money by discount, which fact was known both to W. E. Beattie, cashier, and the plain-

tiff herein. As W. E. Beattie, cashier, did not discount the notes, which was the condition upon which he was to become the lawful owner and holder thereof, he did not acquire such rights; and, as the plaintiff had notice of these facts, it could not become the lawful owner, and holder of these notes by the indorsement of W. E. Beattie, cashier, as alleged in the complaint. W. E. Beattie, cashier, oc-

cupied the position of the payee of a note in possession thereof without consideration, and therefore void. The plaintiff, with knowledge of these facts, could not, by the indorsement of W. E. Beattie, cashier, become the lawful owner and holder thereof. I therefore think the judgment of the circuit court should be reversed, and the case remanded to that court for a new trial.

SOUTH DAKOTA SUPREME COURT.

Re Proceeding to Disbar Joe KIRBY.

(.....S. D.....)

1. **An order for an attorney at law to show cause** why he should not be disbarred is not a process within the meaning of a constitutional provision requiring process to be in the name of the state.
 2. **A statute providing for disbarment of an attorney** when he has been convicted of felony or misdemeanor involving moral turpitude is not repealed by a subsequent one authorizing his disbarment for cause shown, although one section of the latter statute provides that when he is charged with embezzlement or other professional misconduct he shall be ordered to show cause why he shall not be disbarred, and the matter shall be referred to a committee for hearing.
 3. **An attorney convicted of an offense** punishable by imprisonment in the penitentiary is guilty of felony within the meaning of a statute authorizing disbarment.
 4. **Receiving property of the government**, knowing it to have been stolen, with intent to convert the same to one's own use is an offense involving moral turpitude.
 5. **A properly authenticated record of conviction** of crime in a Federal court may by statute be made admissible in a proceeding to disbar the accused as an attorney in a state court.
 6. **A proceeding for disbaring an attorney** is a civil proceeding.
 7. **A writ of error and supersedeas** in a proceeding in which an attorney has been convicted of felony are matters of defense which he must prove in a proceeding to disbar him on account of the conviction.
 8. **The effect of a conviction of felony** as a ground for disbaring an attorney is not annulled by a writ of error and supersedeas.
- On rehearing.*
9. **Persons who institute proceedings** to disbar an attorney are entitled to their costs as against him in case the proceeding is successful.

(November 22, 1897.)

ORIGINAL PROCEEDINGS to disbar Joe Kirby. *Disbarment decreed.*

The facts are stated in the opinion.

Messrs. C. G. Hartley and A. B. Kittredge for accusers.

Mr. Joe Kirby, *in propria persona*:

This court erred in holding that a "convic-

tion" was had within the meaning of § 473, Comp. Laws, regardless of the appeal therefrom pending, and supersedeas granted.

Where we adopt a statute from a sister state, we likewise adopt the interpretation which it has there received. Although the statute is taken bodily from California, your honors refuse to follow the interpretation placed thereon by the highest court of that state.

People v. Treadwell, 66 Cal. 400.

Comp. Laws, § 2559 reads: "Divorces may be granted for any of the following causes: . . . Conviction of Felony."

According to the line of reasoning your honors have adopted in an action for divorce, based on this statutory ground, the question would not be the guilt of the defendant but the conviction. No other court has ever, under such a statute, taken such a view.

Vinsant v. Vinsant, 49 Iowa, 639; *Rivers v. Rivers*, 60 Iowa, 378; 1 Nelson, Divorce & Separation, § 361.

This court erred in holding that the instrument by which it was sought to gain jurisdiction of me was not a process.

You may call this original instrument what you wish, a summons, a citation, original notice, order, or otherwise, but it still remains a process, and as such must issue in the name of the state.

S. D. Const. art. 5, § 38.

Such constitutional provision is mandatory.

19 Am. & Eng. Enc. Law, p. 222; *State v. Hazledahl*, 2 N. D. 521, 16 L. R. A. 150; *Manville v. Battle Mountain Smelt. Co.* 17 Fed. Rep. 127; Cooley, Const. Lim. 6th ed. 93; Black, Const. Law. 770; *Middleton Paper Co. v. Rock River Paper Co.* 19 Fed. Rep. 252; *Hinkley v. St. Anthony Falls Water Power Co.* 9 Minn. 55; *Boyd v. Chesapeake & O. Canal Co.* 17 Md. 195, 79 Am. Dec. 646; *McLaughlin v. Wheeler*, 2 S. D. 379; *Weiskopf v. Dibble*, 18 Fla. 22; *Falvey v. Jones*, 80 Ga. 180.

I hardly think this court will be asked to say that my right to practice law was not a valuable right—was not a property right—and was a right of which I could, legally, be in no manner deprived except by due process of law.

People v. Turner, 1 Cal. 151, 52 Am. Dec. 295; *Fletcher v. Daingerfield*, 20 Cal. 430; Weeks, Attorneys at Law, § 80, p. 156.

This court erred in holding that a conviction in the Federal court was such a conviction as

NOTE.—As to the necessity of bad or fraudulent motive to justify disbarment of an attorney, see *State, Fowler v. Finley* (Fla.) 18 L. R. A. 401, and *note*.

39 L. R. A.

As to disbarment of attorneys generally, see also *Fairfield County Bar, Fessenden v. Taylor* (Conn.) 18 L. R. A. 787, and cases in *note*.

is contemplated by law for disbarment of an attorney.

The conviction contemplated by such a statute is a conviction under the laws of this state.

Klutta v. Klutta, 5 Sneed, 428; *Martin v. Martin*, 47 N. H. 58; *Leonard v. Leonard*, 151 Mass. 151, 6 L. R. A. 682; Bishop, Written Laws, § 141; 1 Bishop, Marr. Div. & Sep. § 1808.

Haney, J., delivered the opinion of the court:

This proceeding was commenced in this court for the purpose of having the name of the accused stricken from the roll of attorneys and counselors of this court, and his license revoked, or to have him suspended from practice for such time as shall seem just. A verified accusation was presented to the court by A. B. Kittredge, Esq., and C. G. Hartley, Esq., attorneys and counselors at law of this court, wherein it is alleged that the accused, who is an attorney and counselor at law of this court, was on October 30, 1896, duly indicted in the United States district court within and for the District of South Dakota, charged with the crime of receiving property of the United States with intent to convert the same to his own use and gain, knowing the same to have been stolen, to which charge he pleaded not guilty; that on June 12, 1897, he was duly convicted by a verdict of a jury of the crime charged; that on June 25, 1897, he was duly sentenced to be imprisoned at hard labor in the penitentiary at Sioux Falls, in this state, for the period of two years; that such conviction and sentence are still in force and effect; and that the crime for which he was convicted is a felony, and one involving moral turpitude. To such accusation was attached a duly authenticated copy of the record of such conviction. Upon reading and filing such accusation and authenticated copy of the record of such conviction, this court issued an order requiring the accused to show cause on the first day of the present term, before this court, why he should not be suspended or disbarred from practicing as an attorney at law, and directing the clerk of this court to forthwith serve upon and deliver to the accused a duly certified copy of such order and accusation. In response to this order the accused appeared specially, and objected to the court assuming jurisdiction for the following reasons: (1) Such proceeding does not appear to be prosecuted by either the public, state, or an individual; (2) the process under which it is sought to bring the accused into court is not issued in the name of the state, nor in the name of any private individual nor any public prosecutor. He also objected to A. B. Kittredge "purporting to appear and argue this matter, for the reason he does not appear in behalf of any client or otherwise." The order to show cause is preceded by these words: "State of South Dakota. In the Supreme Court. April Term, A. D. 1897. In Re Proceeding to Disbar Joe Kirby as an Attorney at Law." The foregoing objections were overruled; a majority of the court being of the opinion that the order to show cause issued in this proceeding is not a process, within the meaning of § 38, art. 5, of the state Constitution. In this ruling I did

not concur, thinking that the order to show cause should have contained the words, "The state of South Dakota sends greeting to Joe Kirby," and that it should be amended by inserting such words. Const. art. 5, § 38; Comp. Laws, § 4807; *Mitchell v. Conley*, 13 Ark. 414; *McKadden v. Fortier*, 20 Ill. 509. In any event, the ruling did not prejudice the rights of the accused in any substantial respect. He received due notice, a copy of the accusation, and was given ample opportunity to appear and defend. Thereupon the accused demurred to the accusation upon the following grounds: "(1) The same does not state facts sufficient to constitute a cause of action; (2) that the court has no jurisdiction of this demurrant; and (3) that said accusation shows on its face facts which entitle the demurrant to his discharge." Decision upon the demurrer was reserved, and the accused filed an answer, wherein it is admitted that Messrs. Kittredge and Hartley are citizens and residents of the county of Minnehaha and state of South Dakota, duly admitted to practise as attorneys and counselors at law in this court; that accused is a resident of Minnehaha county, in this state, and has been duly admitted to practice as an attorney and counselor at law in this court. The answer denies each and every allegation of the accusation not expressly admitted, and alleges "that upon said sentence being pronounced in the said district court of the United States, a large number of exceptions having been, during the progress of the trial, taken, settled, and certified by the judge of said court, the said court and judge thereof, by writ of error duly and legally issued from the Supreme Court of the United States, was required to certify said exceptions and proceedings to the said supreme court as provided by law, in order that the action of the trial court might be reversed and reviewed; and thereupon the trial court and judge thereof did find that there was probable cause to believe that error had been committed upon said trial, and that the action of said trial court should be reversed, and thereupon the said trial court did issue a supersedeas, and thereby did stay said judgment, sentence, and all the force and effect thereof, which appeal is still undetermined and pending." Upon the trial an authenticated transcript of the record of conviction alleged in the accusation was offered in evidence, to which the following objections were made: (1) It is irrelevant to the issues, incompetent, and does not purport to be all the proceedings; (2) the record of such proceedings cannot be proved by an authenticated copy in this criminal action, but must be proved by common-law evidence. These objections were overruled, and the following admission entered of record: "It is admitted that on or about June 25, 1897, the accused sued out a writ of error, in the case of the United States against him, to the Supreme Court of the United States, and that thereupon Hon. John E. Carland, judge of the United States district court, granted a supersedeas therein." No other evidence was offered or received.

So far as it is applicable to this proceeding, Comp. Laws, § 478, reads thus: "The following are sufficient causes for revocation or sus-

pension: (1) When he [an attorney] has been convicted of a felony, or of a misdemeanor involving moral turpitude, in either of which cases, the record of conviction is conclusive evidence." It is contended that this section was repealed by chapter 21, Laws 1898. Comp. Laws, §§ 462-480, inclusive, were formerly chapter 18 of the Political Code, the subject of such chapter being "Attorneys and Counselors at Law." They provide what persons may practice, how they shall be admitted, and the oath to be taken; define the duties and powers of attorneys; create and regulate an attorney's lien; prohibit any attorney from being a surety in any suit instituted in this state; provide for suspending and revoking his license, designate certain causes as sufficient for so doing; and prescribe the procedure in such cases. The act of 1893 provides who shall practise, and how persons shall be admitted; prescribes the same oath, with certain verbal modifications required by the change from a territorial condition to that of statehood; provides for suspension and disbarment, and the procedure, "when an affidavit charging an attorney with embezzlement, or other professional misconduct, is filed in the circuit or supreme court." It expressly repeals all acts and parts of acts in conflict with itself. Evidently, it was not intended that this act should replace all of chapter 18 of the Political Code. The later law cannot be regarded as a revision of the entire subject. It would be unreasonable to infer that the legislature would repeal the sections defining the duties, powers, and liens of lawyers, without enacting something to take their place. As indicated by its language, the legislature clearly intended to repeal such parts of the then existing statute "as are in conflict with the act," and only such. The later law provides that this court shall have power to strike the name of any attorney or counselor from its roll, and to revoke his license, or to suspend him from practice for such time as shall seem just, "for cause shown." Laws 1893, chap. 21, § 8. Is it in conflict with this provision to declare that conviction of a felony or of a misdemeanor involving moral turpitude is a sufficient cause for revocation or suspension? Certainly not. Section 9 of the act is as follows: "When an affidavit charging an attorney with embezzlement, or other professional misconduct, is filed in the circuit or supreme court, it shall order such attorney to show cause why he should not be suspended or disbarred from practice and on the return of such order, the hearing of all matters pertaining thereto shall be referred to a committee of three reputable attorneys and counselors of the supreme court, and judgment shall be rendered on its report." Whether or not this section prescribes the procedure in all disbarment or suspension proceedings will not be decided, because it is not involved in the case at bar. Whatever may be the conclusion when that question is presented, it cannot be successfully contended that the section was intended to limit the powers of the courts to the causes mentioned therein. In construing any statute, it is the duty of the court to consider the entire enactment, and, if possible, give effect to all parts of it. Assuming, without de-

ciding, that, as contended for by the accused, where the legislature has specified certain causes for disbarment or suspension, they are exclusive, if § 9 was intended to embrace all such causes, § 8 should empower this court to revoke or suspend when it has been shown that an attorney has been guilty of "embezzlement or other professional misconduct." Were it shown that an attorney has been convicted of robbery, there would certainly be "cause shown" for revoking his license, yet he would not be guilty of "embezzlement or other professional misconduct." This court has frequently held that repeals by implication are not favored. The conclusion is irresistible that Comp. Laws, § 473, has not been repealed.

The contention that the crime of which accused was convicted is neither a felony nor a misdemeanor involving moral turpitude, within the meaning of § 473, is untenable. "Felony," as therein employed, must be given the definition given the word by the territorial legislature: "A crime which is or may be punishable with death or by imprisonment in the territorial prison." Comp. Laws, § 6204. It means, in ordinary language, a penitentiary offense. This view is consonant with sound reason. Courts should not be required to recognize as attorneys persons who are confined in state prisons. Again, the accused has been convicted of a crime involving "moral turpitude." "Everything done contrary to justice, honesty, modesty, or good morals is said to be done with turpitude." 2 Bouvier, Law Dict. 759. If it is not dishonest and contrary to good morals to receive property of another and convert it to one's own use and gain, knowing it to have been stolen, we are at a loss to know of what honesty and good morals consist.

The objections to the introduction of the record of the Federal court were properly overruled. The material allegations of the accusation are, in effect, admitted by the answer; the transcript is properly authenticated; it contains all the proceedings necessary to sustain the accusation; the writ of error and supersedeas are matters of defense that the accused should have been prepared to prove, and this is not a criminal action. Concerning the character of such proceedings, the authorities are conflicting. The Supreme Court of the United States, in a case wherein the subject is exhaustively discussed, and numerous authorities are cited, reaches what we regard as the correct conclusion. The following language of that learned court is quoted with approval: "The proceeding is, in its nature, civil, and collateral to any criminal prosecution by indictment. The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them. Undoubtedly the power is one that ought always to be exercised with great caution, and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney. But when such a case is shown to exist, the courts ought not to hesitate, from sympathy with the individual, to protect themselves from scandal and contempt, and

the public from prejudice, by removing grossly improper persons from participation in the administration of the laws. The power to do this is a rightful one; and, when exercised in proper cases, is no violation of any constitutional provision." *Ex parte Wall*, 107 U. S. 288, 27 L. ed. 562. In this jurisdiction it has long been the practice to review civil actions on appeal, and criminal actions by writ of error. Under chapter 18, Pol. Code, proceedings to suspend or disbar in the district court were taken to the supreme court on appeal; and under chapter 21, Laws 1893, proceedings to suspend are subject to appeal to this court. Comp. Laws, § 477; Laws 1893, chap. 21, § 8. While not conclusive, this legislation indicates that the territorial and state legislatures regarded such proceedings as being of a civil nature. If the proceeding is of a civil nature, it was competent for the legislature to provide that a record of conviction shall be evidence therein. As accused did not offer to contradict the record by other evidence it is unnecessary to decide whether it should be regarded as conclusive.

Finally, it is contended that by reason of the writ of error and supersedeas the judgment of the Federal court is ineffectual for any purpose, and will not warrant disbarment or suspension until it shall have been affirmed. In discussing this proposition, it will be assumed that the Supreme Court of the United States acquired jurisdiction of the criminal action, and that such action is now pending therein. Regarding civil actions, it is held in numerous cases that the perfecting of an appeal suspends the operation of a judgment as an estoppel, and renders it no longer admissible as evidence in any controversy between the parties. There are other equally respectable authorities which support the doctrine that an appeal, with proper bond to stay proceedings, merely suspends the right to execution, but leaves the judgment, until annulled or reversed, binding upon the parties, as to every question directly decided. *Freeman*, Judgm. § 328; *Willard v. Ostrander*, 51 Kan. 481. In California, under a statute identically the same as that in this state, which provides that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal or until the time of appeal has passed, unless the judgment be sooner satisfied," it is held that a judgment is not final until the time of appeal has expired, and until then it is no evidence of the facts thereby adjudged. Comp. Laws, § 5348; *Re Blythe*, 99 Cal. 472. But it will be observed that this decision relates to judgments in civil actions. We are dealing with the effect of a judgment in a criminal action upon the rights of the defendant therein to practice law after conviction, while such action is pending in an appellate court upon writ of error. If affirmed, the original judgment will be enforced. Execution is suspended by the supersedeas, but the judgment remains until reversed or modified, and it is clearly competent for the legislature to declare what effect it shall have from the time it is rendered. Should this court follow the decisions in California, and hold that, because of the statute quoted, judgments in civil actions, pending upon appeal, are not evidence of the facts

thereby adjudged, it would do so because the legislature has established that rule of evidence; and it would be the duty of the court to ascertain from the statute what rule has been in like manner established for the trial of proceedings to disbar or suspend attorneys. Its language is as follows: "When he has been convicted . . . the record of conviction is conclusive evidence." Comp. Laws, § 473. The question of guilt is not involved. Conviction is cause for disbarment or suspension. The fact of conviction is alone in issue, and the record, the legislature declares, shall be conclusive evidence of that fact. The material inquiry is simply this: Has the accused been convicted? The term "conviction," in its most common use, signifies the finding of the jury that the prisoner is guilty, but we think it is used in the statute under discussion as implying the judgment of a court upon a conviction or confession of guilt. *Com. v. Gorham*, 99 Mass. 420. Then the fact of conviction has been established in this proceeding in the manner prescribed by the statute. The existence of that fact is sufficient cause for suspension or disbarment. In a proceeding like the one at bar, under statutes substantially the same as those in this state, the supreme court of California holds that while the criminal action is pending upon appeal there is no judgment capable of being carried into effect, that it is within the range of possibilities that the judgment may be reversed, and that "there is not such a final conviction against the defendant as the law contemplates, to justify his removal." *People v. Treadwell*, 66 Cal. 400.

With all due respect to that learned court, we must decline to follow its decision in this case. Its conclusion seems to be based upon the clearly-erroneous assumption that the judgment in the criminal action will be reversed, and it interpolates into the statute the word "final." If the court had jurisdiction to try the criminal action, the presumption is that its judgment is right and will not be reversed. Beyond this, we think that the California court fails to observe the real issue of fact involved in the proceeding before it. As heretofore suggested, the issue was not whether the defendant was guilty of the crime charged in the criminal action, but, was he convicted? That court might possibly say that the judgment was not evidence of the fact of defendant's guilt, but it could not say it was not evidence of the fact that he had been convicted.

Sufficient cause having been shown for the suspension or disbarment of the accused, it is the conclusion of the court that his name should be stricken from the roll of attorneys and counselors at law, and his license to practice in all the courts of this state should be revoked. Judgment should be entered in accordance with this decision.

A petition for rehearing having been presented, *Haney*, J., on January 22, 1898, handed down the following response:

Heretofore a decision was rendered herein disbarring the accused because of his conviction in the United States district court. *Re Kirby* (S. D.) . . . He now appeals from the clerk's taxation of costs in favor of the ac-

cusers, and petitions for a rehearing. In *Kirby v. McCook County Circuit Ct.* (S. D.) 72 N. W. 461, this court clearly indicated the practice where a judgment has been rendered for costs and the opposite party claims none should have been awarded. In such cases the party aggrieved should move to have the judgment itself modified and not appeal from the taxation on the ground that no costs should be taxed. For this reason the action of the clerk should be affirmed. Beyond this the judgment in favor of the accusers is right as they are the persons who instituted the proceeding and are entitled to recover such disbursements as they have made, and as are provided for in the statute. Comp. Laws, § 5189. All the items allowed by the clerk being justified by the section cited the taxation in this proceeding in all respects is confirmed.

In support of the contention that the court erred in holding that a conviction was had within the meaning of Comp. Laws, § 473, notwithstanding the writ of error and supersedeas, accused insists that where conviction for crime constitutes a cause for divorce one cannot be obtained for this cause while the criminal action is pending on appeal. It needs no argument to show the essential difference between the consequences of divorce and disbarment, but assuming that there is no distinction in principle, there is such conflict in the authorities regarding the meaning of conviction as a cause for divorce, that were that question before the court, it would be justified in taking the view deemed most consonant with sound reason. In Iowa, divorce cannot be obtained for this cause while the criminal action is pending on appeal. *Vinsant v. Vinsant*, 49 Iowa, 689; *Rivers v. Rivers*, 60 Iowa, 378, 65 Iowa, 568. A different doctrine prevails in Massachusetts and New Hampshire; *Cone v.*

Cone, 58 N. H. 152; *Handy v. Handy*, 124 Mass. 894. Under a statute providing that a sentence of imprisonment for life shall dissolve the marriage of the person sentenced, without any judgment of divorce or other legal process, it was recently held, in Wisconsin, that such a sentence operated to dissolve the marriage when rendered, although it was subsequently reversed for error on appeal. *State v. Duket*, 90 Wis. 272, 81 L. R. A. 515.

In support of the contention that conviction in the Federal court is not a cause for disbarment in the state court attention is again called to the statement that Thomas Addis Emmett, a brother of the famous Robert Emmett, was admitted to practice by the New York court of appeals and the Supreme Court of the United States, after conviction of treason in England and sentence of death which was later commuted to banishment from British soil. Conceding its historic accuracy, the relevancy of this statement is not apparent, as it does not appear that Emmett's conviction was considered by either of the courts which admitted him to practice.

If accused is, in fact, innocent of the crime of which he was convicted, his situation is indeed unfortunate; if he is, in fact, guilty, it is equally if not more unfortunate; but in neither event is this court responsible for his conviction or conduct; and, if it shall ever appear that he was, in fact, not guilty of the crime charged, no court will, in the absence of other valid objections, decline to restore his rights as an attorney and counselor at law. All the matters mentioned in the petition for a rehearing which merit attention have been carefully considered with the result that the court is compelled to adhere to the views expressed in its former decision, and the petition is denied.

KANSAS SUPREME COURT.

STATE of Kansas
v.

A. D. HUBBARD, *Appt.*

(58 Kan. 797.)

***Receivers are not agents**, within the meaning of § 88 of the crimes act, and are not subject to prosecution under the latter part of that section, which provides, in effect, that if any agent shall neglect or refuse to deliver to his employer, on demand, money or property which comes into his possession by virtue of such employment, office, or trust, after deducting lawful fees and charges, unless the same has been lost by means beyond his control, or his employers have permitted him to use the same, shall, upon conviction, be punished as for embezzlement.

(*Johnston, J., dissents.*)

(December 11, 1897.)

A PPEAL by defendant from a judgment of the District Court for Shawnee County convicting him of embezzlement. *Reversed.*

*Headnote by JOHNSTON, J.

NOTE.—On the general question of a receiver's relation to the court, see cases in *note* to *Humphreys v. Hopkins* (Cal.) 6 L. R. A. 792.
89 L. R. A.

Statement by **Johnston, J.:**

This was a prosecution for embezzlement. In the information it was alleged, in substance, that in a certain proceeding pending in the district court of Shawnee county, wherein E. H. Snow was plaintiff, and the Hamilton Printing Company and others were defendants, A. D. Hubbard was appointed as receiver by the district court, and that after qualification he took possession of the printing plant of the Hamilton Printing Company, and the business and property involved in the litigation, carried on an extensive business, sold property, and collected moneys of the aggregate amount of \$40,000, which were to be paid out in accordance with the direction of the court; "and being in the possession of said money and property as such agent and receiver, as aforesaid, said A. D. Hubbard did then and there designedly, fraudulently, unlawfully, and feloniously, and with the intent to cheat and defraud the said partnership of the Hamilton Printing Company, and the Hamilton Printing Company, a corporation, their creditors and stockholders, and to convert the same to his own use, neglect and refuse to turn over and deliver to the clerk of the dis-

strict court of Shawnee county, Kansas, the sum of \$7,056.78, the money which came into the possession of said A. D. Hubbard by virtue of his employment and trust as aforesaid, and remained in his possession after deducting his reasonable and lawful fees, charges, and commission for his services as such agent and receiver, as aforesaid, though an order of said district court for the payment thereof of said \$7,056.78 was duly and legally made and served on said defendant A. D. Hubbard, and demand had been duly and legally made on him (said A. D. Hubbard) for said \$7,056.78, said money, as aforesaid, due and unaccounted for by him; that said \$7,056.78, had not been lost by any means beyond the control of him (the said A. D. Hubbard) before he had an opportunity to make delivery thereof to his employers; and that his said employers did not permit him (the said A. D. Hubbard) to use said \$7,056.78, and which said money, of the value of \$7,056.78, lawful money of the United States of America, the precise character, kind, and denomination thereof being unknown to this informant, and for that reason not herein given, said A. D. Hubbard did then and there, and in the manner and by the means aforesaid, designedly, fraudulently, unlawfully, and feloniously take, steal, embezzle, and convert to his own use, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Kansas." The defendant moved the court to quash the information, for the reason that the same was insufficient to charge the defendant with the commission of a public offense, and, on the trial, objected to the introduction of evidence for the same reason. The motion to quash and the objection to evidence were overruled, and upon the trial the jury found the defendant guilty as charged. A motion in arrest of judgment and a motion for a new trial were overruled, and the defendant was sentenced to the state penitentiary at hard labor for the term of three years.

From that sentence he appealed to this court.

Messrs. P. H. Forbes and E. G. Wilson, for appellant:

The statute does not mention receivers, although, in order to hold clerks, servants, administrators, executors, trustees of express trusts, guardians, etc., it was deemed necessary to describe them as such.

Adhering to the rule that words must be given their ordinary meaning in the construction of a criminal statute, the punishment of a receiver is impossible under our statute unless it is proper to hold that a receiver is an agent in the sense in which the word "agent" is used in the statute referred to, and under which this prosecution is instituted.

State v. Smith, 18 Kan. 274; *State v. Bancroft*, 22 Kan. 202; *Patrick v. Ellis*, 30 Kan. 686.

A receiver may be most comprehensively described as a person standing indifferent between the parties (this does not describe an agent) who is appointed by the court (this does not describe an agent) under its equitable or statutory jurisdiction, as a quasi officer or representative of the court, to take the charge

and management of the property in controversy, under the direction of the court, during the continuance of the litigation or in pursuance thereof.

20 Am. & Eng. Enc. Law, p. 11; *Booth v. Clark*, 58 U. S. 17 How. 881, 15 L. ed. 524; *Kaiser v. Kellar*, 21 Iowa, 96; *Hooper v. Winston*, 24 Ill. 358.

In no case that we have been able to find in the decisions of the several states of the Union, after a very careful investigation, can we discover that a receiver appointed by a court was ever prosecuted for embezzlement.

Messrs. L. C. Boyle, Attorney General, and **A. P. Jetmore**, for the State:

The fact that a receiver furnishes a bond, or may be cited for contempt, is no reason for presuming that the law exempts, or the legislature intended to except, this class of agents or officers from the operation of this statute.

State v. Smith, 18 Kan. 293.

Section 88 was intended to cover every other class of agents on whom a demand is necessary, before even liable civilly, and the language was purposely made general, to include all such agents, for whomsoever they were acting.

State v. Bancroft, 22 Kan. 170; *State v. Yeiter*, 54 Kan. 277; *State v. Smith*, 18 Kan. 294.

Although a receiver holds the property for the benefit of the party ultimately entitled to it, yet when such party is ascertained the receiver is considered as his receiver.

Edwards, Receivers, p. 3; 20 Am. & Eng. Enc. Law, p. 158; *State v. Lillie*, 21 Kan. 728; *State v. Spaulding*, 24 Kan. 1.

Johnston, J., delivered the opinion of the court:

The principal question presented for determination is whether a receiver who unlawfully appropriates money which comes into his hands as receiver, or fails to account for and pay over the same upon demand, is subject to prosecution and punishment as for embezzlement. The defendant was prosecuted upon the theory that he was an agent, and under that portion of ¶ 2220 of Gen. Stat. 1889, which provides that "If any agent shall neglect or refuse to deliver to his employer or employers, on demand, any money, bank bills, treasury notes, promissory notes, evidences of debt, or other property which may or shall have come into his possession by virtue of such employment, office, or trust, after deducting his reasonable or lawful fees, charges, or commissions for his services, unless the same shall have been lost by means beyond his control, before he had opportunity to make delivery thereof to his employer or employers, or the employer or employers have permitted him to use the same, he shall upon conviction thereof be punished in the manner provided in this section for unlawfully converting such money or other property to his own use."

Is a receiver an "agent," within the meaning of the quoted section? The contention of the defendant is that the relation of agency, as ordinarily understood, does not exist between a receiver and the court which appoints him or the parties for whom he acts. A majority of the courts agree with this contention, and are of opinion that a receiver is not an agent, within the meaning of the

statute. It is held that, in construing a criminal statute, words must be given their ordinary meaning, unless it is clear that another was intended, and that to place receivers in a class with agents requires an unusual and strained construction of the statutory language. It does not appear that receivers have ever been designated as agents in our statutes or in the decisions of the court, and, as an evidence that they were not within legislative contemplation, attention is called to the fact that in the first part of the section mention is made of executors, administrators, guardians, and others, vested with official functions somewhat similar to those exercised by receivers, but no mention is made of receivers. It is argued that, if the legislature had intended to make receivers subject to the penalties of that statute, they would have been specifically enumerated with the others of the same general class. The gist of the offense prescribed by the statute is neglect or refusal of an agent "to deliver to his employer or employers on demand any money," etc., and it is said that this statute manifestly contemplates that the agent mentioned shall have an employer. Can it be said that the court is the employer of the receiver, or that he is employed by the parties to the action wherein the receiver is appointed? The court does not pay the receiver, and is not an employer, as the term is ordinarily understood. So, it is said that the parties litigant cannot be said to have employed him, because they did not consent to his appointment, and he does not act under their orders or directions. A receiver is generally regarded as an officer of the court, and subject to its orders and directions. The property or money which comes into his hands as such officer is regarded as being *in custodia legis*, to be delivered or paid over to those who may establish a right to the same. He stands in an indifferent attitude, not representing the plaintiff or the defendant, but really representing the court, and acting under its direction, for the benefit of all the parties in interest. He has no powers other than those conferred by his appointment, and, being but the hand or arm of the court itself, the conclusion is that he does not stand in the relation of agent to the court or to the parties in litigation. The writer is unable to reach this conclusion. The term "agent" is one of wide application, and, as used in the statute, it seems to fairly include receivers. "Agency is the relation, created either by express or implied contract, or by law, whereby one party *vis juris*, called the principal, constituent, or employer, delegates the transaction of some lawful business, with more or less discretionary power, to another party, called the agent, attorney, proxy, or delegate, who undertakes to manage the affair and render to him an account thereof." 1 Am. & Eng. Enc. Law, 2d ed. 937. Webster defines an "agent" as "one who acts for or in the place of another, by authority from him." To constitute agency in its broader sense, it is not essential that it should be created by agreement or contract; it may arise under the law, and anyone who represents another or undertakes to do something for him and on his authority is properly designated as an "agent."

89 L. R. A.

To the mind of the writer the term "agent" was not used in the statute in a limited sense. Instead of using restrictive language, expressions denoting the widest application are employed. For instance, the word "any agent" are used; and, in treating of the money or property for which he must account it speaks of that which comes into his possession by virtue of "such employment, office, or trust." The words last quoted certainly broaden the meaning of the term "agent" and indicate that the legislature did not intend to confine it to agencies arising under a mere contract, but rather that it should extend to agencies possessing the trust or official character as well. In *State v. Bancroft*, 22 Kan. 170, it was contended that the word "agent" was used in a limited sense; and it was there held that, "if the legislature had intended to limit this provision to the agents previously enumerated, it would naturally have said 'any such agent,' and that, failing to use that or some similar term, and in fact using the comprehensive expression 'any agent,' it intended to include every agent." In *State v. Spaulding*, 24 Kan. 1, the city clerk, who was prosecuted for the embezzlement of license fees, and which had not been paid to the city treasurer, contended that he was not the agent of the city, within the meaning of the law, and it was held that, when one assumes to act as the agent of another, he may not, when challenged, deny his agency, and "that one who is agent enough to receive money, is agent enough to be punished for embezzling it." In another embezzlement case, against a county treasurer, it was contended that he had no employer, in the sense in which that term was used in the statute; but the court gave no ear to the contention, and held that, although he was an officer, the public might be regarded as his employer, and that he was therefore subject to prosecution for the embezzlement of the public funds. *State v. Smith*, 13 Kan. 274, 294.

While a receiver is an officer of the court, and acts under its orders and instructions, his relation to the court and to the parties in litigation is that of agency. He represents the court and the parties, and acts for them all in the transaction of the business for which he was appointed. The defendant here was intrusted with the property and business of the state printing establishment and, as receiver, he had business transactions with hundreds of persons and corporations in and out of the state. In dealing with those parties, he represented the court and those who owned an interest in the printing plant and business. They may be properly regarded as the principal or principals, and he as the agent, representing them, and transacting the business under the authority and direction of the court. In 20 Am. & Eng. Enc. Law, p. 158, it is said that "the relation of a receiver to the court appointing him is one of agency;" and so it would appear that, when the statute employs language indicating that the term "agent" is to be applied in its wider sense, it should be held to include receivers. See also *Ellis v. Little*, 27 Kan. 707, 41 Am. Rep. 434. It can hardly be that the legislature, which apparently was endeavoring

to reach everyone guilty of embezzlement, intended to exempt a class of persons intrusted with property and funds so numerous as receivers; and, unless they are held liable within the provisions of this statute, they cannot be punished for embezzlement. As a majority of the court are of opinion that they are not included within the terms of the statute, it must be held that the court erred in overruling the motion to quash the information.

The judgment of the District Court will be reversed, and the cause remanded, with direction to discharge the defendant.

Doster, Ch. J., concurs. **Johnston**, J., dissents.

Allen, J., concurring specially:

It is apparent that the information was framed

to charge the defendant with embezzlement under the last part of ¶ 2220, which relates to agents only, and that the case was tried on the theory that he was so charged. That a receiver is not an agent having an employer to whom he is bound to account and pay over the money received, within the usual meaning of the words, seems to me reasonably clear. Whether a receiver might be charged and convicted of embezzlement under the first part of the paragraph is a question concerning which I am unable to find a satisfactory answer. Receivers are not named, nor do they fall strictly within any class of persons mentioned in this section; yet it would seem to be in the nature of things the same offense for a receiver to convert to his own use trust funds in his hands as for any person belonging to either of the classes mentioned to convert like funds in his hands.

KENTUCKY COURT OF APPEALS.

T. J. STILLWELL, *Appt.*,

v.

Stephen DUNCAN.

(.....Ky.)

1. **The plea of liberum tenementum is available** in an action of trespass *quare clausum fregit* brought by a person who was in actual possession of the land.
2. **One who enters upon his own land, and tears down a fence** which has been built to inclose it by a person who wrongfully took possession of it, is not liable to an action for trespass by the latter.
3. **A counterclaim for damages to the freehold** may be set up as connected with the subject of the action when the defendant in trespass *quare clausum* asserts title to the land.
4. **The amount in controversy is not material** to the jurisdiction of the court of appeals of Kentucky when the title to land is involved.

(January 26, 1896.)

APPPEAL by defendant from a judgment of the Circuit Court for Nelson County in favor of plaintiff in an action brought to recover damages for trespass on real estate. *Reversed.*

The facts are stated in the opinion.

Mr. C. T. Atkinson for appellant.

Du Relle, J., delivered the opinion of the court:

The appellee brought suit against appellant for trespass *quare clausum fregit*, alleging that he (Duncan) was in possession of a tract of land of about an acre, and that on March 20, 1895, appellant wrongfully entered upon said land, and cut down and carried away trees growing thereon, tore down fencing, dug holes, and placed other fencing and timber, and turned cattle thereon. Appellant answered, denying

the wrongful entry, and in the second paragraph as amended, stated that he was the owner and entitled to the possession; averring facts showing title by continuous possession, under record deducible from the commonwealth, for twenty-three years prior to March, 1892, when he averred that appellee forcibly and without right entered on the land, and evicted him, tore down the inclosing fence, and erected a new fence between the tract and the remainder of appellant's land; that on the 1st of March, 1895, appellant recovered judgment against appellee, Duncan, for the trespass referred to and the injury committed by him, up to the date of filing the first action of trespass; that thereafter, about March 20, 1895, appellant peaceably re-entered the tract, took down the separating fence, and erected a new fence within the boundary, connecting the tract with his other land. He also filed a counterclaim for the damage to the land during appellee's possession thereof, from the date of the filing of his former action of trespass down to the date of his re-entry upon the land. A demurrer to this paragraph as amended was sustained, presumably upon the ground that the plea of *liberum tenementum* is not available to an action of trespass *quare clausum fregit* brought by a person who was in actual possession of the land. Such, however, is not the law, as we understand it. In *McClain v. Todd*, 5 J. J. Marsh. 338, 22 Am. Dec. 37, it was held that "an intruder does not gain such a possession as will even authorize him to maintain trespass *quare clausum fregit*." Bacon, Abr." In *Tribble v. Frame*, 7 J. J. Marsh. 601, 23 Am. Dec. 439, the appellant, holding a paramount title, and having a perfect legal right to enter upon the land, entered thereon in the absence of the appellee, who had theretofore been in actual possession; and this court (Chief Justice Robertson delivering the opinion) thus laid down the law upon the question presented by the case at bar: "According to the common law, a person holding the title to land, and having the right of entry,

NOTE.—For rights of owner of land as to regaining possession, see also *Page v. Dwight* (Mass.) ante, 418; *Vinson v. Flynn* (Ark.) ante, 415; *Smith v. Detroit Loan & Bldg. Asso.* (Mich.) ante, 410.

might use actual force, if necessary, for overcoming any forcible resistance; because, his right of entry being perfect, no other person could lawfully resist him in the exercise of his perfect right. The British statutes of forcible entry and detainer declared that an entry with actual force should subject the party so entering to an indictment for any consequential breach of the public peace, and to restitution of possession, and also to an action of trespass. But these statutes have ever been so construed as not to affect the common-law right of justifying, in an action of trespass *quare clausum fregit*, the forcible entry, by pleading and proving a right of entry; and hence, *liberum tenementum* has, notwithstanding those statutes, been always held to be an effectual plea to the action of trespass, and thus proves that the right of entry is a right to make an actual entry on the land. Bacon, Abr. title *Forcible Entry and Detainer*, A; 3 Jacobs, Law Dict. 88; 3 Chitty, Pl. 4 and 5, note, 12; Id. 179, and notes; Selwyn, N. P."

In *Yeates v. Allin*, 2 Dana, 184, the exact question arose which is presented in the case at bar. Yeates, having the legal right to the possession, entered, without actual force, a room of a house in which Allin was living, and, to an action of trespass *quare clausum fregit*, pleaded a judgment in favor of himself and others for seven undivided eighths of the land in the actual possession of Allin. The lower court instructed the jury that although Yeates had the right of entry, and that right was confirmed by the judgment pleaded, yet he had no right to enter without Allin's consent, unless put in possession by writ of habere facias, and that, if he did so enter, he was a trespasser. In delivering the opinion, Chief Justice Robertson said: "The law is altogether different from what the instruction assumed it to be. *Libertum tenementum* is, just as it was at common law, a good plea in bar to an action of trespass *quare clausum fregit*. To say that a person has a legal right of entry, but that he has no legal right to enter without the occupant's consent, or unless the occupant shall have surrendered the possession, or left it derelict, would be inconsistent and unmeaning. The legal right of entry, like every other perfect legal right, is independent of the will of others; for, if it be not so, it cannot be claimed or asserted as a matter of right, but must be invoked as a favor, and is therefore no legal right. A person having a right to enter on his own land cannot be guilty of trespass on the land, or anything pertaining to it, by entering, whether with or without the consent of another, who has no lawful right to prevent the entry. *Tribble v. Frame*, 5 Litt. (Ky.) 187, and *Tribble v. Frame*, 7 J. J. Marsh. 603, 28 Am. Dec. 489." And see *Latta v. Redden*, 5 Ky. L. Rep. 426; *Illinois & St. L. R. & C. Co. v. Cobb*, 94 Ill. 55; Bacon, Abr. title 39 L. R. A.

Trespass, C, 8; *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258. We conclude that the action of the trial court in sustaining the demurrer to the plea of *liberum tenementum* was manifest error.

As to the counterclaim for damages for injury to the freehold between the date of the bringing of the original action of trespass by appellant and the date of his re-entry, the action of the lower court was, in our opinion, incorrect. The counterclaim was not based on a cause of action arising out of the transaction stated in the petition, but was based on a cause of action connected with the subject of the action. In *Whitlock v. Ledford*, 82 Ky. 391, the plaintiff had brought an action for trespass to land, averring title in himself; and the defendant answered, denying plaintiff's title, alleging title in himself, and seeking, by way of counterclaim, to recover of plaintiff the whole tract of land in controversy. The court (Chief Justice Hines delivering the opinion) said: "The subject of the action is the land in controversy, and the foundation of plaintiff's claim is the asserted legal title to the land. The fact that the plaintiff seeks to recover damages for trespass does not alter the character of the action from a direct proceeding to recover the land on the allegation of title, and in such a case there could be no doubt of the defendant's right to assert title in himself, and have it so adjudged. The counterclaim asserted is clearly connected with the subject of the action." That case is hardly distinguishable from the case at bar. In this case no title, but merely the bare possession, was averred by the plaintiff, and the counterclaim for damages did not arise out of the transaction stated in the petition. But the cause of action stated in the counterclaim is connected with the subject of the action for the plaintiff's right of recovery depends on the question whether the defendant has title to the land, upon which question also depends the right of defendant to recover on his counterclaim. If defendant has title, plaintiff cannot recover, for defendant's entry was in that case not wrongful, as averred in the petition. The subject of the original action, therefore, involves the question whether defendant has title, and upon that question defendant's counterclaim is based. Under the view herein taken, it is unnecessary to consider the instructions given by the trial court.

While the amount of recovery by appellee was but \$2.50, this court has jurisdiction of the appeal, as by the answer, pleading title and right to possession in appellant, the question of title to the land became involved. *Clements v. Waters*, 90 Ky. 99; *Hughes v. Swope*, 88 Ky. 257; *Moore v. Boner*, 7 Bush, 28; *Caskey v. Lewis*, 15 B. Mon. 29.

Wherefore the judgment is reversed for further proceedings consistent with this opinion.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Third Quarter of the Judicial Year Beginning with October 1, 1897, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.
- V. FIDUCIARIES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS; DEED.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE; HOLIDAY.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Statutes.

The omission from the legislative journal of an entry of the yeas and nays on the second and third readings of a bill to impose a tax is held fatal to the validity of the act, where the Constitution expressly requires such entry in case of such a bill. (N. C.) 489.

Courts.

A statute attempting to give the court power to assign or transfer a town or city from one class to another is held to violate a constitutional requirement that the legislature should make such assignment or transfer, without providing for delegating the power. (Ky.) 214.

The approval and adoption or modification of a plan for a street railway is held not to be within the scope of judicial power. (Conn.) 794.

Court-house.

The assignment of rooms in a court house to the different judges of the courts of record is held to be a matter for them to arrange among themselves, and not to be included in the power of the county board to provide a court-house and proper rooms and offices for the accommodation of the courts. (Ill.) 197.

Attorneys.

The effect of a conviction of felony as a ground for disbarring an attorney is held not to be annulled by a writ of error and superseas. (S. D.) 856.

Officers.

The words "deputy postmaster" in the Indiana Constitution, excepting such an officer if his salary did not exceed more than \$90 per annum from the provision as to holding more than one lucrative office at the same time, are held to mean postmaster. (Ind.) 278.

Schools.

Power to compel school children to be vaccinated as a condition of attendance is denied, under the general authority to make rules and regulations. (Ill.) 152.

The dismissal of a school superintendent is held to be justified by the fact that he was under indictment for adultery, and especially after a verdict of guilty has been found, although

afterwards the verdict is set aside and the prosecution dismissed. (Mass.) 510.

The right of women to vote at a school meeting for director of a district is sustained, although the Constitution provides that only male citizens shall vote at all elections, but has another provision giving the legislature power to provide a system of schools. (Or.) 768.

Casting vote.

The right of an auditor to give a casting vote on a tie vote by township trustees for county superintendent is held not to be limited to a vote by ballot, but to extend to a preliminary motion or resolution, or a motion to appoint. (Ind.) 282.

Counties.

A statute making a county a municipal corporation is held not to change the prior rule of law under which a county was not held liable for negligence in the maintenance of a bridge which the state requires it to maintain. (N. Y.) 46.

The nonliability of counties for negligence is illustrated in case of injury to an employee at a county insane asylum from a defective machine. (N. Y.) 88.

The broad doctrine that counties are no more liable than the state for acts or omissions of officers is laid down in a case which denies the liability of a county for negligence of officers in respect to the repair of bridges. (Ind.) 58.

But liability of a county for unauthorized and unlawful acts of its officials done *colore officii* is sustained, where the county adopts the acts and retains the benefits thereof, notwithstanding the general rule that a municipality is not liable for such acts of its officers. (Minn.) 75.

A county exhibit at an interstate exposition, and the erection and maintenance of suitable buildings therefor, when authorized by statute, are sustained as for a valid public purpose. (Neb.) 518.

Municipalities.

The right of a city to remove the turnout of a street railway as an obstruction, without notice or hearing, is denied, and legal measures are held necessary. (N. J.) 609.

Bonds payable only in gold coin are held within the power of a city to issue, under a statute authorizing them to be made payable "in gold coin or lawful money," as this is construed to give an option. (Cal.) 444.

A statute reducing the power of a city to levy taxes to pay judgments is held not unconstitutional as depriving the owner of the judgment of property without due process of law, or impairing the obligation of a contract, if the judgment was for a tort. (Tex.) 259.

The right of a city to lease its gas works is sustained, against the contention that the city was under obligation to continue their operation as municipal duty. (Pa.) 887.

Delegation of the power to fix the amount of tax for a public library which must be levied by the common council, to a board which is not chosen by and directly responsible to the people, is held to be beyond the power of the legislature, unless the people consent. (Iowa) 285.

Ordinances.

An ordinance prohibiting an awning over a sidewalk unless it is on a suitable frame is held void for uncertainty. (Conn.) 670.

An ordinance prohibiting dogs from running at large, and providing that in case of its violation the dogs may be seized, and, if not ransomed by payment of \$1 before 10 o'clock on the morning after they have been detained for twenty-four hours, shall be killed, and also providing for notice to the owner if his name is on the dog's collar, is held constitutional. (Md.) 649.

Discrimination between residents and non-residents of a town or city in respect to penalties for allowing stock to run at large in the streets, by exempting the nonresidents partially or entirely, is held constitutional. (N. C.) 245.

An ordinance requiring a street railway company to sprinkle streets through which its cars run is held unreasonable and void,—at least when it does not limit the time to the track; and it is also held void for indefiniteness when it does not specify the extent, mode, or frequency of the sprinkling. (La.) 618.

An ordinance for the prevention of cruelty to animals is held to be within the power to prohibit nuisances. (La.) 520.

An ordinance declaring the emission of dense black or thick gray smoke a nuisance, without any limitation as to the time of emission, or any inquiry as to whether it is a nuisance in fact or not, is held void. (Mo.) 551.

An ordinance for paving with asphaltum from Pitch lake in the island of Trinidad is held void, because it creates a monopoly, where that lake is the property of a private corporation. (Ill.) 482.

The inalienable right to procure food is held violated by an ordinance prohibiting the sale of fresh pork or sausage made therefrom between June 1 and October. (Ark.) 266.

Fisheries.

The right of the state to protect fish is held to extend to streams running through private lands when connected with the public fishing grounds. (Cal.) 581.

Interstate commerce.

A statute providing for the inspection of all

sheep brought into the state, and the dipping of them, whether healthy or not, while exempting some of the sheep in the state therefrom during certain periods of the year, is held to be an unconstitutional burden on interstate commerce as well as a deprivation of equal privileges and immunities of citizens. (Idaho) 365.

Pilots.

Placing 25 tons of coal as ballast in the hold of a vessel of 700 or 800 tons' burden, which is loaded with lumber, is held insufficient to bring her within the provisions of a statute exempting vessels loaded in whole or in part with coal or coke mined in the United States from pilot fees. (C. C. App. 4th C.) 177.

Taxes.

A succession tax is held to be a tax on the right to receive property, and not on the property itself, and an exemption of estate less than \$7,500 is sustained. (Mont.) 170.

The cost of reproduction is held to be the proper basis for local taxation of a railroad under a system which requires the franchise and personal property to be assessed by state officers. (N. Y.) 237.

A statute requiring taxes on personal property unsecured by lien on real estate to be collected at the time of assessment, though before equalization or the beginning of the year for which they are to be paid, but providing for subsequent correction of the amount, is held valid, and the discrimination justified by the difference in the situation between the different kinds of property. (Cal.) 342.

The right to tax a herd of sheep driven through the state is held to depend on the existence of a purpose to obtain grazing for them, not as a necessary incident of the travel merely, but as an additional motive for the movement. (Wyo.) 594.

Eminent domain.

Damages to an abutting lot by cutting down the grade of a street are held to require compensation under a Constitution providing compensation for taking, injuring, or destroying property for public use. (Ky.) 349.

A constitutional provision against taking or damaging property for public use without just compensation is held to apply to the first grading of a street, and to preclude such work without first ascertaining and paying, or tendering, the damages. (S. D.) 345.

A trolley railway on a street is held to constitute an additional burden by virtue of the exclusiveness and permanence of the appropriation of that portion of the street occupied by the poles and wires. (Neb.) 751.

The right to enter and remove gas pipes on abandoning a line which has become useless is held to belong to the gas company subject to the limitations that it must be done in the way least harmful to the landowner, and on payment for any actual injury to growing grain or grass, and, if the field be a meadow, for any substantial injury to the turf beyond opening and filling the trench where the pipe lay. (Pa.) 532.

See also *infra*, IV., VIII., and IX.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

The claim that a boom in a river was illegal is held to be no defense to the payment of just and reasonable compensation for catching ties, etc., in it, where the owner of these had been greatly benefited, and had acquiesced and even assisted in the maintenance of the boom. (W. Va.) 491.

A note given in renewal of one which was given to pay a debt in another state, where it was valid, even if held to be a contract of the latter state, is denied enforcement in a state in which it is contrary to public policy. (N. C.) 835.

Signing an instrument in which the amount is written in pencil, and leaving it with an agent to be delivered for a loan, are held not to be negligence, or to render the maker liable for the forgery to an innocent holder. (Cal.) 697.

Checks.

A bank taking a check instead of cash on a sale of stock for a principal, and then crediting him with the amount of it, is held liable to him if the check proves worthless, even if it used due diligence for its collection. (Pa.) 529.

After a check is made which constitutes an equitable assignment of a fund, and is presented by the holder, a bank is denied the right to appropriate the fund to its own claim against the depositor. (Ill.) 159.

In Illinois, where a check is regarded as an assignment of a deposit *pro tanto*, an arrangement by the drawer with the bank to prevent application of future deposits thereon is held invalid. (Ill.) 479.

Subscription.

A subscription to obtain the location of a college at or in a certain town is held not to require the institution to be placed within the corporate limits when many of the inhabitants live outside of them. (Ark.) 636.

Restraint of trade.

A combination of the owners of distinct patents for the purpose of restraining competition is held to be invalid. (C. C. App. 8d C.) 299.

Employment.

Want of mutuality in a contract for employment with an agreement to promote the employee according to a certain arrangement, and not to discharge him without cause, is held to leave the employer the right to discharge him at any time, where the employee is not bound to serve for any specified time. (Ark.) 467.

Suretyship.

The mere indorsement without recourse by the payee of a note made for discount at a certain bank, and the discount of the note at another bank, are held to release a surety on the note. (S. C.) 847.

The agreement of cosureties as to their relative and proportionate liability is held not to be within the statute of frauds. (Or.) 878.

Innkeepers.

Persons attending a club banquet at a hotel on the invitation and at the expense of the club, which had a contract to pay a certain price per plate, are held to have no right of action against the innkeeper for the loss of

their hats which they left on the rack as they entered the dining room, although they had registered and been assigned rooms as guests. (N. H.) 760.

Lease.

A renewal of a lease with a covenant to deliver the premises in as good condition as they are then in is held to preclude the removal of trade fixtures, which the tenant had a right to remove at the expiration of the original term. (Ill.) 869.

Moving a building to another part of the same lot is held not to constitute an eviction of a tenant of the first floor so as to relieve him from payment of rent, if he retains possession. (Ill.) 156.

Original package.

A pine box in which sealed packages of cigarettes are packed for shipment is held to be the original package of commerce, although each of the sealed packages is held by the internal revenue department to be a proper and original package for the purpose of taxation. (Iowa) 484.

Carriers.

A person holding a free pass on a railroad, who gets on the front platform of a baggage car next the tender after the train has left the depot and is in motion, and then tries to get into the baggage car, is held not to have acquired the rights of a passenger if he is killed by a collision while still on the platform. (Ill.) 148.

A contract between a railroad company and a ticket broker, by which the broker is enabled to sell tickets for interstate transportation at less than the rates charged at the regular agencies of the company, is held invalid under the interstate commerce act of Congress. (Ga.) 275.

The bursting of a hogshead of molasses due to fermentation is held not to be a loss for which a carrier is liable, since it results from the operation of natural laws. (N. H.) 431.

A somewhat unusual case as to the liability of a carrier for unloading goods in a storm on an open platform and leaving them unprotected from the weather at a station where there is no building or any carrier's agent holds that this is not a fault on the part of the carrier, where the contract provided that the goods unloaded on such platform should be at the owner's risk. (Pa.) 535.

Insurance.

The surrender of the original policy in order to obtain a paid-up policy is held not to be a condition precedent under a contract which provides for such surrender. (Ky.) 504.

Benzine kept bottled in small quantities as a part of a stock of drugs and chemicals is held not to avoid a policy on such a stock of goods, although there is a stipulation against keeping benzine in the store. (Ark.) 789.

The intentional burning of a mortgaged building by a mortgagor to defraud the insurer is held to defeat the right of the mortgagee under a policy payable to him as his interest may appear. (Tenn.) 148.

Insurance on wearing apparel, jewelry, etc.,

while contained in a certain building, was held not to cover the property at another place where the family were temporarily staying in accordance with a habit known to the insurance agent. (Tex.) 545.

The fact that some portions of a burned building remain standing, and the lower floors are in condition to be used for rebuilding, is held insufficient to prevent the damage to the building from constituting a total loss under a valued policy. (Mo.) 819.

Failure to keep the covenants as to notice and proofs of loss, and bring suit on a policy within the limited time, where loss occurs aft-

er the death of the insured and before the appointment of the legal representatives, is held fatal, where reasonable efforts had not been made to secure the prompt appointment of such representatives, or other steps taken to keep the covenants. (N. Y.) 433.

Whether an accident or a disease was the cause of the death of a person insured against accident is held to be a question for the jury, unless the proofs are so convincing that all reasonable men, in the fair exercise of their judgment, must be led to the same conclusion. (Neb.) 826.

III. CORPORATIONS AND ASSOCIATIONS.

The lack of corporate existence of a company which has not paid the bonus tax which is, by statute, made a condition precedent to the exercise of any corporate powers, is held sufficient to defeat an action by such company on objection by the defendant. (Md.) 810.

Members of a corporation of another state are by a Florida decision held liable as partners for business done in that state without being incorporated therein. This seems impossible to reconcile with the great body of decisions as to recognition of foreign corporations, as the decision is not based on any statutory exclusion or declared public policy of exclusion, but on the general doctrine that incorporation in another state is insufficient to prevent partnership liability. (Fla.) 362.

The sale of delinquent stock of an irrigation company for assessments is held to give the purchaser the rights of an original subscriber, and to be unaffected by a by-law restricting transfers, since the purchaser takes from the corporation itself. (Cal.) 701.

The validity of a chattel mortgage executed by a foreign corporation in the state of its creation, as a preference to a creditor there residing, is to be determined by the law of the state in which the property is situated, when the corporation was insolvent. (Tex.) 254.

Loan association.

The legality of paid-up stock in a building and loan association is held not to be open to question by the holders of such stock, when it is not questioned by other parties, merely for

the purpose of giving the former an advantage which they would not have if the stock had been valid. (Ill.) 202.

The deposit of securities by a foreign building and loan association as required by statute in order to get the right to do business in the state is held binding on the company, its stockholders, and receiver, and the proceeds thereof applicable to the resident creditors and shareholders in the first place, and the residue only payable to the receiver of the company appointed in the state of incorporation. (Wis.) 559.

Labor union.

The right of an unincorporated labor union to the protection of its union label is sustained under a Massachusetts statute, although a prior decision had held that such unions could not be protected against wrongful use of their labels. (Mass.) 508.

Stock exchange.

A by-law of a live-stock exchange limiting the number of solicitors that can be employed by any member is held void, and also a ground for forfeiting the franchise of the company. (Ill.) 878.

Limited partnership.

The right of a member of a limited partnership to purchase additional shares and have the rights of a member in respect of them is held limited by a rule which requires a re-election to membership in respect to such shares. (Pa.) 100.

IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.

Marriage in another state between a man and his paramour who go there to evade the laws of their domicil, which prohibit his marriage during the life of a former wife, is held invalid at their domicil. (Pa.) 539.

Five years' imprisonment under a conviction for crime is held to give the convict's wife the right to a divorce. (Ky.) 403.

An adopted child is held not to be a child or heir of the adopting parent within the meaning of a statute giving a remainder to children or heirs of a life tenant, under a deed to a person and his bodily heirs, where there was no law providing for adoption at the time of the enactment of such statute. (Mo.) 748.

Incompetency.

A judgment against an insane person, and a

sale of his land thereunder were sustained where he was then going at large attending to his business, and no steps were taken to set them aside, even after the appointment of a committee two years later. (Ky.) 775.

An order for the temporary custody of a person alleged to be insane pending proceedings to determine his sanity is held to be an exercise of police power to guard against danger in an emergency, and not a deprivation of liberty without due process of law. (Conn.) 353.

One who drank largely of intoxicating liquors, and whose memory and will power were weakened, is held not to have had testamentary capacity of the highest order when undue influence is involved. (Pa.) 220.

See also *infra*, IX.

V. FIDUCIARIES.

See also *infra*, VII., *Trusts*.

Participation in a breach of trust by a bank is held to make it liable to the trust estate, where it places to the individual account of the trustee a check which was on its face for deposit to his account as trustee; but it is held otherwise as to a check for deposit to his ac-

count simply, although it includes a clause showing that it was for purchase money due him as trustee. (Md.) 84.

A dedication of land for a church lot or for religious purposes cannot be made to a municipality as trustee. (Ky.) 99.

VI. TORTS; NEGLIGENCE; INJURIES.

The naked assertion of the value of property, known to be false, is held insufficient to constitute an actionable deceit, though relied upon by the purchaser. (Conn.) 644.

False imprisonment.

A police judge is held liable for false imprisonment in ordering a person to be committed to jail merely on a telegram to the chief of police to arrest him. (Ky.) 210.

Libel.

To publish of a trader that he pleaded the statute of limitations, and to characterize this as dishonest, is held not to be libelous. (Iowa) 784.

Carrier's liability.

A conductor who beat a passenger who slapped his face with his hand is held to render the carrier liable, if he used force greatly in excess of what would seem necessary to a reasonable man in repelling the assault. (Ark.) 784.

Injury to a passenger by the breaking of a trolley wire, which comes in contact with him when it is charged with electricity, is held insufficient to render the carrier liable if there is no negligence on its part. (Md.) 161.

Permitting a car labeled "Powder" to stand so near a warehouse that firemen are deterred from attempting to put out a fire in the warehouse is held such negligence as to render the carrier liable, although there was no powder in the car. (C. C. App. 9th C.) 800.

Vendor's liability.

Negligence in the sale of cartridges similar to but in reality different from those asked for by a customer renders the seller liable for the damages caused by premature explosion of the cartridges when they were properly used. (Ga.) 607.

Master's liability.

The negligence of a foreman in a quarry in failing to give warning of a blast is held to be negligence in the duty of the master, and not that of a fellow servant. (N. J.) 884.

An injury to a telephone lineman from electricity escaping from an electric-railroad wire was held to be the result of his own negligence where his employer required him to test the wires for himself. His negligence after knowledge that the wires were unsafe was also held to prevent his reliance, as against the railroad company, on the assumption that it had done its duty in respect to them. (Conn.) 192.

Lessor's liability.

A sweeping provision in a lease exempting

the landlord from liability for damages by fire, water, or otherwise, is held not to exempt him from liability for damage resulting from his own negligence in the use of heating apparatus remaining under his control. (R. I.) 246.

A landlord's re-entry and forcible ejection of the tenant after the lease has expired, but without excessive force, is held to give no civil remedy to the tenant unless it is provided by statute. (Ark.) 415.

Lessee's liability.

The keeper of a lodging house is held to have a right of action against a lodger for bringing disreputable people into his lodging rooms to the damage of the good name and business of the house. (R. I.) 773.

Railroad injury.

A license to use a railroad track as a foot-path, implied from its long use without objection, is held to impose care and diligence in running trains at that place. (Iowa) 899.

A switch about a mile from a railroad depot, to which a switch engine runs frequently and at irregular intervals without receiving orders as against other trains, is within depot grounds or yard limits so that it is not required to be fenced. (Mich.) 405.

Injury in street.

A light is held not to be required, as matter of law, on a platform made by a street-railway company during a freshet. (Or.) 517.

A water company having permission to place hydrants in streets and open them for flushing is held chargeable with the exercise of due care to avoid frightening horses. (Kan.) 90.

Riding a bicycle without a light or signal of warning, on a highway when objects can be seen only a few feet away, is held to be negligence precluding a recovery for a collision with a team. (Iowa) 488.

Other cases.

The death of a person, caused by stepping on a live electric wire which had fallen to the ground is held to raise a presumption, but not a conclusive presumption, of negligence or liability on the part of the electric company. (W. Va.) 499.

Injury caused by the falling of the head of an ax which flew from the handle while being used without negligence is held insufficient to show negligence. (Pa.) 842.

An unguarded door to an elevator in a store used by employees is held to be such an attraction to children that the owner may be liable to a child injured thereby, if the child was allowed to play on the premises. (Ill.) 112.

VII. PROPERTY RIGHTS; WILLS; LIENS; DEED.

A deed to a fictitious person is held to convey no title, but a deed of trust executed in the same name by the true owner of the property, who used his own Christian name as that of a fictitious person in both instruments, is held binding on him. (Tenn.) 428.

Wife's interest.

The inchoate interest of a wife in her husband's real estate, of which he is only a cotenant, under the Indiana statute, is held subject to defeat by a partition. (Ind.) 384.

Riparian rights.

The common-law doctrine of riparian rights is held applicable to the arid portions of the state of Washington, and the riparian owner is held to be protected against subsequent appropriation. (Wash.) 107.

Oil and gas.

That petroleum oil and natural gas are minerals within a reservation by deed is held in a case which also decides that possession of the land for agricultural purposes is not in itself adverse to the owner of the minerals. (Tenn.) 249.

An oil lease of infant's land is held to be a sale which can be made only in the manner prescribed for the sale of infant's real estate. (W. Va.) 292.

The right of a person to drill an oil well on his own lands is not limited by the fact that it is near the line of another person, and draws oil from the latter's lands. (Ohio) 765.

Coal.

Parol partition of the surface of land is held not, as matter of law, to extend to coal beneath, although in the absence of evidence it will be presumed to do so. (Pa.) 587.

Building on leased land.

The removal of a corner of a building to make room for an elevated railroad is held wrongful, and restoration required, when it is done by a company which has purchased a ninety-nine years' lease of the premises, under which the lessee erected the building and had the right to compensation therefor on the expiration of the lease, or in lieu thereof a renewal for an additional term. (C. C. App. 7th C.) 711.

Trade label.

The label of a cigar maker's union is held entitled to protection against use by unauthorized persons, although the union is a voluntary unincorporated organization which does not own the goods to which the label is affixed. (Ky.) 211.

Capital and income.

The decrease in value of bonds due to the wearing away of the premiums as the bonds approach maturity is held to be chargeable to the remaindermen rather than the life
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tenants under a will providing that the latter shall have the full income, where testatrix transmitted the bonds as she held them. (N. Y.) 280.

Trusts.

See also *supra*, V.

A bequest for masses to be said for the testator is sustained as a valid private trust, although not a charity. (Iowa) 204.

The execution of a power by a married woman under a trust deed made by her husband for herself and children, authorizing her to appoint a new trustee in case of vacancy, is held to be properly made by appointing him as trustee. (Fla.) 705.

An attempt to transfer property in trust so as to take it out of the reach of creditors, while retaining control of the income therefrom, is held invalid even if made by a married woman or a woman in contemplation of marriage. (Md.) 806.

Will.

An inoperative devise of land which testator did not own is held not an omission to provide for a child within the meaning of a statute giving a share as in case of intestacy. (Cal.) 689.

A ruling that the formal execution of a will is to be assumed, is held not to preclude the proponents from subsequently calling subscribing witnesses to prove it. (Mass.) 715.

Innkeeper's lien.

An innkeeper's lien is upheld on samples of a traveling salesman which belong to his employer. (Iowa) 291.

Vendor's lien.

Vendor's liens are held not to be adopted as part of the common law of Washington because inapplicable to the conditions of that state. (Wash.) 82.

Mortgage.

A claim for funeral expenses of a mortgagor of land is denied priority over the lien of the mortgage under a statute which requires the funeral expenses to be paid before distribution. (Ky.) 506.

The forgery of the satisfaction of a mortgage by a mortgagor who was allowed to take it merely for inspection, and fraudulently substituted a copy in place of it was held ineffectual to defeat the mortgagee's rights, even as against a bona fide purchaser of the premises relying on the record of the discharge. (Ga.) 95.

Warehouse receipts.

Warehouse receipts issued by a corporation on its own property, in its own possession, to secure its own debt, are held to be invalid, as such, and to be within the statute respecting the record of chattel mortgages. (Ind.) 725.

VIII. CIVIL REMEDIES.

The remedy on a note with warrant of attorney given by statute at the time they were made, by which a judgment could be entered and enforced notwithstanding any subsequent assignment for creditors, is held to be a part of the obligation which cannot be taken away by a statute providing that such an assignment shall dissolve all levies. (Wis.) 569.

A judgment *pro confesso* after striking out defendant's answer to punish him for contempt is held absolutely void, at least when rendered by the supreme court of the District of Columbia, which had no right under U. S. Rev. Stat. § 725, to strike out such answer. (N. Y.) 449.

Election.

The retaking of property by a vendor who had retained title is held to preclude a subsequent action for the unpaid part of the purchase price. (Mich.) 815.

Garnishment.

Money or property taken from a prisoner under arrest, whether lawfully or unlawfully taken is held not subject to garnishment in the sheriff's hands, since if lawfully taken, it is in custody of law, and otherwise it was obtained by wrongful use of criminal process. (Mo.) 165.

Distress.

The right of distress is held not to pass to an assignee of a rent note, where the statute merely authorized the assignment of the rent and its recovery by the assignee. (Ky.) 403.

Ejectment.

The right to bring ejectment to compel the removal of telegraph poles which had been placed in a highway without compensation to the owner of the fee is sustained in favor of a subsequent purchaser of the land. (Ill.) 722.

Case.

Failure to pay over money collected for an employer is held to give no right of action by trespass on the case. (R. I.) 845.

Injunction.

An injunction against an action at law for which a release had been given and the specific performance of the agreement not to harass the complainant by such actions is held proper notwithstanding the release was an available defense at law, where the nature of the claims was such that the trial of the actions, although unsuccessful, would damage the defendant's reputation. (N. Y.) 240.

Appeal.

The insanity of a defendant in a divorce suit is held insufficient to prevent taking a writ of error from a decree against him, although he is incapable of making any personal election. (Ill.) 115.

Process.

Service of process on an officer of a foreign corporation who is only temporarily and casually in the state, when the company has never done business therein, is held insufficient to sustain a judgment *in personam*. (Wash.) 548.

Levy; exemption.

A combined harvester, although used by the owner to cut his neighbor's grain as well as his own, is held to be exempt from execution as 89 L. R. A.

an implement of husbandry or farming utensil. (Cal.) 840.

Evidence.

An oral agreement to show that the nominal maker of a note was only an agent and executed it under an agreement with the payee that he would look only to the principal is held inadmissible in favor of the agent when sued on the note. (Wash.) 473.

Damages.

The right to recover damages for mental suffering on account of delay in delivering a telegram is denied in an Arkansas case on a review of the conflicting decisions. (Ark.) 463.

Replevin.

Replevin for goods fraudulently purchased is sustained without any tender of a part payment which had been made, when the purchaser had realized from sales more than that amount. (C. C. E. D. Wis.) 579.

Partition.

Land subject to an easement of a right of way when owned in common by persons who have the easement is held subject to partition. (Mass.) 215.

See also *supra*, VII., *Coal*.

Action for death.

The "heir or heirs" intended by a statute defining the parties who may bring action for death are held equivalent to child or children, and limited to lineal descendants. (Colo.) 351.

Re entry on premises.

The owner of land which has been wrongfully entered upon by another person is held not to be liable for trespass in re-entering and taking possession of it. (Ky.) 863.

The right of a landlord to re-enter, if it can be done peaceably, and then maintain the possession by such force as is necessary, is sustained, where the tenant was in default and had been served with notice to terminate the lease; and in such case the legal proceedings to recover possession are held unnecessary. (Mich.) 410.

The right to maintain forcible entry when a person has been forcibly ejected from a possession lawfully obtained by one who has the present right of possession is denied under a statute expressly giving the right to a person entitled to possession. (Mass.) 418.

A man sixty-six years old is held entitled to an exemption from levy and sale of his property as an "aged or infirm person." (Ga.) 710.

Set-off.

A claim against a decedent's estate which was not due when the debtor died, but has become due before the commencement of an action, is held properly set off. (Cal.) 686.

Receivership.

A receiver of a trading corporation is appointed pending litigation between two factions each of which owns one half of the capital stock, when its affairs have come to a deadlock. (N. J.) 762.

The doctrine of equity which gives employees of a corporation a prior right to payment out of assets of a receiver in certain cases receives an extended discussion in a case which holds that the public nature of the corporation

is not an element of the equity, but that a mining or manufacturing company is as much within the rule as a railroad company. (Ala.) 628.

IX. CRIMINAL LAW AND PRACTICE; HOLIDAY.

Monday, July 5, is held to be a holiday within the meaning of a statute against opening saloons on holidays. (Mich.) 218.

Insanity.

Insanity caused by the voluntary use of cocaine, morphine, and whisky is held to preclude an action for assault with intent to murder, although the statute provides that insanity from voluntary recent use of intoxicating liquor shall be no defense. (Tex.) 262.

Manacles.

The right of an accused person to appear in court without being manacled is held to be a common-law right, and his rights are also impaired by keeping manacles on others who have already been found guilty of the crime with which he is charged, when they are kept in the presence of the jury. (Wash.) 821.

Cruelty.

A dog is held to be a domestic animal within a statute as to cruelty,—especially where the Constitution provides for taxing domestic animals which are destructive of other property. (Ga.) 709.

Embezzlement.

A receiver is held not to be an agent within the meaning of a statute as to embezzlement. (Kan.) 860.

Evidence.

Evidence obtained by forcibly entering a house and searching it and the person of the owner is held admissible to show the possession of articles which tend to establish guilt, notwithstanding the unlawfulness and unreasonableness of the search. (Ga.) 269.

Opinions as to sanity are allowed by non-ex-

pert witnesses after giving full detail of the facts on which the opinions are based. (Tex.) 305.

Proof of insanity as a defense in a criminal case need be only by preponderance of evidence. It need not be sufficient to "satisfy" the jury of the insanity. (Ohio) 737.

Witnesses.

The obligation of expert witnesses to testify on payment of ordinary witness fees only is sustained against the contention that to compel them to give their opinions is a taking of their property without just compensation. (Ill.) 116.

Contempt.

The refusal to permit a person charged with contempt in publications respecting the evidence on a trial, to show that they were true, and to disprove the reporter's notes offered against him, is held to be a denial of due process of law. (Cal.) 691.

Jurors.

The fact that a juror did not know how to read or write the English language, although this was not known to the accused until after the trial, was held, overruling a prior decision, to be insufficient ground for a new trial. (Iowa) 302.

Costs and fees.

A statute making costs and fees of officers and witnesses in criminal cases depend on conviction is sustained against the contention that this denies the right to a fair trial which is involved in the constitutional right of trial by jury. (Tenn.) 126.

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TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ABANDONMENT. See ACTION OR SUIT, 2; GAS, 1.

ACTION OR SUIT. See also PARTITION, 2.

1. A right of action must be complete before the action is brought, and the subsequent occurrence of a material fact will not avail in maintaining it. *Maryland Tube & I. Works v. West End Improv. Co.* (Md.) 810

2. Failure to bring an injunction suit to prevent the changing of the grade of a street without making compensation for injury to the abutting owner is not an abandonment of the right to bring an action for such compensation after the change is effected. *Henderson v. McClain* (Ky.) 349

3. The delivery of a life-insurance policy which is void for failure to pay a premium is not a prerequisite to the institution of an action to obtain judgment for a paid-up policy in accordance with a provision of the policy, as such original policy is of no effect and can be of no value to any person. *Mutual L. Ins. Co. v. Jarboe* (Ky.) 504

4. A purchaser who was induced to make the contract by the false and fraudulent representations of the vendor may, acting seasonably, rescind the contract, after giving or tendering back what he has received, and recover back the consideration, or he may retain the land and recover damages for the deceit in a proper action. *Gustafson v. Rustemeyer* (Conn.) 644

5. The sole apparent maker of a note when sued thereon is not entitled to have his alleged principals brought in as defendants. *Shuey v. Adair* (Wash.) 473

ADOPTION. See DESCENT AND DISTRIBUTION; PARENT AND CHILD.

ADULTERY. See SCHOOLS, 7.

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Possession of land is not adverse to the owner of minerals therein, when the land is used merely for agricultural purposes, without any denial of the right to the minerals, or any assertion of claim inconsistent therewith. *Murray v. Allard* (Tenn.) 249

ALTERATION OF INSTRUMENTS. See also FORGERY.

1. The unauthorized alteration of an instrument by an agent with whom it is left to be delivered does not bind the principal. *Walsh v. Hunt* (Cal.) 697

2. An alteration of an obligation, amounting to forgery, by an agent of the maker, does not avoid the contract in its entirety or prevent a recovery by an innocent holder upon it in accordance with its original terms, if they can be ascertained. *Id.*

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1. Provisions for the summary destruction of dogs running at large contrary to statutes or ordinances are within the police power of the state. *Hagerstown v. Witmar* (Md.) 649

2. An ordinance prohibiting dogs from running at large on the streets and alleys of a city is within the general power to pass all ordinances necessary for good government and for the preservation of peace and good order and the protection of the lives and property of citizens. *Id.*

3. Dogs are domestic animals, within the meaning of Ga. Pen. Code, § 703, prohibiting cruelty to domestic animals, since they are classed as such by the constitutional provision authorizing a tax "upon such domestic animals as from their nature and habits are destructive of other property." *Wilcox v. State* (Ga.) 709

4. Favoritism of a society for the prevention of cruelty to animals, in respect to giving notice or warning to violators of an ordinance, does not constitute a defense to a prosecution instituted in the name of the state for such violation. *State v. Karstendiek* (La.) 520

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1. The insanity of a defendant in a divorce 877

suit does not prevent maintaining a writ of error from a decree against him. *Iago v. Iago* (Ill.) 115

2. The next friend of an insane person in a writ of error is not necessarily the same person who represented him as guardian *ad litem* in the lower court, since the incapacity of the insane person to change his representative does not prevent the court from making the change. *Id.*

3. An order quashing a summons is appealable under a statute permitting appeals from orders terminating the action or proceeding. *Carstens & Earles v. Leidigh & H. Lumber Co.* (Wash.) 548

4. The amount in controversy is not material to the jurisdiction of the court of appeals of Kentucky when the title to land is involved. *Stillwell v. Duncan* (Ky.) 863

5. The amount in dispute on an appeal is the difference between the amount claimed and the amount recovered. *Holker v. Hennessey* (Mo.) 165

Effect of appeal.

6. The effect of a conviction of felony as a ground for disbarring an attorney is not annulled by a writ of error and supersedeas. *Re Kirby* (S. D.) 856

Dismissal.

7. Three weeks' delay in filing a brief for appellant in a criminal case will not require the dismissal of the appeal, when the delay was due to the removal of his attorney from the state, and the brief was filed as soon as the appellant, who was confined in jail, could procure it to be done after he learned that it was not done within the proper time. *State v. Williams* (Wash.) 821

Presenting questions.

8. Parties can preserve by exceptions any questions of law for decision as readily as by submitting propositions to be held as law, under Ill. Rev. Stat. 1893, chap. 117, § 1, providing that referees shall have authority to take testimony and report the same in writing together with their conclusions of law and fact, and that either party may except to such report. *Sanitary Dist. v. Cook* (Ill.) 869

9. The rejection of a hypothetical question involving assumptions concerning which no evidence has been offered is not ground of error. *Porter v. Ritch* (Conn.) 858

10. A general objection is not sufficient to raise the point that an instruction is slightly defective in form and may be misunderstood. *Phenix Ins. Co. v. Fleming* (Ark.) 789

11. The rejection of written evidence cannot be presumed on appeal to be prejudicial when the record does not show the nature of the evidence rejected. *Modern Woodmen Acci. Assn. v. Shryock* (Neb.) 826

What questions open.

12. The admission of a note in evidence without proof of its execution, when it was admitted by the maker, who was a defendant, cannot be complained of on appeal by another party as to whom the evidence was immaterial. *Wiel v. Robertson* (Tenn.) 428

13. One who has proved certain statements

by his own witnesses cannot object to proof of the same statements by witnesses for the other party. *Modern Woodmen Acci. Assn. v. Shryock* (Neb.) 826

14. In the absence of proper exceptions to a finding on a mixed question of law and fact, the only question is whether the findings of fact warrant the conclusions of law. *Carstens & Earles v. Leidigh & H. Lumber Co.* (Wash.) 548

15. A finding by the court that testator had testamentary capacity, of the highest order is erroneous where the question of undue influence is also involved, if it appears that, possessed of property over \$300,000 in value, he gave more than three fourths of it to one of his children, and for a period of ten years covering the time of the will he drank largely of intoxicating liquors and was afflicted with locomotor ataxia; while interested witnesses testify to the daily consumption of unusual quantities of intoxicants, and the failure of memory, and weakening of will power, although the evidence of incapacity is not sufficient to send the case to the jury. *Re Miller* (Pa.) 230

16. The facts may be reviewed by the supreme court of Illinois to the extent of ascertaining whether or not there was such evidence tending to establish plaintiff's declarations as should have been submitted to the jury, where error is assigned to the giving or refusal of an instruction to find for the defendant. *Siddall v. Jansen* (Ill.) 112

17. Negligence is a question of fact which cannot be reviewed on appeal unless the trial court failed to apply the correct standard of duty, or violated some rule or principle of law applicable to the facts as found. *Bergin v. Southern New England Teleph. Co.* (Conn.) 192

Questions first made on appeal.

18. The trial court cannot be convicted of error on appeal in excluding evidence which was not admissible for the purpose for which it was offered because it was admissible for purposes first suggested in the appellate court. *Gustafson v. Rustemeyer* (Conn.) 644

19. The objection that the amount of the judgment is in excess of the verdict cannot be taken for the first time on appeal. *Greenville v. Ormand* (S. C.) 847

20. The objection that the facts found show that plaintiffs have no cause of action cannot be raised on appeal under Conn. Gen. Stat. § 1135, where the appellant did not make any claim of that kind in the court below and does not make it in his assignments of error, but merely presents it in his brief. *Gustafson v. Rustemeyer* (Conn.) 644

Errors cured.

21. Error in taxing an item of costs is cured by promptly remitting that item. *Second Ward Sav. Bank v. Schranek* (Wis.) 569

22. Objection to the admission in evidence of a will because it is not proved by the subscribing witnesses is obviated by the subsequent calling and examination of the witnesses who testify to the execution of the will by the testator. *Re Sketson's Will* (Mass.) 715

Grounds of reversal.

23. Errors in rulings which could not af-

fect the trial or decision will not be prejudicial. *Bergin v. Southern New England Teleph. Co.* (Conn.) 192

24. The failure of the court upon a trial without a jury to definitely adopt one of the two measures of damages contended for by the respective parties is not reversible error, where the application of either rule leads to substantially the same result. *Gustafson v. Rustmeyer* (Conn.) 644

25. Rejection of evidence is immaterial error if the complaining party has had the full benefit of it from another witness. *Greenville v. Ormand* (S. C.) 847

26. To permit an answer by an expert on a hypothetical question as to insanity, embracing only the evidence of one party, is not reversible error if both parties subsequently submit and obtain answers to questions containing all the evidence. *Burt v. State* (Tex.) 805

27. Failure to dispose of a special plea is not ground for reversal if the same defense was available under the other pleadings. *Taylor v. Branham* (Fla.) 862

28. The refusal of a proper instruction is not ground of reversal if it could not have been prejudicial. *St. Louis S. W. R. Co. v. Jones* (Ark.) 784

Judgment.

29. A dismissal of the complaint on the merits cannot be made by the appellate division on hearing exceptions upon a motion for a new trial under N. Y. Code Civ. Proc. § 1000, but if the exceptions are well taken the motion should be granted and the case sent back for a new trial; if they are not well taken, the motion should be denied and judgment entered on the verdict or order of nonsuit, as the case may be. *Matthews v. American C. Ins. Co.* (N. Y.) 438

APPOINTMENT. See HUSBAND AND WIFE, 3.

APPROPRIATIONS. * See PUBLIC MONEY; WATERS, 1.

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ASSOCIATIONS. See STOCK AND PRODUCE EXCHANGE.

ASSUMPSIT. See also CASE, 1.

1. Voluntary payment which cannot be recalled, by a bank to its principal, is made where, after taking a check instead of cash, without authority to do so, on the sale of stock, it notifies the principal of the deposit of the

check to his credit, and afterwards pays his check for the proceeds. *Pepperday v. Citizens' Nat. Bank* (Pa.) 529

2. A payment of a tax on sheep is not voluntary when made after first refusing to pay it and because the collector declares either that he can or that he will take enough sheep to pay the tax. *Kelley v. Rhodes* (Wyo.) 594

ASYLUM. See COUNTIES, 8, 4.

ATTACHMENT. See CORPORATIONS, 8.

ATTORNEY GENERAL. See FISHERIES, 3.

ATTORNEYS. See also APPEAL AND ERROR, 6; COSTS AND FEES; STATUTES, 6.

1. An order for an attorney at law to show cause why he should not be disbarred is not a process within the meaning of a constitutional provision requiring process to be in the name of the state. *Re Kirby* (S. D.) 856

2. Receiving property of the government knowing it to have been stolen, with intent to convert the same to one's own use, is an offense involving moral turpitude. *Id.*

3. An attorney convicted of an offense punishable by imprisonment in the penitentiary is guilty of felony within the meaning of a statute authorizing disbarment. *Id.*

4. A writ of error and supersedeas in a proceeding in which an attorney has been convicted of felony are matters of defense which he must prove in a proceeding to disbar him on account of the conviction. *Id.*

5. A proceeding for disbarring an attorney is a civil proceeding. *Id.*

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Attorneys; disbarment of. 856

AUCTIONS.

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AUDITOR. See PARLIAMENTARY LAW.

AWNING. See MUNICIPAL CORPORATIONS, 2.

AX. See NEGLIGENCE, 2.

BANKS. See also ASSUMPSIT, 1; CHECKS.

1. A bank is not responsible for the use of trust funds made by a trustee unless it knowingly participates in the breach of trust or profits by the fraud. *Duckett v. National Mechanics' Bank* (Md.) 84

2. A check stating that it is for "deposit to the credit of" a person named, with the word "Trustee" added to his name, is an explicit notification to the bank in which he deposits it that he is not the actual owner of the money; and if the bank credits it to his individual account, and loss ensues to the trust estate by reason of his drawing out the fund by checks on his personal account, the bank is liable for participation in the breach of trust. *Id.*

3. A check stating that it is "for deposit to credit of" a person named, without adding the word "Trustee" to his name, although it contains a further clause stating that it is "the balance of purchase money due him as trustee," does not impress the funds with a trust, so as to prevent a bank in which he deposits it from crediting the check to his individual account. *Id.*

4. A ratification by a trustee of the act of a bank in placing to his individual credit a check which showed on its face that it was due to him as trustee cannot relieve the bank from liability to the trust estate, if the funds are lost by his checking them out on his personal account. *Id.*

5. After a check is given, the depositor cannot, in Illinois, by arrangement with the bank, prevent the application of future deposits to its payment. *Gage Hotel Co. v. Union Nat. Bank* (Ill.) 479

6. A bank to which a check is presented by a third person receiving it in the usual course of business cannot, where such check constitutes an equitable assignment of the fund, appropriate such fund after such presentation to the payment of a note held by it against the depositor and refuse to pay the check, if at the time of presentation it has taken no steps to appropriate the deposit to the payment of the note. *Niblack v. Park Nat. Bank* (Ill.) 159

7. That the controller of the currency has taken charge of a bank at the time of the presentation of a check by a third person holding it in the regular course of business does not authorize the application subsequent to such presentation of the fund to the payment of a note held by the bank against the depositor, as neither the controller nor the receiver appointed by him has any more right to transfer such fund than the bank itself. *Id.*

8. A bank receiving a check instead of cash, without authority from its principal, on a sale of his stock, and crediting his account with the amount of it, is liable to him therefor notwithstanding the fact that the check proves worthless, and irrespective of the question of its diligence in attempting to collect it. *Pepperday v. Citizens' Nat. Bank* (Pa.) 529

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Banks; deposit of trust fund in. 85

Check as assignment of funds. 159

Prohibiting application of future deposit to check. 479

BENEVOLENT SOCIETIES. See INSURANCE, 6.

BEQUEST. See WILLS, 8.

BET.

A note to pay a bet on a horse race run in Virginia where such notes are presumed valid, and where the original note of which this is a renewal was given, will not be enforced in North Carolina, even if it is deemed a Virginia contract, since it is contrary to the public policy of the state. *Gooch v. Faucette* (N. C.) 835

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Bet; on race. 835

Betting on street as a nuisance. 681

BICYCLE. See HIGHWAYS, 7; NEGLIGENCE, 4.

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Bicycles; as vehicle; negligence in riding. 488

BILLS AND NOTES. See also ACTIONS OR SUIT, 5; ALTERATION OF INSTRUMENTS, 2; BET; EVIDENCE, 16; FORGERY; INJUNCTION, 1; PRINCIPAL AND SURETY; PROXIMATE CAUSE.

An agent who made a note in his own name is not released by an agreement after its maturity between the payee and the principal for the substitution of the latter's note, when this was never made. *Shuey v. Adair* (Wash.) 473

NOTES AND BRIEFS.

Bills and notes; fictitious names as affecting validity of. 423

Liability on note made by agent. 473

BONDS. See also LIFE TENANT, 4; VOTERS AND ELECTIONS, 1.

1. Bonds may be made payable in gold coin only, under Cal. act March 19, 1889, as amended in 1893, giving power to issue municipal bonds "payable in gold coin or lawful money," as this, to have any effect, must be construed—especially in view of other provisions of the statute—to give the city the option to make them payable in gold coin alone, or in lawful money. *Murphy v. San Luis Obispo* (Cal.) 444

2. The alternative of making interest payable annually or semi-annually need not be submitted to the voters on an election respecting the issue of municipal bonds under Cal. act March 19, 1889, § 3, requiring a notice of the election, the purpose and character of the bonds, and the rate of interest, without requiring any notice as to the time of paying interest. *Id.*

BOOM. See LOGS; NUISANCES, 4.

BOWLING ALLEYS.

NOTES AND BRIEFS.

Municipal regulation of, as a nuisance. 524

BRIDGES. See also COUNTIES, 6.

A county is not liable by implication for damages caused by negligence of its officers in respect to keeping bridges in repair, where the county commissioners have no power to appropriate county funds for that purpose, except when and so far as the road district is unable to make the repairs, and there is no statute giving a right of action against the county for its negligence or that of its commissioners, or authorizing the use of county funds to pay damages caused thereby. *Jasper County v. Altman* (Ind.) 59

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Bridges; liability of counties for torts and negligence as to. 88

Municipal control of, as a nuisance. 681

BUILDING AND LOAN ASSOCIATIONS. See also CORPORATIONS, 11.

1. Notice of withdrawal from an insolvent loan association does not entitle members to priority of payment over their fellow stockholders. *Gibson v. Safety Homestead & L. Assn.* (Ill.) 202

2. The illegality of an issue of paid-up stock by a building and loan association cannot be asserted by stockholders who have taken it and paid for it in order to place themselves in a better position with respect to other stockholders, who do not question its validity, than they would be in if the stock had been valid. *Id.*

3. Securities deposited by a foreign building and loan association "in trust for the benefit and security of its members in this state," in order to obtain the right to do business in the state under the Wisconsin statute (Sanb. & B. Ann. Stat. §§ 2014a, 2014b), will be sold or collected in case of insolvency, and the proceeds applied according to the trust, and the residue only turned over to the receiver appointed in the state of incorporation. *Lewis v. American Sav. & L. Assn.* (Wis.) 559

4. Only resident shareholders and creditors are entitled to participate in the proceeds of securities deposited with the state treasurer by a foreign building and loan association under the Wisconsin statute (Sanb. & B. Ann. Stat. §§ 2014a, 2014b) in order to obtain the right to do business in the state. *Id.*

NOTES AND BRIEFS.

Building and loan associations; right to withdrawal. 202

BUILDINGS. See INJUNCTION, 7; LANDLORD AND TENANT.

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Buildings; liability of counties for torts and negligence as to. 38

As nuisance in street. 663

BY-LAWS. See CORPORATIONS, 5, 6; PARTNERSHIP; STOCK AND PRODUCE EXCHANGE.**CANALS.**

NOTES AND BRIEFS.

Liability of counties for injury to real property from. 59

CAPITAL. See LIFE-TENANT, 2-5, NOTES AND BRIEFS; TRUSTS, 1.**CARRIERS.** See also CONTRACTS, 12; EVIDENCE, 9.

1. A person must be expressly or impliedly received as a passenger before he can sustain that relation to a carrier. *Illinois C. R. Co. v. O'Keefe* (Ill.) 148

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2. A conductor's knowledge that some one has boarded his train while in motion by getting on the platform between the tender and baggage car is not sufficient to show that he has accepted him as a passenger, when he does not know who the person is or what he is there for. *Id.*

3. The holder of a free pass on a railroad, who gets on the front platform of a baggage car next the tender when the train is in motion and after it has left the depot, and then tries to open the baggage-car door, does not thereby become a passenger so as to make the railroad company liable for his protection as such, when he is killed by a collision while he is on the car platform. *Id.*

4. The utmost care and diligence which human foresight can use is the measure of duty which a carrier owes to a passenger. *Baltimore City Pass. R. Co. v. Nugent* (Md.) 161

5. A conductor beating a passenger who slaps his face with his hand renders the carrier liable, if he uses force greatly exceeding that which would appear to a reasonable man necessary to repel the assault. *St. Louis S. W. R. Co. v. Jones* (Ark.) 784

6. An injury to a passenger on a trolley car by contact with a trolley wire charged with electricity, which breaks and falls over the rear end of the car, does not render the carrier liable if the accident was caused solely by a hidden or latent defect in the wire, which could not have been discovered or detected by any reasonable examination, unless the carrier has been in some way negligent in respect to the danger of such an accident. *Baltimore City Pass. R. Co. v. Nugent* (Md.) 161

7. A street-railway company which constructs a walk over a street temporarily submerged by a freshet, for the use of passengers in going from one car to another, is not, as matter of law, required to provide a light for such walk at night. *Finseth v. City & S. R. Co.* (Or.) 517

8. A street-railway company which, for the facilitation of its own business, constructs a platform along a street temporarily submerged during a freshet, for the accommodation of its passengers, is required to make such walk reasonably safe, but not to make it "as reasonably safe as possible." *Id.*

9. A person trucking goods for particular customers at prices fixed in each case by special contract is not a common carrier so as to be liable as an insurer of the goods. *Faucher v. Wilson* (N. H.) 431

10. A carrier is not liable for the loss due to the bursting of a hogshead of molasses by reason of fermentation, as this results from the operation of natural laws which a common carrier does not insure against. *Id.*

11. Permitting a car labeled "Powder" to stand in such close proximity to its warehouse as to deter the city fire department from attempting to extinguish a fire in the warehouse will render a carrier liable for the loss of goods in the warehouse which would not have been destroyed had the car not been there, although liability as carrier had ceased and there was in fact no powder in the car. *Hardman v. Montana U. R. Co.* (C. C. App. 9th C.) 300

12. The rule that a carrier must give notice to the consignee of the arrival of goods at destination is subject to exceptions growing out of special circumstances and out of customs that have grown up for the mutual advantage of shipper and carrier. *Allam v. Pennsylvania R. Co. (Pa.)* 585

13. A contract that goods shall be at the risk of the consignors when unloaded on a platform at a station where there is no building or any agent of the carrier is not against public policy. *Id.*

14. Unloading goods during a storm on an open platform and leaving them unprotected from the weather is not a fault of the carrier where there is no building at that station or any agent of the carrier, and the bill of lading provides that when delivered on the platform they are at the risk of the owner. *Id.*

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Carriers; when person becomes passenger.	149
Liability for assault on passenger.	785
Who are; loss by act of God.	481
Negligence of, as warehousemen.	800
Duty as to giving notice to consignee.	585

CARTRIDGES. See NEGLIGENCE, 8; TRIAL, 8.

CASE.

1. The failure of a servant or agent to pay over on demand money which he has collected for his principal will not sustain an action of trespass on the case, but the only remedy is by assumpsit or debt. *Royce v. Oakes (R. I.)* 845

2. A man who hires lodging rooms in a dwelling house is liable to the owner for injuries to the good name of the house and the damage to the owner's custom and business, if he brings dissolute and immoral persons to such rooms, and applies the rooms to the purposes of assignation or to create a nuisance therein. *Sullivan v. Waterman (R. I.)* 773

CASTING VOTE. See PARLIAMENTARY LAW.

CERTIORARI.

An examination of the evidence may be made on certiorari for the purpose of determining the claim that the court exceeded its power. *McClatchy v. Sacramento County Super. Ct. (Cal.)* 691

CHARITIES. See also MUNICIPAL CORPORATIONS, 5.

1. A bequest to the pastor of a specified church "that masses may be said for me," although not a charity, creates a valid private trust. *Moran v. Moran (Iowa)* 204

2. A bequest of money "to be divided among the Sisters of Charity," without any limitation as to locality, state, or nation, and without any provision for the exercise of discretion by the trustees, is void for uncertainty. *Id.*

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Charities; validity of bequest for; gift for masses. 205

CHECKS. See also BANKS, 5-7; INJUNCTION, 1; INTEREST.

A check is properly presented to a bank for payment where the notary public takes it to the bank during banking hours for the purpose, and upon finding the doors closed makes a demand upon the bank president, although the controller of the currency has taken charge of the bank. *Niblack v. Park Nat. Bank (Ill.)* 159

CIGARETTES. See COMMERCE, 8.

CIGAR MAKERS' UNION. See TRADE MARK, 4, 5.

CITY ATTORNEY. See OFFICERS, 2.

COAL. See EVIDENCE, 5; PARTITION, 1; PILOT.

COASTING.

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In street, as a nuisance. 679

COCAINE. See CRIMINAL LAW, 1.

COLLATERAL - INHERITANCE TAX. See CONSTITUTIONAL LAW, 8, 13, 18; TAXES, 11-13.

COLLEGE. See CONTRACTS, 1, 5, 6, 8, 9.

COMMERCE. See also CONTRACTS, 12.

1. The nonexercise by Congress of its power to regulate commerce among the states is equivalent to a declaration that such commerce shall be free from any restrictions. *State v. Duckworth (Id.)* 365

2. Restrictions on bringing sheep into the state by *Id.* Sess. Laws 1895, p. 125, and *Id.* Sess. Laws 1897, p. 115, appointing a sheep inspector, and making it unlawful to bring sheep into the state without his inspection and having the sheep dipped as provided in the statute,—constitute an unnecessary and unconstitutional burden upon interstate commerce. *Id.*

3. A pine box in which are packed for convenience in shipment packages of cigarettes, each of which contains ten cigarettes and is sealed with an internal revenue stamp, without any other packing or inclosure around or about them except the box itself, is the original package of commerce, and when that is opened the packages of cigarettes are subject to the police power of the state as a part of the common mass of property therein. *McGregor v. Cone (Iowa)* 434

4. The determination of the internal revenue department that a package is a proper and original package for purposes of taxation does not show that it is an original package of commerce. *Id.*

5. An original package is that package

which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. *Id.*

NOTES AND BRIEFS.

Commerce; discrimination against imported sheep. 865

What are original packages. 484

COMMON LAW. See also EVIDENCE, 8; WATERS, 2, 3.

The legislative adoption of so much of the common law as is applicable to the condition of the state of Washington does not include vendor's liens. *Smith v. Allen* (Wash.) 82

CONDITIONAL SALE. See SALE.

CONFLICT OF LAWS. See also BET.

1. A contract of another state, valid where it was made, will not be enforced in a state in which it is forbidden by public policy. *Gooch v. Faucette* (N. C.) 885

2. The validity of a chattel mortgage executed by an insolvent foreign corporation in the state which created it, to secure a creditor residing in that state, must be determined by the laws of the state in which the property is situated. *Fowler v. Bell* (Tex.) 254

3. The marriage in another state, where it is lawful, of a divorced man and his paramour, who go there to evade the law of their domicile, which prohibits their marriage during the life of the former wife, is not valid in the latter state. *Re Stull's Estate* (Pa.) 539

NOTES AND BRIEFS.

Conflict of laws; marriage in other state to evade law of domicile. 539

CONSTITUTIONAL LAW. See also ANIMALS, 1; COURTS, 3; CRIMINAL LAW, 8, 4; EMINENT DOMAIN, 1; WITNESSES, 8.

1. A constitutional provision against taking or damaging property for public use without just compensation is self-executing. *Searle v. Lead* (S. D.) 345

2. The incapacity of the legislature to execute a power which is essentially and merely a judicial power, and of the judiciary to execute a power which is essentially and merely a legislative power, as well as the limitation of the meaning of legislative power by force of certain primary principles of government fairly embodied in the Constitution, and by the necessities involved in the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government as established in the United States. *Norwalk Street R. Co.'s Appeal* (Conn.) 794

3. The right to a fair trial involved in the constitutional provision for trial by jury is not infringed by a statute making the costs and fees payable to officers and witnesses in a criminal case depend on conviction, where this provision does not apply to the jury, and applies to a justice of the peace only in cases where his power is merely to bind over the

accused for trial in a tribunal in which the justice has no voice. *State v. Henley* (Tenn.) 126

4. The legislature has unlimited power to act in its own sphere of legislation, except so far as restrained by the Constitution of the United States and the Constitution of the state. *Id.*

5. A statute which does not violate some provision of the Constitution cannot be annulled by the courts, whether its provisions are wise or unwise, or whether its operations be hurtful or beneficial. *Id.*

6. Ordinary services such as may be required of all citizens or officials by general or valid special laws are not particular services within the provision of Tenn. Const. art. 1, § 21, providing that no man's particular services shall be demanded without the consent of his representatives or just compensation. *Id.*

7. The property of an expert witness is not taken without just compensation, by requiring him to give his opinion as an expert without other compensation than ordinary witness fees. *Dixon v. People* (Ill.) 116

Vested rights.

8. A statute taxing the right already vested to take shares of an estate of a person who died before the act was passed, but which is yet subject to the control of the probate court and not yet distributed, is not an unconstitutional impairment of vested rights. *State, Gelsthorpe, v. Furnell* (Mont.) 170

Due process of law.

9. An order by a judge for the temporary confinement of a person alleged to be insane, pending proceedings for the determination of that question, is not a denial of due process of law when made on a written complaint and affidavit to the fact of insanity, but it is clearly within the police power of the state, and is for the restraint of a dangerous person in an emergency. *Porter v. Ritch* (Conn.) 353

10. Refusal to permit a man charged with contempt by publications respecting evidence in a judicial trial, to show in defense that the publications were true, and for this purpose to disprove the accuracy of the reporter's notes which have been offered against him, is such a deprivation of his constitutional right to make a defense as to be a denial of due process of law. *McClatchy v. Sacramento County Super. Ct.* (Cal.) 691

11. A statute making an employer's samples liable to a lien for hotel bills of his traveling salesman in whose possession they are does not deprive him of his property without due process of law. *Brown Shoe Co. v. Hunt* (Iowa) 291

12. A statute reducing the power of a city to levy taxes to pay a judgment does not deprive the owner of the judgment of his property therein without due process of law. *Sherman v. Langham* (Tex.) 258

13. A succession tax does not take property without due process of law when it is imposed on all property which passes by will or intestate laws except when the estate is less than \$7,500. *State, Gelsthorpe, v. Furnell* (Mont.) 170

Equality.

14. A statute providing that the state or county will pay costs of criminal prosecutions only in certain classes of cases is not partial or class legislation. *State v. Hanley* (Tenn.) 126

15. A statute denying fees and costs or mileage to witnesses who reside within 5 miles of the place at which attendance is required, while allowing them in other cases, is not so unreasonable and capricious a classification of witnesses as to make the statute partial and unconstitutional. *Id.*

16. Discrimination between sheep brought into the state and those which are already therein, made by Id. Sess. Laws 1895, p. 125, and Id. Sess. Laws 1897, p. 115, requiring all sheep, whether healthy or not, to be dipped before they are brought into the state at any time of year, while sheep within the state are exempt from dipping between December 1 and the time when they are sheared in the following spring, and also exempting ewes with lambs between March 15 and May 15,—constitutes a violation of the equal privileges and immunities of citizens in the several states. *State v. Duckworth* (Id.) 865

17. Discrimination in favor of nonresidents of a town or city, by a statute granting them partial or entire exemption from penalties for allowing stock to run at large in the streets is not unconstitutional as a grant of any "exclusive or separate emoluments or privileges," or as a denial to any person of the equal protection of the laws., *Broadfoot v. Fayetteville* (N. C.) 245

18. An inheritance tax does not deny to anyone the equal protection of the laws because it exempts estates less than \$7,500 each. *State, Gelathorpe, v. Funnell* (Mont.) 170

Police power, affecting property.

19. The private rights of property of the owners of animals are not infringed by an ordinance requiring that the animals shall not be cruelly treated in the public places of a city. *State v. Karstendiek* (La.) 520

20. An ordinance making it unlawful to sell fresh pork or sausage made thereof between June 1 and October is unreasonable and void, since it violates the inalienable right of man to procure food. *Helena v. Dwyer* (Ark.) 266

21. An ordinance providing that a dog seized while running at large shall be killed if not ransomed by payment of \$1 before 10 o'clock of the morning after it has been detained twenty-four hours, and providing for a notice of the seizure to be given to the owner of any dog having a collar with the owner's name thereon, is not unconstitutional or so unreasonable that the court can hold it void. *Hagerstown v. Witmer* (Md.) 649

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Constitutional law; separation of departments of government. 794

As to compulsory service by witnesses without compensation. 116

Decision against constitutional right as a nullity subject to collateral attack. 449

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CONTEMPT. See also CONSTITUTIONAL LAW, 10; JUDGMENT, 1; PLEADING, 10.

1. A physician duly subpoenaed and interrogated as an expert witness can be punished as for a contempt if he refuses to testify without receiving compensation other than ordinary witness fees. *Dixon v. People* (Ill.) 116

2. Locking the door of a court-room during the adjournment of court, and refusing to allow the judge of the court and his officers and the parties to the suit on hearing before him to enter the court-room at the time to which court was adjourned, is a contempt of court. *Dahnke v. People* (Ill.) 197

3. Civil as well as criminal contempts are within the provisions of U. S. Rev. Stat. § 725, authorizing fine or imprisonment only, as a punishment therefor, and this is applicable to the District of Columbia. *Hovey v. Elliott* (N. Y.) 449

4. Continuing a case to the following day to permit the completion of the jury from the regular panel, rather than from talesmen, is no abuse of discretion or violation of law. *Cook v. Fogarty* (Iowa) 468

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Contempt; right to defend in case of. 691

CONTRACTS. See also ACTION OR SUIT, 4; BET; ESTOPPEL, 2; REPLEVIN.

1. A binding contract is made by a subscription to secure the location of a college at a certain town, when the required amount is subscribed, and the subscription accepted, and the college located at that place, while agencies are constituted and put to work to carry out the enterprise. *Rogers v. Galloway Female College* (Ark.) 636

2. No contract between a city and the holder of its bonds is created, with respect to the continued application of the revenues of gas works to a sinking fund, by an ordinance which, merely for the protection of the city, imposed on the trustees of the gas works the obligation of paying money into the sinking fund, where no pledge was made to the loan holders. *Baily v. Philadelphia* (Pa.) 837

3. A railroad engineer employed under a contract by which the employer agrees to pay him according to specified rates for his services, not to discharge him without just cause, to promote him according to specified grades of service, and when discharges of engineers are made to discharge in the order of juniority in service, may, in the absence of any agreement by the engineer to stay for any special time, be discharged at any time because of the want of mutuality, notwithstanding the implied undertaking on the part of the company to retain him in its service as long as he serves acceptably. *St. Louis, I. M. & S. R. Co. v. Mathews* (Ark.) 467

statute of frauds.

4. A contract between cosureties fixing the proportion and extent of their several or correlative liability as between themselves is not within the statute of frauds. *Rose v. Woltenberg* (Or.) 378

Construction.

5. A contract to establish a college "in" a certain town does not require it to be placed within the corporate limits when a large number of the inhabitants of the town dwell beyond such limits. *Rogers v. Galloway Female College* (Ark.) 636

6. A contract to establish a college "at" a certain town does not require that it should be placed within the corporate limits. *Id.*

7. A private understanding with one of four persons who make equal subscriptions, to the effect that other persons will raise and pay a part of his subscription, will not release one of the other four, where this agreement did not amount to a release of the subscriber from any part of his subscription. *Id.*

8. A subscriber to a fund to be given for securing the location of a college at a certain place on condition that a specified sum is raised cannot avoid his subscription by showing a deficiency in the amount after it has been accepted as sufficient by the party establishing the college, where he was a leading spirit in the enterprise, knew the subscribers, and knew what was demanded. *Id.*

9. A college established by a church pursuant to subscriptions and propositions therefor is the beneficiary of the subscriptions, standing *in loco ecclesie* as to the right to sue upon it. *Id.*

Validity.

10. If a provision in a contract for the employment of railroad engineers by which the employer undertakes to reinstate any engineer discharged from service whenever, upon his complaint, specified persons shall on investigation decide that the discharge was unjust, is void as against public policy, such provision does not render invalid a further provision in the contract that the engineers shall not be discharged without just cause. *St. Louis, I. M. & S. R. Co. v. Mathews* (Ark.) 467

11. An action on a contract which is not only declared unlawful by statute, but is made a penal offense, cannot be maintained. *Raleigh & G. R. Co. v. Swanson* (Ga.) 275

12. A contract between a railroad company and a ticket broker, whereby the latter is enabled to sell tickets to individuals over the company's lines for interstate transportation at less than the established rate for the sale of tickets by its regular agents, between the same points and for the same accommodation, is in violation of the act of Congress of Feb. 4, 1887, to regulate commerce. *Id.*

13. The exposure of holders of patents covering similar articles to litigation will not justify them in making a combination in restraint of competition. *National Harrow Co. v. Hench* (C. C. App. 3d C.) 299

14. An agreement to sell no harrow for less than the schedule price is invalid when made by the owner of the patent with a corporation organized by rival manufacturers of harrows to take title to the patents and license the former owners to operate under them and sell only at schedule prices to be fixed by the corporation. *Id.*

15. Efforts to prevent competition to re-
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strict individual effort and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions and in violation of law. *People, McIlhenny, v. Chicago Live-Stock Exch.* (Ill.) 873

Impairing obligation.

16. A judgment upon a tort is not a contract, within the meaning of the constitutional provision against impairing the obligation of contracts. *Sherman v. Langham* (Tex.) 258

17. The remedy on promissory notes and warrants of attorney by statutes in force at the time that they were made, which authorized the holder to enter judgment, issue execution, and levy upon and sell the debtor's property notwithstanding any assignment for creditors which he might make more than sixty days after their issue, constitutes an essential part of the contracts or securities, and cannot be taken away by a subsequent statute which attempts to provide that all levies or other processes shall be dissolved by such an assignment. *Second Ward Sav. Bank v. Schranck* (Wis.) 569

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Contracts; capacity to make, see INCOMPETENT PERSONS.

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CONVICT LABOR.

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CORPORATIONS. See also BUILDING AND LOAN ASSOCIATIONS; CONFLICT OF LAWS, 2; ESTOPPEL, 3-5; EVIDENCE, 4; INJUNCTION, 1; LIFE TENANT, 2, 8; RECEIVERS, 1-8, 7; WAREHOUSEMEN, 8; WRIT AND PROCESS.

1. The subjection of what purports to be a corporation but has no legal existence; as such because of the nonpayment of the bonus tax imposed by Md. act 1890, chap. 536, to a suit by the state for the recovery of the tax by Md. Code, § 88*h*, does not, by implication, give it a legal existence for all purposes, including a capacity to sue, as it is expressly denied the exercise of any corporate powers until the bonus is paid, by § 88*f*. *Maryland Tube & I Works v. West End Improv. Co.* (Md.) 810

2. The lack of the corporate existence of the plaintiff suing as a corporation can be set up to defeat the action by the defendant, where this is based on the failure of the plaintiff to pay the bonus tax prescribed by Md. Acts

1890, chap. 586, under which such nonpayment prevents the attempted corporation from having or exercising any corporate powers. *Id.*

Powers.

8. The plea of *ultra vires* will not be allowed to prevail when it will not advance justice, but will, on the contrary, accomplish a legal wrong. *Lewis v. American Sav. & L. Assn. (Wis.)* 559

4. An extension of the business of a corporation into another state is within the power of the directors. *Id.*

By-laws.

5. By-laws providing that the transfer of the stock of an irrigation company shall be made only with the land for which it was issued do not apply to a sale of delinquent stock for assessments, as the purchaser is not a transferee of the former owner of the stock. *Spurgeon v. Santa Ana Valley Irrig. Co. (Cal.)* 701

6. The rights of a purchaser of delinquent stock sold for assessments must be determined by the general law, if no provision therefor is made by the charter or by-laws, and general provisions of a by-law as to transfer of shares of stock do not apply. *Id.*

Forfeiture.

7. An act of a corporation tending to produce injury to the public by affecting the welfare of the people is an abuse of its corporate franchise for which the charter of the company may be forfeited by an information in the nature of quo warranto. *People, McIlhenny, v. Chicago Live-Stock Exch. (Ill.)* 378

Insolvency.

8. The invalidity of an attachment of property of an insolvent corporation will not preclude a purchaser of the property from defending against one claiming it under a mortgage which constitutes an invalid preference. *Howler v. Bell (Tex.)* 254

Foreign corporations.

9. Members of a company incorporated in another state, who organize and choose directors in Florida and undertake to carry on the corporate business in that state without becoming incorporated therein, are liable as partners in the business. *Taylor v. Branham (Fla.)* 362

10. A corporation created under the laws of another jurisdiction cannot exercise corporate functions in Florida without becoming incorporated under its laws, and its liabilities contracted there while unincorporated therein rest upon its members or stockholders in the jurisdiction as partners. *Id.*

11. The compliance by a foreign building and loan association with the laws of the state which created it need not be investigated by the authorities of another state in which it deposits securities as required by statute in order to obtain a license to do business therein. *Lewis v. American Sav. & L. Assn. (Wis.)* 559

12. A deposit of securities by a foreign corporation as required by law in order to obtain the right to do business in the state is not *ultra vires*. *Id.*

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See also LIFE TENANTS.

Corporations; conditions of right to do business.

ness; depositing securities in trust; for whose benefit. 562

Failure to perfect; status of. 811

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COSTS AND FEES. See also APPEAL AND ERROR, 21; CONSTITUTIONAL LAW, 8, 14, 15.

Persons who institute proceedings to disbar an attorney are entitled to their costs as against him in case the proceeding is successful. *Re Kirby (S. D.)* 856

COUNTERCLAIM. See SET-OFF AND COUNTERCLAIM.

COUNTIES. See also BRIDGES; COURT-HOUSE; PARLIAMENTARY LAW; RAILROADS, 1, TAXES, 9, 10; VOTERS AND ELECTIONS, 2.

1. Counties being subdivisions of the state and instrumentalities of government exercising authority given by the state, are no more liable for the acts or omissions of their officers than the state. *Jasper County v. Allman (Ind.)* 53

2. A county is liable for the unauthorized and unlawful acts of its officials done *colore officii*, when it adopts and ratifies them and retains and enjoys the benefit thereof. *Schussler v. Hennepin County (Minn.)* 75

3. The maintenance of a county asylum does not become a private business such that the county is liable for injuries received by employees, by reason of the fact that some revenue is incidentally derived by the county from the sale of surplus farm products and from payments made by those liable for the support of insane persons kept in the asylum. *Hughes v. Monroe County (N. Y.)* 33

4. A county is not liable for injuries received by an employee from a defective machine in an asylum which was maintained by the county in discharge of its duty as a political division of the state to care for its insane. *Hughes v. Monroe County (N. Y.)* 33

5. No new liability for torts is imposed upon a county by a statute making it a municipal corporation for exercising the powers and discharging the duties of local government and the administration of public affairs, and providing that actions for damages for any injury to any property or rights for which it is liable shall be in the name of the county. *Markey v. Queens County (N. Y.)* 46

6. A county is not liable for the negligent exercise of the duty of maintaining bridges, imposed on it by the state, since it derives no special advantage from it in its corporate capacity. *Id.*

NOTES AND BRIEFS.

Liabilities of counties in actions for torts and negligence:—(1.) Injuries to travelers and vehicles; (a) by bridges and approaches being out of repair; (1) implied liability; (2) where statute imposes liability; (b) from defective

roads and highways; (c) where the injury was caused by the fright of a horse; (d) by negligence of employees; (II.) injuries to other persons: (a) from condition of buildings; (1) generally; (2) on account of escape from prison; (b) by negligence or wrongful act of employee; (III.) injuries to real property from public improvements: (a) generally; (b) by construction and operation of bridges; (c) by roads; (d) by ditches, canals, and dams; (e) by buildings; (IV.) other wrongful and negligent acts affecting persons or property: (a) generally; (b) affecting property; (V.) infringement of patents; (VI.) damages by defaulting officer; (VII.) by misapplication, conversion, or taking property; (VIII.) presentation of claims before county board as a condition precedent to suit; (IX.) summary. 88

COURTHOUSE. See also CONTEMPT, 2.

1. The custody and care of the courthouse and jail, given to the sheriff by Ill. Rev. Stat. chap. 125, § 14, is a limitation of the provision of chap. 84, § 25, giving to the county board the care and custody of all the real estate owned by the county. *Dahnke v. People* (Ill.) 197

2. The custody of a courthouse which the sheriff, as the court's executive officer, has, is the custody and care of the building as a courthouse, while as real estate simply it is in the care and custody of the county board, which controls the title and keeps it in repair. *Id.*

3. An assignment of the different courtrooms in the courthouse to the different judges of the courts of record is not within the power of the county board under statutes requiring the board to provide a courthouse and proper rooms and offices for the accommodation of such courts; but it rests with the judges of the courts to arrange among themselves how they will occupy the several courtrooms provided by the board. *Id.*

4. The power to manage county affairs, given to the county board by Ill. Const. 1870, art. 10, § 7, does not include the power to assign court rooms to the different judges of the courts of record. *Id.*

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Courthouse; assignment of rooms to court. 198

COURTS. See also CONSTITUTIONAL LAW, 2; CONTEMPT, 2; COURTHOUSE, 2.

1. The determination by the legislature of the question what is a public purpose is not conclusive upon the courts. *State, Douglas County, v. Cornell* (Neb.) 518

2. A tax law will not be declared invalid on the ground that the tax is not for the benefit of the public, unless it is for the furtherance of an object or enterprise in which the public has palpably no interest. *Id.*

3. A superior court or judge thereof cannot validly exercise a power which is not "a judicial power" within the meaning of the Constitution. *Norwalk Street R. Co.'s Appeal* (Conn.) 794

4. An original application to a superior 89 L. R. A.

court or judge thereof for the approval and adoption or modification of a plan for the location and construction of a street railway, including the determination of the streets to be occupied and the location as to grade and center line of the street, as well as changes to be made in the street or kind and quality of track to be used, the motive power and method of applying it, does not call for the exercise of a judicial power within the meaning of the Constitution, although the application is called an appeal and is made after the refusal or neglect of local authorities to give notice of their decision on the plan within sixty days after it is presented to them; and this is by statute deemed to be a refusal on their part to approve and accept the plan. *Id.*

5. The assignment or transfer by a court of a town or city from one class to another, which Ky. Stat. §§ 8661, 8662, attempt to authorize, is in violation of Ky. Const. § 156, requiring the general assembly to make such assignments and transfers, and making no provision for delegating that power. *Jernigan v. Madisonville* (Ky.) 214

6. It is the duty of the court to overrule a decision or series of decisions, if clearly incorrect either through a mistaken conception of the law or through misapplication of the law to the facts, if no injurious results would follow from their overthrow. *Jasper County v. Allman* (Ind.) 58

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Courts; imposing nonjudicial duties on. 794

COVENANT. See LANDLORD AND TENANT, 8.

CRIMINAL LAW. See also ANIMALS, 4; CONSTITUTIONAL LAW, 8; EVIDENCE; GARNISHMENT.

1. Conviction for assault with intent to murder cannot be had in case the accused was at the time of committing the deed insane because of the recent voluntary use of cocaine, morphine, and whisky, although the statute provides that insanity from the voluntary recent use of intoxicating liquor shall be no defense. *Edwards v. State* (Tex.) 262

2. The ancient right of one accused of crime under an indictment or information, to appear in court unfettered, is preserved by legislative adoption of the common law. *State v. Williams* (Wash.) 821

3. The rights of an accused person to a fair trial are impaired by keeping manacles on other persons who are kept in court and in the presence of the jury, when they have been found guilty of the crime of burglary, with which he also is charged. *Id.*

4. The constitutional right of an accused person to appear and defend in person includes the right to be unfettered, unless some compelling necessity demands his restraint to secure the safety of others and his own custody. *Id.*

NOTES AND BRIEFS.

See also EVIDENCE.

Criminal law; morphinism as affecting responsibility. 262

Searching person or house of prisoner. -269

Right of prisoner to appear unmanacled at his trial:— (I.) In general; (II.) when justifiable; (III.) upon his arraignment and sentence; (IV.) as a ground for reversal and review; (V.) provisions of state Constitutions and statutes. 821

CRUELTY. See ANIMALS, 8, 4; CONSTITUTIONAL LAW, 19; MUNICIPAL CORPORATIONS, 4.

CUSTODY OF LAW. See GARNISHMENT, 1.

DAMAGES. See also APPEAL AND ERROR, 24; TRIAL, 5.

1. Mental anguish independent of and unaccompanied by physical injury of any kind cannot be recovered for delay in delivering a telegram. *Peay v. Western U. Teleg. Co. (Ark.)* 468

2. The measure of damages for the fraudulent misrepresentation of a vendor of real property inducing the purchaser to enter into the contract is the difference between the value of the property as it would have been if as represented and its real value, and not necessarily the difference between the purchase price and its real value. *Gustafson v. Rustmeyer (Conn.)* 644

3. Only actual damages are recoverable for injuries unnecessarily committed in the ejection of a tenant after his term has expired, unless it is done under circumstances of aggravation. *Vinson v. Flynn (Ark.)* 415

NOTES AND BRIEFS.

Damages; for mental anguish; in telegraph case. 468

DAMS.

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Liability of counties for injury to real property from. 69

DEATH. See also TRIAL, 9.

The words "heir or heirs," in Colo. Gen. Laws 1877, p. 848, giving to the heirs a right of action for death if there be no husband or wife or any action by him or her within one year, mean "child or children," and limit the right of action to lineal descendants. *Hindry v. Holt (Colo.)* 351

NOTES AND BRIEFS.

Death; right of action for, given to heirs 352

DEBT. See CASE, 1.

DEBTOR AND CREDITOR. See TRUSTS, 5.

DECEIT. See FRAUD.

DEED. See also TRUSTS, 2.

A deed to a fictitious grantee conveys no title. *Wiell v. Robertson (Tenn.)* 428

NOTES AND BRIEFS.

Deed; fictitious names as affecting validity of. 428

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DEFENSE. See CONSTITUTIONAL LAW, 10.

DEFINITIONS.

Aged, see HOMESTEAD.

At, see CONTRACTS, 6.

In, see CONTRACTS, 5.

See also CONSTITUTIONAL LAW, 6; DESCENT AND DISTRIBUTION.

DELEGATION OF POWER. See COURTS; 5; MUNICIPAL CORPORATIONS, 6, 7.

DEPOT. See EVIDENCE, 19.

DEPUTY. See POSTOFFICE.

DESCENT AND DISTRIBUTION.

"Children" and "heirs" of a life tenant, to whom the remainder is given by Mo. Rev. Stat. 1855, p. 855, chap. 32, § 5, under a deed to a person and his "bodily heirs," do not include an adopted child of such life tenant, where there was no law authorizing the adoption of children at the time of the enactment of such statute, since the life tenant cannot destroy the vested right of the statutory heirs by an adoption. *Clarkson v. Hutton (Mo.)* 748

DEVISE. See WILLS, 2.

DISMISSAL. See APPEAL AND ERROR, 7.

DISORDERLY HOUSES. See CASE, 2.

NOTES AND BRIEFS.

Disorderly houses; municipal regulation of, as a nuisance. 521

DISTRESS. See LANDLORD AND TENANT, 5, 6.

DITCHES.

NOTES AND BRIEFS.

Liabilities of counties for injury to real property from. 69

DIVORCE. See HUSBAND AND WIFE, 4, 5.

DOGS. See ANIMALS, 1-8; CONSTITUTIONAL LAW, 21.

DOWER.

1. The inchoate right of the wife of a cotenant of real estate is subject to the liability of the husband's estate to be devested by a partition sale. *Haggerty v. Wagner (Ind.)* 384

2. A wife's inchoate interest under Ind. Rev. Stat. 1894, § 2652, in real property owned by her husband as a tenant in common, may be extinguished by a partition sale notwithstanding the Indiana statutes make no provision for the partition of her inchoate right and the courts are not authorized to direct the payment of any part of the proceeds to her upon such a sale. *Id.*

3. The inchoate right of a wife under Ind. Rev. Stat. 1894, § 2652, in land held by her husband as a cotenant, may be barred by a

partition sale in an action to which she was not a party, notwithstanding Ind. Rev. Stat. 1894, § 2660, providing that no sale of the husband's property by virtue of any decree to which she shall not be a party shall affect her rights, as that section applies only where the wife is a necessary party, which she is not in such action. *Id.*

4. The effect of the deed in a partition sale is not reduced to that merely of co-owners so as to leave the property subject to the inchoate dower rights of their wives, by a statute providing that the conveyances shall bar all claims of such owners to said lands as effectually as if they themselves had executed the same. *Id.*

5. A statute providing that a judicial sale of a man's property in a suit to which his wife is not a party shall not prejudice her dower rights has no effect in case of a sale for partition of land in which he has an undivided interest, where another statute designating the persons to be made parties to partition proceedings does not recognize her as a necessary one. *Id.*

NOTES AND BRIEFS.

Dower; inchoate interest of wife under statutes; effect of partition. 884

DRUMMERS. See INNKEEPERS, 2.

DRUNKENNESS. See also CRIMINAL LAW, 1.

NOTES AND BRIEFS.

See also WILLS.

Drunkenness; municipal regulation of, as a nuisance. 524

EASEMENTS. See PARTITION, 8, 4.

EJECTMENT.

1. Ejectment may be maintained to compel the removal of telegraph poles from a public highway over plaintiff's land on which the line constitutes an additional burden for which compensation has not been made to the owner. *Postal Telegr. Cable Co. v. Eaton* (Ill.) 722

2. A transfer of land over which a telegraph line has been constructed without right gives the purchaser all his grantor's rights, including the right to bring ejectment. *Id.*

ELECTRICAL USES AND APPLIANCES. See also CARRIERS, 6; EVIDENCE, 8.

1. The breaking of a live electric wire which falls to the ground and causes the death of a person touching it does not render the owner liable, if it was due entirely to accident which no reasonable human care could prevent. *Snyder v. Wheeler Electrical Co.* (W. Va.) 499

2. The use of the same poles by a telephone company and an electric-railroad company, at the request of the municipal authorities, is not unlawful when it is not shown to be necessarily attended with increased danger. *Bergin v. Southern New England Teleph. Co.* (Conn.) 192

3. A telephone company may require its

lineman to inspect and test for himself the guy wires or circuit breakers of an electric-railroad company, which uses the same poles that are used by the telephone company when it furnishes him with suitable appliances for that purpose, and he knows that there are no other persons employed to do such testing. *Id.*

4. The right of a telephone lineman to assume that an electric-railroad company has used suitable and safe appliances to prevent the escape of electricity from its main or trolley wire to the guy wires does not excuse him from exercising proper care to prevent injury, when he knows as a fact that the wires are not safe. *Id.*

NOTES AND BRIEFS.

Electrical uses; negligence as to dangerous wires. 192

Electricity; use of, in street, as a nuisance. 621

ELECTRIC RAILWAYS. See EMINENT DOMAIN, 6, 9.

ELEVATED RAILROADS. See INJUNCTION, 5, 6.

ELEVATORS.

1. An ascending and descending cage of an elevator is such an attraction to children that an unguarded or open door or one which may readily be opened from the outside, may constitute negligence on the part of the owner when children are allowed to play where they may be injured by it. *Siddall v. Jansen* (Ill.) 112

2. Failure to comply with the provisions of an ordinance respecting the doors of elevators will render the owner liable for an injury received in consequence by a child which was rightfully at the place of the injury. *Id.*

EMBEZZLEMENT.

A receiver who unlawfully appropriates money which comes into his hands as receiver, or fails to account for or pay over the same on demand, is not within Kan. Comp. Laws 1889, ¶ 2220, providing that if any "agent" shall neglect or refuse to deliver to his "employer or employers," on demand, any money which has come into his possession by virtue of such employment, he shall on conviction be punished. *State v. Hubbard* (Kan.) 860

EMINENT DOMAIN. See also CONSTITUTIONAL LAW, 1, 7; GAS, 1; INJUNCTION, 8, 9.

1. A liberal construction should be given to the constitutional provision for just compensation to the owners of property taken or damaged for public use. *Searle v. Lead* (S. D.) 345

2. Damages by the grading of a street in front of one's premises, although no prior grade had been established, are within the provisions of the Constitution against taking or damaging property without just compensation. *Id.*

3. No admission that any damage will be

caused by the grading of a street is necessary to the filing of a petition by the city, under S. D. Acts 1891, chap. 94, providing for the ascertainment of damages before taking or damaging private property for public use. *Id.*

4. The ascertainment and payment of damages that may be caused by a change of grade of a street is a condition precedent to the right of the municipality to proceed under a Constitution providing for just compensation to the owners of property taken or damaged for public use. *Id.*

5. Damages for injuries caused to an abutting lot by being left 8 or 10 feet above the street by change of grade must be paid by the city to the lotowner, under a Constitution providing compensation for property taken, injured, or destroyed, for public use. *Henderson v. McClain* (Ky.) 849

6. Poles for a trolley railroad, set at stated distances on either side of tracks near the margin of a street, on which wires are placed, constitute an additional burden upon the street. *Jaynes v. Omaha Street R. Co.* (Neb.) 751

7. A telegraph line is an additional burden on the fee of a public highway, for which compensation must be made to the owner. *Postal Teleg. Cable Co. v. Eaton* (Ill.) 723

8. The motive power which moves vehicles on a street does not determine whether or not an additional burden is imposed upon the easement, but that question depends on the exclusiveness and permanency of the occupation of any portion of the street. *Jaynes v. Omaha Street R. Co.* (Neb.) 751

9. The depreciation of the property of abutting owners by the exclusive use of a portion of the street by a trolley company's poles and wires gives a right to compensation under Neb. Const. art. 1, § 21, which provides that property shall not be "taken or damaged" for public use without just compensation. *Id.*

NOTES AND BRIEFS.

Eminent domain; injuring property without compensation. 846, 849

Extent of rights acquired by; right to enter and remove property. 533

Additional burden on highway. 723

Additional burden of street railway. 752

EQUITY.

An available legal defense to a pending action at law which is furnished by a valid release will not prevent equitable relief in favor of the defendant when the trial of the action at law might affect his reputation and character in the community by reason of charges and revelations as to his past conduct, whether real or fabricated, on which the action was based. *Bomeister v. Forster* (N. Y.) 240

ESCAPE.

NOTES AND BRIEFS.

Escape; liability of county for. 83

ESTOPPEL. See also BUILDING AND LOAN ASSOCIATIONS, 2; CONTRACTS, 8; TRIAL, 11.

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1. One will not be heard to deny the existence of a state of facts which he, either in express terms or by conduct, has represented as existing, and which he intended to be acted upon by another in a certain way, and which was so acted upon in good faith by the other to his detriment. *Rogers v. Galloway Female College* (Ark.) 636

2. The doctrine of estoppel does not apply to contracts which are forbidden by statute or contrary to public policy. *Franklin Nat. Bank v. Whitehead* (Ind.) 725

3. The doctrine of estoppel cannot be successfully invoked against the denial of corporate existence unless the corporation has at least a *de facto* existence. *Maryland Tube & I. Works v. West End Improv. Co.* (Md.) 810

4. A corporation is not estopped from denying that it is a warehouseman, or that its receipts, as such, are valid, as against a holder of them who took them with knowledge of the facts respecting the character and powers of the corporation. *Franklin Nat. Bank v. Whitehead* (Ind.) 725

5. A foreign corporation as well as its stockholders and receiver are estopped from disputing the validity of a trust upon which the corporation deposited securities as a condition of the license to do business in the state. *Lewis v. American Sav. & L. Asso.* (Wis.) 559

6. A party to an action who procures from the presiding judge a ruling that a specified judgment is valid and legal, as the result of which the case is adjudicated in his favor, is estopped in a subsequent litigation with the same adverse party to deny the validity or legality of such judgment. *Luther v. Clay* (Ga.) 95

EVICTION. See LANDLORD AND TENANT, 4.

EVIDENCE. See also APPEAL AND ERROR, 9, 11, 13, 18, 22, 25, 26; TRIAL, 2, 3, 5.

Judicial notice.

1. The source, course, and destination of the rivers of the state are a matter of judicial cognizance. *People v. Truckee Lumber Co.* (Cal.) 581

Presumptions and burden of proof.

2. The one alleging the unconstitutionality of a statute has the burden of substantiating his claim. *Cook v. Fogarty* (Iowa) 488

3. The common law is presumed, in the absence of proof, to prevail in a sister state which was once under the jurisdiction of England. *Gooch v. Faucette* (N. C.) 635

4. It is a reasonable presumption that a foreign corporation which has obtained a license by depositing securities which it had agreed to do and which the law required as a condition of the license did so in the manner and for the purposes prescribed by the law. *Lewis v. American Sav. & L. Asso.* (Wis.) 559

5. The presumption, from the fact of the partition of the surface of land by parol, is that it includes the coal beneath as well as the surface; and one who denies it has the burden of proof. *Byers v. Byers* (Pa.) 537

6. The mere happening of an accident is

not sufficient to show negligence as between persons having no contract relations with each other if other evidence shows due care under the circumstances. *Stearns v. Ontario Spinning Co. (Pa.)* 842

7. An accident which in the ordinary course of things could not have happened if proper care had been used affords reasonable evidence, in the absence of explanation, that it arose from want of care. *Snyder v. Wheeling Electrical Co. (W. Va.)* 499

8. The presumption of negligence from the breaking of a live electric wire and its fall to the ground is not final or conclusive, but may be repelled by evidence. *Id.*

9. A carrier has the burden of showing that its conductor, in beating a passenger in alleged self-defense, used no more force than appeared to him, as a reasonable man, necessary to repel the assault. *St. Louis S. W. R. Co. v. Jones (Ark.)* 784

10. The burden is on defendant in a murder trial in Ohio, who sets up insanity as a defense, to establish it by a preponderance of the evidence; but the proof should be deemed to preponderate in favor of insanity whenever its existence is made probable upon a full and fair consideration of all the evidence adduced for and against it. *Kelch v. State (Ohio)* 787

Best evidence.

11. A contractor for city work cannot state from memory the state of his accounts with the city at a certain time, when books showing such facts are accessible. *Greenville v. Ormand (S. C.)* 847

Documentary.

12. Legislative journals are competent evidence to show that a bill was not passed in accordance with mandatory provisions of the Constitution. *Stanly County v. Snuggs (N. C.)* 439

13. A properly authenticated record of conviction of crime in a Federal court may by statute be made admissible in a proceeding to disbar the accused as an attorney in a state court. *Re Kirby (S. D.)* 856

14. An agreed statement of facts upon which a case was tried without a jury, although not absolutely binding on the parties in a jury trial of another case between them involving the same issues, is admissible in evidence on the latter trial at the instance of one party against the other, subject to the latter's right to disprove, rebut, or explain any statement contained therein. *Luther v. Clay (Ga.)* 95

Demonstrative.

15. Evidence obtained by forcibly entering the house of an accused person and searching it and the person accused, without any warrant or authority of law, is not inadmissible to show the possession of articles tending to establish guilt, although the search and seizure may have been unlawful, unwarranted, unreasonable, and reprehensible. *Williams v. State (Ga.)* 269

Oral, as to writings.

16. Oral evidence is inadmissible to show that the maker of a note was only an agent. 89 L. R. A.

and signed it under an agreement with the payee that the principal only should be liable. *Shuey v. Adair (Wash.)* 478

17. Parol evidence is admissible to show fraudulent misrepresentations by the vendor as to the quantity of the land sold, though not in any manner incorporated in the deed consummating the contract. *Gustafson v. Rustemeyer (Conn.)* 644

18. A devise absolute in form cannot be shown by oral evidence to be in trust for other persons. *Moran v. Moran (Iowa)* 204

Opinions.

19. The opinion of a witness is of no value on the question whether or not a particular place at which there is a railroad switch, to which the switch engine frequently runs, is within the depot grounds or yard limits. *Rabidon v. Chicago & W. M. R. Co. (Mich.)* 405

20. After one accused of murder has offered evidence of his demeanor for the purpose of convincing the jury of his insanity at the time of trial, for the purpose of raising the presumption of insanity when the crime was committed, a person who is acquainted with him may testify that he is simulating. *Burt v. State (Tex.)* 805

21. An opinion as to sanity may be given by a nonexpert witness who has given a very full detail of the facts upon which the opinion is based. *Id.*

22. A hypothetical question by contestant to an expert witness upon the question of incapacity of a testator need embrace only the facts which the evidence of the contestant tends to prove, and not those alleged by proponents, which he denies, or those which are irrelevant. *Re Miller (Pa.)* 220

23. Testimony that a person "looked very bad; he was lame and he could scarcely get up stairs," is not inadmissible on an issue as to his condition at a certain time. *Baltimore City Pass. R. Co. v. Nugent (Md.)* 161

Declarations; res gestæ.

24. Testimony of a defendant that he did not instruct his counsel in the matter, but that he acted altogether on the advice of the counsel, is admissible where he is charged with acting maliciously in making a complaint on which a hearing as to the insanity of another person was based. *Porter v. Ritch (Conn.)* 358

25. Sureties cannot testify to instructions to the maker as to the disposition of the notes against the holder unless he is shown to have knowledge of them. *Greenville v. Ormand (S. C.)* 847

26. The absence of the sureties on a note at the time of its attempted negotiation will not preclude testimony as to what then took place being given by one who, after the refusal of the payee to discount it, advanced money on the note which was committed by the sureties to the maker's hands for negotiation. *Id.*

27. Testimony that the members of a club considered a certain paper one of the strongest they had had read before them is incompetent as hearsay. *Porter v. Ritch (Conn.)* 358

Relevancy.

28. Evidence of acts of an agent of a de-

fendant cannot be given under allegations of the performance of such acts by the defendant.

Id.

29. An allegation of a particular negligent act does not admit evidence of other acts causing the damage. *Snyder v. Wheeling Electrical Co.* (W. Va.) 499

30. An allegation that defendant did a particular act causing damage will admit evidence of all such incidental facts and circumstances of omission and commission as fairly tend to establish the negligence of the primary act. *Id.*

31. Evidence of the conduct constituting plaintiff's cause of action is not admissible in a suit by defendant to enforce specific performance of a contract of plaintiff to release the cause of action and refrain from bringing suit upon it. *Bomeister v. Forster* (N. Y.) 240

32. Evidence tending to show testamentary incapacity is admissible upon the question of undue influence in the obtaining of the will, although it may be insufficient to show want of capacity to make the will. *Re Miller* (Pa.) 220

33. A claimant of property levied on under execution issued in favor of the legal representative of the sole heir of the party who obtained the judgment cannot object to the admissibility of the execution in evidence on the trial of the claim case, on the ground that an order directing such execution to issue had been granted without service upon or notice to the defendant in the judgment. *Luther v. Clay* (Ga.) 95

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FALSE IMPRISONMENT.

A police judge ordering the commitment to jail of a person of whose guilt there is no evidence, and without any other warrant than a telegram to the chief of police to arrest him, is guilty of false imprisonment, although his motives may not have been improper or corrupt. *Glazer v. Hubbard* (Ky.) 210

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FENCE. See RAILROADS, 2-4; TRESPASS, 1.

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FIRES. See CARRIERS, 11.

FIREWORKS. See INSURANCE, 8.

FISHERIES. See also INJUNCTION, 8; NUISANCES, 3.

1. The state has a right to protect fish in all streams through which they have freedom of passage to and from the public fishing grounds, although they flow over lands entirely subject to private ownership. *People v. Truckee Lumber Co.* (Cal.) 581

2. A riparian owner's exclusive right to fish in the water upon his own land does not include the right to destroy the fish he does not take. *Id.*

3. The attorney general may proceed without the intervention of a private relator to enjoin the unlawful destruction of fish. *Id.*

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Fisheries; governmental control over:—In general; as between governments; general right to regulate; power to grant rights to individual; right of individual; power to interfere with private right; close time; method of taking fish; regulation of stream because of fish; right to prevent obstruction of stream; preservation of fish in public waters; statutes; powers of local authorities; powers of fish officers; pollution of water; regulation of lobster fishery; penalties; joint offense; intent; constitutional provisions. 581

FIXTURES. See LANDLORD AND TENANT, 7-10.

FORCIBLE ENTRY AND DETAINER. See also JUSTICE OF THE PEACE; LANDLORD AND TENANT, NOTES AND BRIEFS.

1. An entry which has no other force than that employed in every trespass is not within the statute respecting forcible entry. *Smith v. Detroit Loan & B. Asso.* (Mich.) 410

2. One forcibly put out from a peaceable possession lawfully obtained, if evicted by one who had the title and the right of possession, cannot maintain forcible entry and detainer under Mass. Pub. Stat. chap. 175, as this gives such action only to "the person entitled to the premises;" and a former statute which extended the right to a person forcibly dispossessed by a person entitled to possession has been repealed. *Page v. Dwight* (Mass.) 418

FOREIGN CORPORATION. See CORPORATIONS; ESTOPPEL, 5; EVIDENCE, 4; WRIT AND PROCESS.

FORFEITURE. See CORPORATIONS, 7.

FORGERY. See also ALTERATION OF INSTRUMENTS, 2; MORTGAGE, 3; PROXIMATE CAUSE.

Signing an instrument in which the amount to be paid is written in pencil, and leaving it with an agent to be delivered for a loan, do not constitute negligence or render the maker liable to an innocent holder for the forgery of the agent in raising the same. *Walsh v. Hunt* (Cal.) 697

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FRAUD. See also ACTION OR SUIT, 4; DAMAGES, 2; EVIDENCE, 17; PLEADING, 8.

The mere naked assertion of the value of property by a vendor to the purchaser during negotiations for a sale, though consciously untrue and relied upon by the purchaser to his hurt, does not, in the absence of such circumstances, constitute an actionable deceit. *Gustafson v. Rustemeyer* (Conn.) 644

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Fraud; in opinion as to value. 645

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GAMBLING.

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GARBAGE.

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As a nuisance in streets. 653

GARNISHMENT.

1. Money and property lawfully taken from a prisoner under arrest is not subject to garnishment in the hands of the sheriff because it is in custody of law. *Holker v. Hennessy* (Mo.) 165

2. Money or property unlawfully taken from a prisoner under arrest is not subject to garnishment because a wrongful use of criminal process was made in getting possession of it. *Id.*

3. The lien on the estate of a criminal, given to the party injured by Mo. Rev. Stat. 1889, § 4317, does not authorize the garnishment of his property while in the hands of a sheriff who took it from the prisoner while under arrest. *Id.*

NOTES AND BRIEFS.

Garnishment; of property in *custodia legis*. 166

GAS. See also CONTRACTS, 2; MINES, 1; MUNICIPAL CORPORATIONS, 6, 9-12.

1. An abandonment of a pipe line and the removal of the pipe may be made by a natural gas company which has laid its pipe in the exercise of eminent domain across the lands of other persons, when there is a failure of the supply of gas. *Clements v. Philadelphia Co.* (Pa.) 582

2. A right to enter and remove gas pipe without being liable as a trespasser belongs to a gas company which has condemned a right of way for its pipe line, where the supply of gas has failed; but this right must be exercised at the time and in the manner least harmful to the landowner and subject to the payment of compensation for any actual injury to growing grain or grass, and, if the field be a meadow, for any substantial injury to the turf beyond the mere opening and filling of the trench in which the pipe lay. *Id.*

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GOLD. See BONDS, 1.

GUARDIAN AND WARD. See INFANTS, 1.

HEALTH. See SCHOOLS, 1-3, NOTES AND BRIEFS.

HEIRS. See DEATH; DESCENT AND DISTRIBUTION.

HIGHWAYS. See also ACTION OR SUIT, 2; EJECTMENT, 1; EMINENT DOMAIN, 2-9; INFUNCTION, 8; MUNICIPAL CORPORATIONS, 8; NEGLIGENCE, 4-7; PUBLIC IMPROVEMENTS; TRIAL, 6.

1. The public holds the title to streets and alleys in trust for the use to which they are dedicated when the fee simple vests in the public on the platting of an addition to a city. *Jaynes v. Omaha Street R. Co.* (Neb.) 751

2. The title to streets and alleys, when land is surveyed and platted into an addition to a city in pursuance of Neb. Comp. Stat. 1897, chap. 14, art. 1, §§ 104-6, vests in the public. *Id.*

3. The right of the public to use the streets for the purpose of passage by such means as it may see fit to employ is given when streets are granted by a plat of an addition to a city, but this right of passage does not include the right to permanently and exclusively appropriate any portion of the street to the continued exclusion of the remainder of the public. *Id.*

4. A water company's permission to place hydrants in the streets and open them to flush its mains gives it no license or right to flush either at such times or in such manner as unnecessarily to impede travel or imperil the safety of those using the street, but it is under obligation to do the flushing with reasonable care and a due regard to the rights of others. *Topeka Water Co. v. Whiting* (Kan.) 90

5. An open hydrant from which water is thrown about 10 feet into the street with considerable noise and spray is calculated to frighten ordinarily gentle horses, and requires precautions and care for the protection and safety of those traveling on the street. *Id.*

6. A presumption that a street is reasonably safe for ordinary travel may be made by persons whose attention has not been called to any obstructions or perils, where the street is in constant use; and, while they must act with reasonable care, they are not required to keep their eyes continuously upon the pavement, watching for obstructions or pitfalls. *Id.*

7. A person who rides a bicycle without a light or other signal of warning in a public thoroughfare when he is liable to meet moving vehicles or pedestrians, at a time when objects can be discerned readily at a distance of but a few feet, is guilty of negligence. *Cook v. Fogarty* (Iowa) 488

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Highways; nuisances in, see NUISANCES.
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Negligence as to temporary platform on. 517

HOLIDAY. See INTOXICATING LIQUORS, 1.

HOMESTEAD.

A man sixty-six years of age, though hale and hearty, is "aged," within the clause of the Georgia Constitution (Ga. Civ. Code, § 5912) giving to every aged or infirm person an exemption of his property from levy and sale. *Allen v. Pearce* (Ga.) 710

HOMICIDE. See EVIDENCE, 10, 20.

HOSPITAL. See COUNTIES, 8, 4.

HOTEL. See INNKEEPERS, 1.

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Municipal regulation of, as a nuisance. 521

HUSBAND AND WIFE. See also APPEAL AND ERROR, 1; CONFLICT OF LAWS, 8; DOWER; TRUSTS, 5.

1. A married woman can execute a power at common law without the concurrence of her husband, whether it was given to her while sole or married, and she can execute the power in his favor. *Stearns v. Fraleigh* (Fla.) 705

2. The execution of a power under a trust deed by a married woman need not be made with the formalities required for a conveyance. *Id.*

3. A wife can appoint her husband to be a trustee of property conveyed by him in trust for herself and children, where the deed of trust gives her the power to appoint and choose by her writing under seal another trustee in case of the resignation or death of the one first appointed. *Id.*

4. The lapse of five years after the conviction of a crime and sentence to imprisonment for life entitles the wife of the person convicted to a divorce, under Ky. Stat. § 2117, making it a ground for divorce that the parties had been living apart without cohabitation for five years before the application. *Davis v. Davis* (Ky.) 403

5. An action for divorce need not be brought within five years after the conviction for a felony of one sentenced to imprisonment for life, under Ky. Stat. § 2117, making "condemnation for felony" a ground for divorce, and Ky. Civ. Code, § 423, subs. 3, requiring plaintiff in a divorce suit to prove that the cause of divorce "occurred or existed within five years next before the commencement of the action." *Id.*

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INCOME. See **LIFE TENANT**, 2-5, **NOTES AND BRIEFS**; **TRUSTS**, 1.

INCOMPETENT PERSONS. See also **APPEAL AND ERROR**, 1, 2; **CONSTITUTIONAL LAW**, 9; **CRIMINAL LAW**, 1; **EVIDENCE**, 10, 20, 21; **JUDGMENT**, 4.

1. A proceeding for a hearing as to the insanity of a person is pending after a written complaint alleging the insanity is presented to the judge as required by Conn. Pub. Acts 1889, p. 88, and supported by an affidavit of a physician. *Porter v. Ritch* (Conn.) 353

2. A temporary provisional order for the custody of a person alleged to be insane, pending a hearing of the question as to his insanity, is not an adjudication, and is not void on its face because it fails to recite the affidavit of a physician on which it was based, or the fact that proceedings for a hearing as to the sanity were then pending. *Id.*

NOTES AND BRIEFS.

Evidence as to sanity, see **EVIDENCE**.

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Morphinism and other additions as affecting responsibility and capacity:—(I.) Scope and general view of the subject; (II.) effect on criminal responsibility; (III.) effect on capacity to contract; (IV.) effect on testamentary capacity; (V.) as a ground for divorce; (VI.) as affecting insurance; (VII.) as affecting competency of witness. 263

INFANTS. See also **ELEVATORS**; **PARENT AND CHILD**.

1. A guardian can lease or sell the land of his ward for any purpose, only as authorized by statute, under a decree of the court. *Wilson v. Hughes* (W. Va.) 292

2. An oil lease of land in which infants have an estate is a sale of their real estate within the provisions of a statute as to the sale of the real estate of infants. *Id.*

NOTES AND BRIEFS.

Infants; protection of property of; sale of real estate of. 293

INJUNCTION. See also **EQUITY**; **FISH-ERIES**, 8.

1. An injunction against the plaintiff may be imposed as a condition of a similar injunction in his favor against the defendants limiting their power to make promissory notes or checks for a corporation of which they are directors and officers, and the affairs of which have come to a deadlock by dissensions between two factions, each of which owns one half of the capital stock. *Sternberg v. Wolff* (N. J. Err. & App.) 762

2. An injunction against actions on claims for which a valid release has been made may be granted when the trial at law might affect the reputation and character of the defendant in the community because of charges and reve-

lations as to his past conduct, whether real or fabricated, on which the claims were based. *Bomeister v. Forster* (N. Y.) 240

3. Making the unlawful destruction of fish a misdemeanor and punishable as such does not preclude a civil proceeding to enjoin it as a nuisance. *People v. Truckee Lumber Co.* (Cal.) 581

4. Injunction may issue to compel the restoration by a railroad company of a portion of a building on a leasehold which has been acquired by it, and which, without making compensation therefor, it has removed to make space for the laying of its tracks. *Base v. Metropolitan West Side Elev. R. Co.* (C. C. App. 7th C.) 711

5. The right of a landlord to enjoin the construction of an elevated railroad in place of the corner of a building which had been removed by the railroad company as lessee is not affected by the fact that the lease is for ninety years, while the charter of the company is limited to fifty years, as new companies will undoubtedly be organized to which in succession the road and its equipment will be transferred, and the occupation is wrongful from the beginning. *Id.*

6. The right of a landlord to enjoin an elevated-railroad company owning a lease from locating its track in place of the corner of the building, which has been removed, is not affected by the fact that if the leasehold should be extinguished the company would be a trespasser if it did not remove its track, as it might abandon possession, leaving to the landlord the expense of removing and reconstructing the building, or, more probably, surrender possession only at the end of a litigation. *Id.*

7. Injunction will not be refused to prevent the destruction of a portion of a building because it is small and insignificant in comparison with the space that remains. *Id.*

8. A mere denial that plaintiff is entitled to any damages, while affirmatively showing that the work of grading a street in front of his premises is being done, is not such a denial of all the equities of his bill for an injunction as to justify the vacation of an injunction order. *Searle v. Lead* (S. D.) 845

9. An allegation of irreparable injury to plaintiff's property, or of the inability of the defendant to respond in damages, is not necessary for an injunction against grading a street in front of plaintiff's premises without paying him compensation for his damages, where the Constitution forbids taking or damaging his property without such compensation. *Id.*

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Injunction; against action which has good legal defense. 240

Against damaging property without compensation. 846

Against acts on behalf of corporation. 703

INNKEEPERS. See also **CONSTITUTIONAL LAW**, 11.

1. The loss of the hats of persons attending a club banquet on the invitation and at the

expense of the club, which had a contract to pay a specified sum for each plate furnished, where they left their hats on the rack as they entered the dining room of a hotel, and they were taken without the negligence or fault of the innkeeper or his employees,—does not render him liable, although such persons had registered and been assigned a room in the inn. *Amey v. Winchester* (N. H.) 760

2. Samples belonging to his employer may be retained to satisfy the hotel bill of a traveling salesman, under a statute authorizing the retention of all property under the control of guests which may be in the hotel. *Brown Shoe Co. v. Hunt* (Iowa) 291

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INSANITY. See EVIDENCE; JUDGMENT, NOTES AND BRIEFS; INCOMPETENT PERSONS.

INSOLVENCY. See CONTRACTS, 17; CORPORATIONS, 8.

INSPECTION. See COMMERCE, 2.

INSURANCE. See also ACTION OR SUIT, 3; TRIAL, 9.

1. A liberal construction of an insurance policy, if it is a reasonable one and will prevent injustice, should be adopted when a liberal construction would lead to manifest injustice. *Mattheus v. American C. Ins. Co.* (N. Y.) 433

2. A standard insurance policy, being prepared by insurers, should be construed, when the meaning is doubtful, most favorably to the insured. *Id.*

3. One insured under a policy entitling him to a paid-up policy in proportion to the premiums paid, after payment of three annual premiums, provided he surrenders the policy before making default or within six months after default in the payment of premiums, is entitled to a paid-up policy after making three payments although the original policy is not surrendered or a demand made for the paid-up policy within the six months after default if such demand is made during his lifetime. *Mutual L. Ins. Co. v. Jarboe* (Ky.) 504

4. Insurance on wearing apparel, jewelry, satchels, trunks, books, etc., "while contained in" a specified building, does not cover the property when located at another place where the insured was temporarily staying with his family, although the insurance agent knew of his habit to take his family periodically to such place for a temporary stay. *British America Assur. Co. v. Miller* (Tex.) 545

5. Statements contained in an application for insurance will not be warranties unless the provisions of the application and policy taken together leave no room for any other construction. *Modern Woodmen Acct. Assn. v. Shryock* (Neb.) 826

6. Liability for the full amount of a certificate for \$3,000 insurance in a fraternal benefit association cannot be denied on the ground that the certificate limits the amount to the

proceeds of an assessment of \$2 on each member, where the association is forbidden by statute to issue a certificate for more than \$1,000 if it has not a membership of 2,000. *Id.*

7. Benzine kept bottled in small quantities as part of a stock of drugs and chemicals does not avoid a policy on such a stock, although there is a stipulation against keeping benzine in the store. *Phoenix Ins. Co. v. Flemming* (Ark.) 789

8. The fact that fireworks were on exhibition in a store when a policy of insurance was issued on the stock, or that one of a firm of agents which issued a policy soon after purchased fireworks at the store, is insufficient to show knowledge of the agent when issuing the policy that fireworks were kept in stock. *Id.*

9. A mortgagee of land cannot recover on an insurance policy taken out by the mortgagor, payable to the mortgagee "as his interest may appear," where the mortgagor burned the insured building for the purpose of realizing on the policy. *Cocking v. Virginia F. & M. Ins. Co.* 143

Waiver.

10. An insurance agent's knowledge acquired while attending to his own affairs, of the fact that fireworks are kept in an insured stock of goods, must have been present in his mind when the policy was issued, or some act done in the course of his duties as agent recognizing the continued validity of the policy, in order to make a waiver of a condition against keeping such articles. *Phoenix Ins. Co. v. Flemming* (Ark.) 789

11. An adjuster's insistence upon strict proofs of loss, made in reply to a question if other proofs are necessary, does not waive any forfeiture that may have occurred. *Id.*

12. An insurer's demand of an exhibition of the books of the insured, and of proofs of loss, is not a waiver of any condition of the policy, where it provides for the right to make an examination of the books and that this shall not be treated as a waiver of any condition. *Id.*

Notice and proofs of loss.

13. In case of a loss by fire after the death of the original insured and before the appointment of a legal representative, those interested in the policy must make reasonable efforts to see that the covenants as to notice and proofs of loss are kept, and within a reasonable time must use such agencies as the law provides to secure that result. *Mattheus v. American C. Ins. Co.* (N. Y.) 433

14. The appointment of a temporary representative who may take the necessary steps to prosecute a cause of action on an insurance policy within the period limited may be necessary in case of a loss occurring after the death of the insured, if the appointment of an executor or administrator cannot for any reason be secured with ordinary promptness. *Id.*

Total loss.

15. A building that has lost its identity and specific character as a building, and become so far disintegrated that it cannot be properly designated as a building, although some part of it may remain standing and the lower floors

are in such condition that they could be safely used for rebuilding, is a total loss within the meaning of Mo. Rev. Stat. 1899, § 5997, requiring full payment of insurance in case of total loss. *O'Keefe v. Liverpool & L. & G. Ins. Co. (Mo.)* 819

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Limitation of time to sue for; in case of death.	433
Change of location of personal property.	545
Total loss of building.	819

INTEREST.

Interest is properly allowed upon a check, payment of which has been wrongfully refused by a bank, from the date of its presentation for payment. *Niblack v. Park Nat. Bank (Ill.)* 159

INTERVENTION. See RECEIVERS, 8.

INTOXICATING LIQUORS.

1. Keeping open a saloon on Monday, July 5, is prohibited by Mich. Pub. Acts 1887, act No. 313, § 17, providing that all saloons shall be closed on "all legal holidays," and Mich. Pub. Acts 1893, act No. 185, designating July 4 as a holiday and providing that when such day falls on Sunday the next Monday following shall be deemed a public holiday for all or any of the "purposes aforesaid." *People v. Thielman (Mich.)* 218

2. The offense of keeping open a tippling house on the Sabbath day is sufficiently proved by showing that the owner of a dwelling house, on at least three different Sundays within the same year, sold whisky by retail to different persons, and permitted it, or a portion of it, to be drunk on the premises. *Williams v. State (Ga.)* 269

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INTOXICATION. See WILLS, NOTES AND BRIEFS.

IRRIGATION. See CORPORATIONS, 5.

JUDGMENT. See also APPEAL AND ERROR, 19; CONSTITUTIONAL LAW, 12; CONTRACTS, 16, 17; ESTOPPEL, 6; EVIDENCE, 13; FALSE IMPRISONMENT; MANDAMUS.

1. A judgment *pro confesso* after striking out defendant's answer to punish him for contempt, rendered by the supreme court of the District of Columbia, which has, under U. S. Rev. Stat. § 725, no power to impose such punishment for contempt, is void on collateral attack. *Hovey v. Elliott (N. Y.)* 449

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2. Reference to the caption or to the pleadings, process, and proceedings in a case, may be made in determining the sufficiency of the record of a judgment in respect to naming the parties. *Taylor v. Branham (Fla.)* 862

3. A judgment is not void for vagueness or indefiniteness, although it fails in the body thereof to give the names of the plaintiffs and defendants for and against whom it is rendered, where it gives the style of the cause at its head with sufficient definiteness to show without doubt that the plaintiffs and defendants referred to therein as such are the same individuals that are named and designated as such in the declaration and throughout the proceedings composing the record. *Id.*

4. A judgment against an insane person, and a sale of real estate in satisfaction thereof, will not be set aside long after on the ground of his insanity, if he was going at large and attending to his own affairs without objection up to the time of the sale, and, upon appointment of a committee for him two years later, no steps were taken to set aside the judgment, although he had no other property. *Spurlock v. Noe (Ky.)* 775

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Judgment; decision against constitutional right as a nullity subject to collateral attack:—(I.) Denial of due process of law or other constitutional right of procedure: (a) in general; (b) habeas corpus cases; (II.) conviction for violating unconstitutional statute or ordinance; (III.) judgment on unconstitutional contract; (IV.) other cases. 449

Insanity as affecting:—(I.) Validity and effect of judgments against insane persons: (a) generally; (b) as to purchasers; (II.) what degree of insanity affects; (III.) enforcement; (IV.) collateral attack; (V.) when relieved against; (VI.) relief, how obtained; (VII.) effect of inquisition. 775

JUDICIAL NOTICE. See EVIDENCE, 1.

JURY. See NEW TRIAL; TRIAL, 1.

JUSTICE OF THE PEACE.

Failure of the justice of the peace to send up the complaint in an action for forcible entry and detainer is waived by going to trial on appeal to the circuit court without objecting to its absence. *Leiferman v. Osten (Ill.)* 156

LABEL. See TRADEMARK, 2, 6-8.

LABOR UNION. See TRADEMARK, 1-7.

LANDLORD AND TENANT. See also CASE, 2; DAMAGES, 3; INJUNCTION, 4-6.

1. The use of a defective appliance in a building by the landlord to the damage of a tenant may constitute actionable negligence on his part. *Railton v. Taylor (R. I.)* 246

2. The improper construction of a building or steam-heating apparatus therein does not give a tenant any right of action for negligence on account of damages caused thereby, when the condition has not changed during the tenancy. *Id.*

3. The lessor's own negligence in the management and use of that part of the premises remaining in his control, including the heating apparatus, is not within a stipulation that he shall not be liable for any loss to property on the premises if "destroyed or damaged by fire, water, or otherwise, or by the use or abuse of the Cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner." *Id.*

4. Eviction of a tenant of the first floor of a building is not effected by moving the building to another part of the lot, so as to relieve him from the payment of rent if he retains possession of his rooms. *Leiferman v. Osten* (Ill.) 156

Distress.

5. The direction in a distress warrant to levy on property of subtenants found in the county is immaterial, when the levy is not in fact made on any property that is not found on the leased premises. *Hutsell v. Deposit Bank* (Ky.) 403

6. The right of distress does not pass to the assignee of a rent note, in the absence of statutory provision therefor, and is not given by Ky. Stat. § 2304, authorizing the assignment of the rent and its recovery by the assignee. *Id.*

Buildings; fixtures.

7. Trade fixtures erected by a tenant upon the leased premises during the term of the original lease cannot be removed after the expiration of the term of a new lease which contained no reservation of any right or claim of the tenant to the fixtures, and does not recognize his right to remove them. *Sanitary Dist. v. Cook* (Ill.) 389

8. The covenant in a new lease that the tenant will keep the premises in good repair and deliver them up in as good condition as they were when entered upon, prevents the removal at the close of the new term of trade fixtures placed on the premises by the tenant during the original term, where the new lease contains no reservation or recognition of such right, even if the right of removal would not be lost in the absence of such a covenant. *Id.*

9. A tenant has no right to remove a building placed by him upon the leased property under a stipulation requiring him to make the erection, keep it insured and in repair, and requiring the lessor to purchase it at the expiration of the term or to renew the lease for a specified time, at the expiration of which the title should pass to the lessor, and it is immaterial that a lien is reserved in favor of the lessor to enforce performance of the lessee's covenants. *Bass v. Metropolitan West Side Elevator R. Co.* (C. C. App. 7th C.) 711

10. The right to remove a small portion of a building to make room for railroad tracks is not acquired without condemnation proceedings by purchasing a ninety years leasehold with the assent of the lessor, although the building was erected by the tenant under a stipulation in the lease which required the lessor to make him certain compensation for it at the expiration of the lease, or renew it for forty years more, at the expiration of which 39 L. R. A.

the building should belong to the owner of the fee. *Id.*

Re-entry.

11. A landlord forcibly taking possession of the premises after the lease has expired, if he does not use excessive force, is not subject to a civil action by the tenant unless it is provided by statute. *Vinson v. Flynn* (Ark.) 415

12. A landlord who has peaceably regained possession during the temporary absence of a tenant who is in default and on whom notice has been served to terminate the lease may defend such possession against the tenant, if he uses no more force than is necessary. *Smith v. Detroit Loan & B. Assn.* (Mich.) 410

13. The landlord's common-law right of re-entry after default in payment of rent and notice served upon the tenant to terminate the lease, if such re-entry is made peaceably, is not abridged by How. (Mich.) Ann. Stat. §§ 8299 *et seq.*, respecting legal proceedings to recover possession. *Id.*

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LEASE. See INFANTS; MUNICIPAL CORPORATIONS, 10-12.

LEGISLATIVE JOURNALS. See EVIDENCE, 12.

LEVY. See also EVIDENCE, 33; HOMESTEAD.

A combined harvester used by a man engaged in the business of farming and grain raising, which he testifies is a necessary implement for his business, is exempt from execution under Cal. Code Civ. Proc. § 690, subd. 3, as a farming utensil or implement of husbandry, although the owner has used it, after doing his own work, in harvesting the crops of his neighbors. *Re Klemp's Estate* (Cal.) 340

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Levy; exemption of implements.	341
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LIBEL AND SLANDER.

It is not libelous to publish of a debtor that he pleaded the statute of limitations in an action, under Iowa Code 1873, § 4097, defining libel to be the malicious defamation of a person made public by writing tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence and social intercourse; and the publication is not rendered

libelous by characterizing such conduct on his part as dishonest. *Hollenbeck v. Hall* (Iowa) 784

NOTES AND BRIEFS.

Libel; charging dishonesty. 784

LIBRARY. See MUNICIPAL CORPORATIONS, 7, 8.

LICENSE. See also RAILROADS, 5, 6.

NOTES AND BRIEFS.

License; of pilots. 183

LIENS. See COMMON LAW; TAXES, 2, 3; VENDOR AND PURCHASER.

LIFE TENANTS. See also TRUSTS, 1.

1. A royalty on an oil lease of land subject to a life estate belongs to the remainderman, subject to the payment of interest thereon to the life tenant. *Wilson v. Hughes* (W. Va.) 292

2. A corporation cannot change accumulated earnings into capital, as between life tenant and remainderman, by its mere resolution, or conclude the courts on that question. *McLouth v. Hunt* (N. Y.) 230

3. Stock certificates for the accumulated earnings of a corporation represent profits belonging to life tenants of stock, rather than an increase of capital for the benefit of remaindermen. *Id.*

4. A decrease in the value of bonds by the lessening or wearing away of premiums on account of the bonds reaching maturity should be borne, as between life tenants and remaindermen, by the corpus of the estate, where the bonds were held by a testatrix and transmitted as she held them to trustees, with a direction that the life tenants should receive the full income. *Id.*

5. The only principle for determining the relative rights of life tenants and remaindermen in respect to the capital and income of trust property under a will is to ascertain the intention of the testator from the language used, the relations of the parties to each other, their condition, and all the surrounding facts and circumstances of the case. *Id.*

NOTES AND BRIEFS.

Life tenants; stock dividends as capital or income. 281

LIMITATION OF ACTIONS. See also HUSBAND AND WIFE, 5; PLEADING, 9.

A defense of the statute of limitations cannot be invoked by a participant in a breach of trust, any more than by the trustee himself. *Duckett v. National Mechanics' Bank* (Md.) 84

LIVE-STOCK EXCHANGE. See STOCK AND PRODUCE EXCHANGE.

LOAN ASSOCIATIONS. See BUILDING AND LOAN ASSOCIATIONS.

LOGS. See also NUISANCES, 4.

The contention that a boom in a river was maintained in violation of law, and was a public nuisance interfering with steamboat 39 L. R. A.

navigation, will not constitute a defense against payment of just and reasonable compensation for catching and preserving ties, lumber, etc., therein to the benefit of the owner thereof, where he acquiesced and even assisted the owner of the boom in maintaining it. *Miller v. Hare* (W. Va.) 491

NOTES AND BRIEFS.

Logs; right to construct log booms:—In general; boom must not block up stream; liability for injury caused by boom; boom on property of third person; recovery for injury to boom; right of action against boom owner; charter power; acquisition of property by eminent domain; governmental control. 491

MALICIOUS PROSECUTION.

1. An action before a court without jurisdiction of the subject-matter is not the basis of an action for malicious prosecution. *Vinson v. Flynn* (Ark.) 415

2. A want of probable cause is necessary to a cause of action for malicious prosecution. *Id.*

MANACLES. See CRIMINAL LAW, 2-4.

MANDAMUS.

The validity of the original cause of action cannot be questioned in a mandamus proceeding to enforce performance of a judgment. *Sherman v. Langham* (Tex.) 258

MANDATORY INJUNCTION. See INJUNCTION, 4.

MASSES. See also CHARITIES, 1.

NOTES AND BRIEFS.

Masses; validity of bequest for. 205

MASTER AND SERVANT. See also CONTRACTS, 10; COUNTIES, 4; ELECTRIC USES AND APPLIANCES, 3; TRADEMARK, 3.

The failure of a quarry foreman to give warning of a blast, as it was his duty to do, in time to permit the workmen to get out of danger, is imputable to the employer, and is not one of the risks assumed by the employee. *Belleville Stone Co. v. Mooney* (N. J. Err. & App.) 834

NOTES AND BRIEFS.

Master and servant; foreman as fellow servant. 834

MAXIMS.

1. Res ipsa loquitur. *Snyder v. Wheeler Electrical Co.* (W. Va.) 499

2. Sic utere tuo ut alienum non lædas. *Smith v. Clarke Hardware Co.* (Ga.) 607

3. Where one of two innocent persons must suffer from the wrongful act of another, the loss must fall upon the one making the act possible. *Walsh v. Hunt* (Cal.) 697

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Maxims; as to which of two innocent persons must suffer. 95

MEDICAL BOOKS. See TRIAL, 3.

MENTAL ANGUISH. See DAMAGES, 1.

MILEAGE. See CONSTITUTIONAL LAW, 15.

MINES. See also ADVERSE POSSESSION; EVIDENCE, 5; INFANTS, 2; LIFE TENANT, 1; PARTITION, 1.

1. Natural gas is a mineral within a reservation of minerals by deed. *Murray v. Allard* (Tenn.) 249

2. Petroleum oil is a mineral within a reservation by deed of "all mines, minerals, and metals in and under the land." *Id.*

3. Petroleum oil as it is found in the cavities of the rock is part of the realty and embraced in the comprehensive idea which the law attaches to the word "land." *Wilson v. Hughes* (W. Va.) 292

4. Petroleum oil is a mineral, and while in the earth forms parts of the realty; but when it reaches a well and is produced on the surface it becomes personal property and belongs to the owner of the well. *Kelley v. Ohio Oil Co.* (Ohio) 765

5. An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of giving the lessors a certain per cent thereof, is in legal effect a sale of a portion of the land and the proceeds represent the respective interests of the lessors in the premises. *Wilson v. Hughes* (W. Va.) 292

6. Whether petroleum percolates through the rock or exists in pools or deposits, it forms a part of that tract of real estate in which it lies for the time being; but when it leaves one tract and enters another it becomes a part of the realty of the latter, so that the owner of the former loses all right to the oil while it remains away from his land. *Kelley v. Ohio Oil Co.* (Ohio) 765

7. Neither a landowner nor one acquiring oil rights in his lands has a right of action because of the drilling and operation of wells upon adjoining lands which draw the oil from his lands, but his remedy is to drill wells along and near the division line so as to prevent the passage of such oil. *Id.*

NOTES AND BRIEFS.

Mines; right to drill oil wells. 766

MONEY. See BONDS, 1.

MONOPOLY. See PUBLIC IMPROVEMENTS.

MORPHINE. See CRIMINAL LAW, 1.

MORTGAGE. See also CONFLICT OF LAWS, 2; INSURANCE, 9; RECEIVERS, 5, 7.

1. A trust deed executed in a fictitious name by the real owner of the property, whose own Christian name was used as the name of a fictitious person, and who had previously 89 L. R. A.

made a void deed of the property, using the same name as that of the grantee, is binding on the maker, when he intended it to take effect as security for bonds issued therewith and transferred by him as security for his own debt. *Wohl v. Robertson* (Tenn.) 423

2. A claim for funeral expenses of a mortgagor of land is not entitled to priority over the lien of the mortgage, under Ky. Stat. § 3868, providing that if the personal estate of a decedent is not sufficient to pay his liabilities the burial expenses shall be paid in full "before any *pro rata* distribution shall be made." *Milward v. Shields* (Ky.) 506

3. The lien of a mortgage on land is not affected by the act of the mortgagor to whom the mortgagee handed the mortgage at the former's request for the purpose of inspection only, in secretly and fraudulently substituting in its place a copy thereof, and forging upon the original an entry of satisfaction, by means of which he procures the cancellation of the record of the mortgage, where the mortgagee reposed no trust or confidence in the mortgagor and had no reason to suspect his fraudulent design, and was not negligent in failing to detect the fraud at the time of its perpetration or thereafter, even though the land has been purchased by a third person in the honest belief that the mortgage has been actually satisfied. *Luther v. Clay* (Ga.) 95

4. A warehouse receipt is subject to a statute respecting the acknowledgment and recording of an assignment of goods by way of mortgage, when the receipt is issued by a debtor upon his own property in his own possession, as a pledge to secure his debt. *Franklin Nat. Bank v. Whitehead* (Ind.) 725

NOTES AND BRIEFS.

Mortgages; fictitious names as affecting validity of. 423

MUNICIPAL CORPORATIONS. See also ANIMALS, 2, 4; BONDS; CONSTITUTIONAL LAW, 19-21; CONTRACTS, 2; COUNTIES, 5; COURTS, 5; NUISANCES, 1, 2; PUBLIC IMPROVEMENTS; STREET RAILWAYS; STREET SPRINKLING, 1; TAXES, 9.

1. All valid ordinances must fix the duty and liability of the citizen by certain intelligible, prescribed rules by which he may govern himself without being subject to an unregulated official discretion. *St. Louis v. Heitzberg Packing & P. Co.* (Mo.) 531

2. An ordinance prohibiting the maintenance of an awning over a sidewalk "except the same be upon a suitable frame," without specifying what should be a suitable frame, or delegating the power to determine the question to any person or tribunal, is void for uncertainty. *State v. Clarke* (Conn.) 670

3. An ordinance requiring the sprinkling of streets "in some reasonable manner" by a street-car company is void for indefiniteness, when it does not indicate how the work shall be done, how often it shall be done, or the capacity of the sprinklers. *State v. New Orleans C. & L. R. Co.* (La.) 619

See also STREET SPRINKLING.

4. An ordinance to prevent cruelty to animals is a valid exercise of a power to pass ordinances to prohibit nuisances. *State v. Karstendiek* (La.) 520

5. A municipal corporation cannot hold the title as trustee on a dedication of land for a church lot or for religious purposes. *Maysville v. Wood* (Ky.) 93

6. No delegation of any municipal power, legislative or other, which involves municipal duty, is made by a lease of city gas works. *Baily v. Philadelphia* (Pa.) 837

7. The legislature cannot delegate the power to fix and determine the amount of a tax for a public library, which must be levied by the common council to a board which is not chosen by, and directly responsible to, the taxpayers, unless the people assent thereto. *State, Howe, v. Des Moines* (Iowa) 285

8. Consent to the levying by a board of a tax for a public library is not given by a vote adopting a statutory plan for such library by which the tax is to be levied by the common council, although the board subsequently provided for is to be appointed by the mayor with consent of the council. *Id.*

9. The supplying of gas for lighting purposes is not a municipal duty, either inherent or under the Pennsylvania act of 1885, which regulates the exercise of the municipal power on this subject. *Baily v. Philadelphia* (Pa.) 837

10. A lease of city gas works is not an interference with the executive functions of the department of public works, within the prohibition of Pa. act of June 1, 1885, art. 16, although by that statute the gas works are under the direction, control, and administration of that department. *Id.*

11. The inability of a common council to bind the discretion of its successors for a term of years, in respect to a municipal or governmental function, does not extend to a lease of city gas works in respect to which the city acts in a business capacity only. *Id.*

12. A provision of an ordinance leasing city gas works, that the city will not in any way interfere with, limit, restrict, or imperil the exclusive right thereby vested in the gas company, does not create a monopoly against public policy, where the franchise of the lessee is derived from the legislature, and not from the city, and it merely makes the privilege exclusive so far as the city is concerned. *Id.*

NOTES AND BRIEFS.

See also NUISANCES.

Municipal corporations; power of, to act as trustee. 93

Police power as to health. 266

Letting contract to monopolist. 482

Delegation of power of; surrender of discretion of; ownership of gas works. 838

NAME. See also DEED; MORTGAGE, 1.

NOTES AND BRIEFS.

Use of fictitious name as affecting validity of instrument:— (I.) Of contractors, grantors, and mortgagors; (II.) of grantees, patentees, 39 L. R. A.

mortgagees, and transferees; (III.) of makers and drawers of negotiable paper; (IV.) of payees: (a) in promissory notes; (b) in bills of exchange, checks, and drafts. 428

NATURAL GAS. See MINES, 1.

NEGLIGENCE. See also CARRIERS, 11; ELECTRICAL USES AND APPLIANCES, 4; ELEVATORS; EVIDENCE, 6-8; HIGHWAYS, 5-7; LANDLORD AND TENANT, 1-3; TRIAL, 6-8.

1. Negligence is relative, and cannot exist independently of some imposed or implied correlative duty essentially related to the particular circumstances. *Baltimore City Pass. R. Co. v. Nugent* (Md.) 161

2. Recovery cannot be had for an injury inflicted by the head of an ax falling from a door in the fifth story of a building into the areaway below if it flew from the handle while it was being used by a competent person who had used due care in inspecting the instrument and found no defect in it. *Stearns v. Ontario Spinning Co.* (Pa.) 842

3. Negligence in the sale of cartridges different from those which are asked for but similar in appearance renders the seller liable to the purchaser for damages caused by a premature explosion of the cartridges while he is properly using them. *Smith v. Clarke Hardware Co.* (Ga.) 607

4. Contributory negligence will prevent a recovery under a statute making one driving on a highway liable for the damages caused by his failure to turn to the right upon meeting another vehicle. *Cook v. Fogarty* (Iowa) 488

5. No duty rests upon one driving on a highway to turn out until he knew, or with reasonable care could have known that someone was approaching, under a statute making one failing to turn out liable for the damages resulting therefrom. *Id.*

6. Absence of negligence in failing to turn out upon meeting a traveler upon the highway in the night is shown by the fact that the driver was watching the horse and the road in advance for the purpose of seeing anyone who might be on the road, and did not see or hear anyone until a collision occurred. *Id.*

7. Negligence in failing to turn to the right upon meeting a traveler on the highway is not established by the mere fact that it would have been possible to discover his approach in time to do so. *Id.*

NOTES AND BRIEFS.

Negligence; in violation of ordinance; as to licensee. 113

In collision on highway. 488

In use of dangerous article. 607

NEW TRIAL. See also APPEAL AND ERROR, 29.

1. The inability of a juror to read or write the English language, which is not known to the defendant in a prosecution until after the trial, does not entitle the latter to a new trial. *State v. Pickett* (Iowa) 302

2. Failure to challenge a juror for cause as to his competency, and to examine him or other witnesses in support of the challenge, is a waiver of the right of challenge, though the fact of incompetency is not known to the party until after the trial. *Id.*

NOTES AND BRIEFS.

New trial; for incompetency of juror. 802

NEXT FRIEND. See APPEAL AND ERROR, 2.

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NOISE.

NOTES AND BRIEFS.

On street, as a nuisance. 672

NOTICE. See INSURANCE, 10.

NUISANCES. See also ANIMALS, 2; CASE, 2; INJUNCTION, 3; LOGS; MUNICIPAL CORPORATIONS, 4; PLEADING, 4, 5; STREET RAILWAYS, 1.

1. General power of a city to declare, prevent, and abate nuisances does not include the power to declare that nuisance which is not so in fact. *St. Louis v. Heitzberg Packing & P. Co. (Mo.)* 551

2. An ordinance declaring the emission of dense black or thick gray smoke to be a nuisance, without any limitation as to the length of time it is emitted, or as to whether it is in fact a nuisance or not, and without providing for any inquiry as to these matters, is not within the general power of a city to declare, prevent, and abate nuisances. *Id.*

3. Pollution of the water of a river by means of refuse from a saw mill, so as to destroy the fish therein, is a nuisance. *People v. Truckee Lumber Co. (Cal.)* 581

4. One who does not suffer a special and peculiar damage from the erection of a boom in a navigable stream contrary to law, making a public nuisance, cannot complain of it in a private action. *Miller v. Hare (W. Va.)* 491

NOTES AND BRIEFS.

Nuisance; municipal control over smoke as. 551

Municipal control over public nuisances upon public streets and highways created by street railroads and other electrical companies:—(I.) Street railroads; (II.) telegraph and electrical poles, etc.; (III.) steam and electricity. 609

Municipal power as to nuisances affecting public morals, decency, peace, or good order:—(I.) Nuisances affecting public morals and decency: (a) in general; (b) houses of ill fame, etc.; (c) gambling; (d) bowling alleys; (e) drunkenness; (II.) nuisances affecting public peace and good order: (a) in general; (b) intoxicating liquors; (c) public amusements. 520

Municipal power over nuisances affecting highways and waters:—(I) In general; (II.) removal of garbage, etc.; (III) obstruction of, 89 L. R. A.

and encroachments on streets: (a) in general; (b) stalls, showcases, signboards, etc.; (c) buildings and fences; (d) things overhanging streets, etc.; (e) trees on streets: (IV.) nuisances relating to the use of streets: (a) parades and noise on streets; (b) animals running at large; (c) vehicles; (d) selling on streets; (e) sliding in the streets; (f) sidewalks; (g) gas pipes; (h) convict labor on the streets; (i) betting on streets: (V.) water, watercourses, etc. 649

OFFICERS. See also CONSTITUTIONAL LAW, 6.

1. One who has surrendered or vacated one office by accepting another cannot be restored to any right or title under the first by subsequently resigning the second. *Bishop v. State, Griner (Ind.)* 278

2. Erroneous advice by a city attorney to the police justice as to his power to arrest an alleged fugitive from justice will give the justice no right of action over against him in case recovery is had against the justice, although he acts out of the line of his duty and apparently in ignorance of the law. *Glaser v. Hubbard (Ky.)* 210

NOTES AND BRIEFS.

Officers; liability of county for damages by default of. 74

OIL. See INFANTS, 2; LIFE TENANT, 1; MINES, 2-7.

OPINIONS. See EVIDENCE, NOTES AND BRIEFS.

ORDINANCE OF 1787.

The ordinance of 1787, passed by the Congress of the Confederation of the government of the Northwest Territory, has no force in Illinois except so far as its principles are embodied in the state Constitution. *Dixon v. People (Ill.)* 116

ORIGINAL PACKAGES. See COMMERCE, 3-5, NOTES AND BRIEFS.

PARADES.

NOTES AND BRIEFS.

As nuisance in street. 672

PARENT AND CHILD. See also DESCENT AND DISTRIBUTION.

The consent of the natural parents or guardian of a child to its adoption is not required by 1 Wag. (Mo.) Stat. p. 256, § 1. *Clarkson v. Hatton (Mo.)* 748

NOTES AND BRIEFS.

Parent and child; status of adopted child. 748

PARLIAMENTARY LAW.

The right of the auditor to give a casting vote in case of a tie on a vote by township trustees to fill a vacancy in the office of county superintendent, under Ind. Rev. Stat. 1894, § 5900, is not limited to a case in which there

has been a tie vote by ballot for such officer, but extends to a tie on a *viva voce* vote on a motion or resolution preliminary to making the appointment or a motion to appoint. *State, Morris, v. McFarland* (Ind.) 282

PARTICULAR SERVICES. See CONSTITUTIONAL LAW, 6.

PARTIES. See ACTION OR SUIT, 5; PARTITION, 2; RECEIVERS, 8.

PARTITION. See also DOWER; EVIDENCE, 5.

1. A parol partition of land may be limited to the surface, and does not, as matter of law, extend to coal in the ground if the intent was to retain this in common. *Byers v. Byers* (Pa.) 587

2. The interest of a woman in an undivided share of real estate held by her husband in common with others, which is contingent on her surviving him, does not bring her within the provisions of a statute authorizing persons to be made parties to partition proceedings who are "necessary to complete determination or settlement of the questions involved,"—especially where there is no authority to award her any of the proceeds of the sale. *Haggerty v. Wagener* (Ind.) 384

3. Land all of which is subject to an easement of a right of way is nevertheless subject to partition, if owned in common, under Mass. Pub. Stat. chap. 178, § 1, providing that "tenants in common may be compelled to divide." *Crocker v. Cotting* (Mass.) 215

4. An agreement that the land should remain in common and not be partitioned is not implied on the purchase in common of land subject to an easement already belonging to the purchaser. *Id.*

NOTES AND BRIEFS.

Partition; agreement to retain land in common. 205
Of minerals under surface. 537

PARTNERSHIP. See also CORPORATIONS, 9.

A rule of a partnership association excluding the right of a member to purchase additional shares and exercise the rights of a member in respect of them until he shall be re-elected to membership in respect of those shares is valid under Pa. act June 25, 1885, providing that interests in such associations shall be personal estate and transferred under such rules and regulations as the associations prescribe. *Carter v. Producers' Oil Co.* (Pa.) 100

NOTES AND BRIEFS.

Partnership; limited, nature of. 104

PASS. See CARRIERS, 3.

PATENTS. See also CONTRACTS, 13, 14.

The owners of distinct patents have no right by virtue of their grants to combine for the purpose of restraining competition and trade.

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National Harrow Co. v. Hench (C. C. App. 3d C.) 299

NOTES AND BRIEFS.

Patents; liability of county for infringement. 73

PENALTY. See CONTRACTS, 11.

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PHYSICIANS. See CONTEMPT, 1.

PILOT.

Placing 25 tons of coal as ballast in the hold of a vessel of 700 or 800 tons' burden which is loaded with lumber does not bring her within the provisions of the Maryland law, exempting from pilot fees vessels laden in whole or in part with coal or coke mined in the United States. *Clayton v. Hebb* (C. C. App. 4th C.) 177

NOTES AND BRIEFS.

Pilots; liability of vessel or owner for compulsory pilotage fees:—(I.) What constitutes compulsory pilotage; (II.) consideration and construction of provisions for: (a) generally; (b) exemptions; (III.) effect of constitutional restrictions; (IV.) effect of national prohibition against discrimination; (V.) effect of national provision for waters between states; (VI.) effect of Federal licenses and license laws; (VII.) conditions of liability: (a) necessary qualifications of pilot; (b) tender of services; (c) refusal of services tendered; (d) first pilot offering; (e) proper destination; (VIII.) outward-bound pilotage; (IX.) to whom and what the liability attaches; (X.) the amount or rate. 177

PIPE LINE. See GAS.

PLEADING. See also APPEAL AND ERROR, 27; EVIDENCE, 28-30; TRESPASS, 2.

1. An averment is not objectionable because made on information and belief. *Drennen v. Mercantile Trust & D. Co.* (Ala.) 623

2. An averment of the receipt of "about \$40,000" is not insufficient for indefiniteness. *Id.*

3. An allegation that the neglect to pay over money collected for an employer was with the intent to defraud does not change the neglect into a tort. *Royce v. Oakes* (R. I.) 845

4. A declaration for a private nuisance need not allege special damage, but a general claim for damages will sustain a recovery of such actual damages as are the natural and proximate consequence of the wrong. *Sullivan v. Waterman* (R. I.) 778

5. An allegation that acts constitute a nuisance is not necessary where the acts, as stated, amount to a nuisance in fact and in law. *Id.*

6. An allegation of a threat to "change the grade" of a street is fairly construed to mean a physical grading of the street, and not merely an ordinance establishing the grade. *Searle v. Lead* (S. D.) 345

7. The exception in favor of a postmaster whose annual compensation does not exceed \$90, in Ind. Const. art. 2, § 9, prohibiting a person from holding more than one lucrative office at the same time, must be negatived in an allegation that a person holding another office has forfeited it by becoming a postmaster. *Bishop v. State, Griner* (Ind.) 278

8. A purchaser seeking to avoid the general rule that mere representations of value do not constitute actionable deceit must allege the specific facts which bring him within one of the exceptions to the rule. *Gustafson v. Rustmeyer* (Conn.) 644

9. The statute of limitations must be invoked by plea or answer in order to be available as a defense. *Duckett v. National Mechanics' Bank* (Md.) 84

10. Striking out a defendant's answer to punish him for contempt is not authorized by U. S. Rev. Stat. § 725, which restricts such punishment to fine or imprisonment. *Hovey v. Elliott* (N. Y.) 449

11. The filing of a second traverse of an answer is not necessary in case the answer after having been traversed was withdrawn for the purpose of a motion to dismiss the petition, and refiled when the motion was dismissed. *Henderson v. McClain* (Ky.) 349

12. A general demurrer to a bill in equity is properly overruled, if the bill as a whole states facts entitling the plaintiff to relief. *Miller v. Hure* (W. Va.) 491

PLEDGE. See WAREHOUSEMEN, 2.

POLES. See EJECTMENT, 1; ELECTRICAL USES AND APPLIANCES, 2; EMINENT DOMAIN, 6.

POLICE JUDGE. See FALSE IMPRISONMENT.

PORK. See CONSTITUTIONAL LAW, 20.

POSTOFFICE. See also PLEADING, 7.

The postmaster of a local postoffice is a "deputy postmaster" within the meaning of Ind. Const. art. 2, § 9, providing that the office of a deputy postmaster whose compensation does not exceed \$90 per annum shall not be deemed lucrative within the provision respecting the right to hold other offices. *Bishop v. State, Griner* (Ind.) 278

POWDER. See CARRIERS, 11.

POWERS. See HUSBAND AND WIFE, 1-3.

PRINCIPAL AND AGENT. See also ALTERATION OF INSTRUMENTS, 1, BILLS AND NOTES; EVIDENCE, 16; FORGERY.

Agencies representing a church committee for the express purpose of enforcing subscriptions have no authority to vary the terms of the contract of a subscriber. *Rogers v. Galloway Female College* (Ark.) 686

PRINCIPAL AND SURETY. See also CONTRACTS, 4; EVIDENCE, 25, 26.

Sureties are released from their liabilities on a note made to raise money by discount

by the fact that the nominal payee who was to make the discount never gave or received anything for the note, but merely indorsed in blank without recourse when a third person advanced the money on it. *Greenville v. Ormand* (S. C.) 847

NOTES AND BRIEFS.

Principal and surety; statute of frauds as to contract between sureties. 378

Release of surety by change of contract. 850

PRISON.

NOTES AND BRIEFS.

Liability of county for escape from. 33

PRISONER. See GARNISHMENT.

PRIVATE ACTION. See NUISANCES, 4.

PROBABLE CAUSE. See MALICIOUS PROSECUTION, 2.

PROCESS. See WRIT AND PROCESS.

PROXIMATE CAUSE.

The forgery is the proximate cause of the injury to an innocent holder, where an obligation is unlawfully raised by an agent of the maker, although the latter may have been negligent in signing the instrument in such condition as to facilitate the successful perpetration of its fraudulent alteration. *Walsh v. Hunt* (Cal.) 697

PUBLIC IMPROVEMENTS.

An ordinance precluding competition for a street-paving contract, by requiring the use of asphaltum which can be obtained only from premises owned and controlled by one private corporation, is void as against public policy in creating a monopoly, although the ordinance provides that the work shall be awarded to the lowest responsible bidder. *Fishburn v. Chicago* (Ill.) 483

NOTES AND BRIEFS.

Public improvements; liability of county for injuries to real property from. 33

PUBLIC LANDS. See WATERS, 3, 4.

PUBLIC MONEY.

A county exhibit at the Trans-Mississippi and International Exposition to be held in the city of Omaha in 1898, and the erection and maintenance of suitable buildings therefor, is for a public purpose or use, and a sale of bonds and an appropriation therefor is not in violation of the Constitution. *State, Douglas County v. Cornell* (Neb.) 513

NOTES AND BRIEFS.

Public money; lawfulness of use of. 513

PUBLIC MORALS. See NUISANCES, NOTES AND BRIEFS.

QUARRY. See MASTER AND SERVANT.

QUASHING. See APPEAL AND ERROR, 3.

QUO WARRANTO. See CORPORATIONS, 7.

RAILROADS. See also EVIDENCE, 19; JUNCTION, 4; TAXES, 8.

1. "The completion" of a railroad, within the meaning of N. C. Code, § 1996, authorizing counties to subscribe to stock to "aid in the completion" of a railroad, applies only to roads the building of which has begun. *Stanley County v. Snuggs* (N. C.) 439

2. A switch about a mile from a railroad depot to which a switch engine runs frequently and at irregular intervals without receiving orders as against other trains, is within depot grounds or yard limits so that it is not required to be fenced. *Rabidon v. Chicago & W. M. R. Co.* (Mich.) 405

3. A fence on one side of a railroad in front of a dwelling house, to prevent children from getting on the track cannot be required of a railroad company at a place at which it is not required to build a statutory fence with cattle guards and wing fences because it is within depot grounds or yard limits. *Id.*

4. The distance from depots and the frequency of use for switching purposes do not control in determining whether a certain point on a railroad a mile distant from the depot is or is not within the depot grounds or yard limits, so as to be exempt from the statutory provision as to fencing the railroad. *Id.*

5. A license to use a railroad track as a footpath may be found from the facts that it had been so used for a number of years to the extent that plainly visible paths had been worn upon the ground, and that a ladder had been placed from the highway to reach the road-bed with the knowledge of the employees of the road, to which no objection had been made. *Thomas v. Chicago, M. & St. P. R. Co.* (Iowa) 399

6. Implied assent by a railroad company to the use of its tracks as a footpath will impose upon its employees the duty of exercising care, diligence, and watchfulness to discover if persons are on the track at that point, when running trains which will be likely to injure them if there. *Id.*

NOTES AND BRIEFS.

Railroads; right of counties to subscribe to stock of. 439

Places which must be fenced. 405

RATIFICATION. See BANKS, 4; COUNTIES, 2.

REAL PROPERTY. See also MINES, 3.

NOTES AND BRIEFS.

Real property; registration of forged instrument. 95

RECEIVERS. See also ASSIGNMENT; BANKS, 7; BUILDING AND LOAN ASSOCIATIONS, 3; EMBEZZLEMENT.

1. A receiver of a trading corporation may be appointed pending litigation over the man- 89 L. R. A.

agement and conduct of its business, when its affairs have come to a deadlock because of dissensions between two families each of which owns one half of the capital stock. *Sternberg v. Wolff* (N. J. Err. & App.) 762

2. Employees of a corporation in the hands of a receiver on foreclosure of a mortgage have a perfect equity to priority of payment for wages earned within six months before the receiver's appointment, when the funds from which they ought to have been paid have been used for the benefit of bondholders, even if the terms of the mortgage embrace income. *Drennen v. Mercantile Trust & D. Co.* (Ala.) 623

3. The public character of a corporation is not an element of the equity in favor of the priority of claims against a receiver for wages when earnings which should have been applied to them have been wrongfully diverted for the benefit of bondholders; but a manufacturing company or a mining company is subject to the rule as much as a railroad company. *Id.*

4. Claims [for the purchase price of the products of a corporation constituting a part of its gross earnings, and a part of which represents the labor of employees, constitute, in the hands of a receiver, a class of assets to which employees whose wages earned within six months are still unpaid have a claim prior to that of bondholders on foreclosure. *Id.*

5. Labor necessary to the continuation of the business of a corporation does not entitle the workmen to priority [of payment out of the assets of a receiver on foreclosure of a mortgage, if the labor is not shown to have been to the advantage of the bondholders or necessary in conservation of their interests, or if the receiver has not realized any income out of which the wages should be paid. *Id.*

6. Mere casual and incidental repairs to remedy defects caused by current use are not improvements or betterments within the rule which gives priority to wages out of the assets of a receiver of a corporation when funds that should have been used to pay wages have gone into improvements. *Id.*

7. A receiver may avoid an assignment of goods by way of mortgage, made by a corporation, on the ground that it was not recorded within the time required by law in order to make it valid "as against any other person than the parties. *Franklin Nat. Bank v. Whitehead* (Ind.) 725

8. A general creditor has the right to intervene in case of a receivership, and contest the validity, as well as the priority, of other claims or asserted liens. *Id.*

NOTES AND BRIEFS.

Receivers; as agents. 860

REFERENCE. See APPEAL AND ERROR, 8.

RELEASE. See CONTRACTS, 7.

RELIGIOUS SOCIETIES. See CONTRACTS, 9; MUNICIPAL CORPORATIONS, 5; PRINCIPAL AND AGENT.

REPLEVIN.

A seller of goods purchased under fraudulent representations may maintain replevin, notwithstanding payments by the purchaser generally upon account, without returning or tendering the amount paid, where the purchaser has sold an amount of the goods fraudulently purchased exceeding the aggregate of the payments both in the invoice value and in the amount realized from the sale. *John V. Farwell Co. v. Hilton* (C. C. E. D. Wis.) 579

• **NOTES AND BRIEFS.**

Replevin; for goods fraudulently purchased; restoration to other party. 579

RESUME.

For resumé of contents of book, see 865

RIVERS. See EVIDENCE, 1.**SALE.** See also REPLEVIN.

The retaking by a vendor, as owner, of property sold by conditional sale with a reservation of title, and the giving of credit to the vendee for one half the invoice price of the property, retaining the instalments of purchase price paid, as the contract allowed, for the use of the property, will preclude an action for the balance of the purchase price on a note therefor, where this provides that the property may be retaken, and also that a suit on the note shall not waive the vendor's title to the property. *Perkins v. Grobden* (Mich.) 815

NOTES AND BRIEFS.

Sales; conditional; remedies of vendor. 815

SCHOOLS. See also TAXES, 10.

1. School directors and boards of education have no authority to exclude children from public schools for refusal to submit to vaccination, unless in cases of emergency in the exercise of police power it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox. *Potts v. Breen* (Ill.) 152

2. It will not be supposed that the legislature has by mere implication conferred on an administrative board power to require vaccination as a condition precedent to the exercise of the constitutional and statutory right of a child to attend school. *Id.*

3. Power to require children to be vaccinated as a condition of attending school is not given to a board of health by a statute providing that it shall have general supervision of the interests of health and life of the citizens, and shall have authority to make such rules and regulations as it may from time to time deem necessary for the preservation or improvement of the public health, when the remainder of the statute imposes and confers specific duties and powers by which the general language of the statute is limited. *Id.*

4. A contract of employment of a school superintendent is deemed to be for a year, unless there is something to show that it is for a less term. *Freeman v. Bourne* (Mass.) 510
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5. There is an implied condition which authorizes the dismissal of a school superintendent, if circumstances arise which render him no longer able or fit to perform the duties of his position. *Id.*

6. The joint committee of towns which united under Mass. Stat. 1892, chap. 344, to employ a superintendent of schools and obtain a contribution therefor from the commonwealth, has authority to dismiss the superintendent for sufficient cause, and its authority does not cease with obtaining the contribution and employing the superintendent. *Id.*

7. The indictment of a school superintendent for adultery, and especially a verdict of guilty, will justify his dismissal, although the verdict is afterwards set aside and the prosecution dismissed, since not only good character, but good reputation, is essential to the greatest usefulness in his position. *Id.*

8. The right of women to vote at a school meeting for a director of a district, as provided by Or. Sess. Laws 1891, p. 130, is not precluded by Or. Const. art. 2, § 2, limiting the right to vote "at all elections authorized by law" to male citizens, as this is construed with the constitutional provision giving the legislature power to provide a system of common schools. *Harris v. Burr* (Or.) 763

NOTES AND BRIEFS.

Schools; requiring vaccination of pupil. 152
Right to discharge teacher or officer. 510
Voted by women at school elections. 763

SEARCH. See EVIDENCE, 15.**NOTES AND BRIEFS.**

Of house or person of prisoner. 269

SET-OFF AND COUNTERCLAIM.

1. A definition of what a counterclaim is, and not a mere rule for pleading counterclaims, is stated by Cal. Code Civ. Proc. § 438. *Ainsworth v. Bank of California* (Cal.) 686

2. The immaturity of a debt at the time of the debtor's death does not prevent it from being set off against a claim due to the estate, if it is mature at the commencement of the action, as prescribed by Cal. Code Civ. Proc. § 438. *Id.*

3. A counterclaim for damages to the freehold may be set up as connected with the subject of the action, when the defendant in trespass *quare clausum* asserts title to the land. *Stillwell v. Duncan* (Ky.) 863

NOTES AND BRIEFS.

Set-off; against estate of decedent. 686

SHEEP. See COMMERCE, 2; CONSTITUTIONAL LAW, 16; TAXES, 5-7.**SHIPPING.** See PILOTS, NOTES AND BRIEFS.**SHOWCASES.****NOTES AND BRIEFS.**

On sidewalk, as a nuisance. 661

SIDEWALKS.

Nuisance on, see NUISANCES, NOTES AND BRIEFS.

SIGNBOARDS.

NOTES AND BRIEFS.

As a nuisance in street. 661

SLIDING.

NOTES AND BRIEFS.

In street, as a nuisance. 679

SMOKE. See NUISANCES, 2, NOTES AND BRIEFS.

SPECIFIC PERFORMANCE. See also EVIDENCE, 81.

Specific performance of an agreement not to harass a person by suits upon claims which are thereby released may be enforced when a defense of the actions at law would not be an adequate remedy because the actions, although unsuccessful, might damage his reputation by the charges on which they were based. *Bomeister v. Forster* (N. Y.) 240

STALLS.

NOTES AND BRIEFS.

On sidewalk, as a nuisance. 661

STARE DECISIS. See COURTS, 6.

STATUTE OF FRAUDS. See CONTRACTS, 4.

STATUTES. See also EVIDENCE, 2, 12.

1. The failure to enter on a legislative journal the yeas and nays on the second and third readings of a bill authorizing a tax is absolutely fatal to the validity of the act under N. C. Const. art. 2, § 14, which expressly requires such entry. *Stanley County v. Snuggs* (N. C.) 439

2. There is sufficient unity of object in a statute entitled "An Act Relative to Societies for the Prevention of Cruelty to Animals; Their Organization, Their Officers, Members and Agents, and the Fines Collected. . . . and the Duties of Municipal Corporations with Respect Thereto." *State v. Karstendiek* (La.) 521

3. Special provisions relating to a particular subject-matter will prevail over general provisions when statutes are conflicting. *State, Douglas County, v. Cornell* (Neb.) 513

4. Reference to laws repealed is not necessary in a statute which repeals them only by necessary implication. *State v. Henley* (Tenn.) 126

5. Existing riparian rights are not affected by Wash. Laws 1878, p. 520, regulating irrigation and water rights. *Benton v. Johncox* (Wash.) 107

6. A statute providing for disbarment of an attorney when he has been convicted of felony or misdemeanor involving moral turpitude is not repealed by a subsequent one 89 L. R. A.

authorizing his disbarment for cause shown, although one section of the latter statute provides that when he is charged with embezzlement or other professional misconduct he shall be ordered to show cause why he shall not be disbarred and the matter shall be referred to a committee for rehearing. *Re Kirby* (S. D.) 856

7. A statute making different provisions for the collection of taxes on different kinds of property is not special, if the classification is based upon intrinsic differences requiring different regulations. *Rode v. Siebe* (Cal.) 342

NOTES AND BRIEFS.

Statutes; general words as affected by particular ones. 218

STEAM.

NOTES AND BRIEFS.

Use of, in street, as a nuisance. 621

STOCK AND PRODUCE EXCHANGE.

A by-law of a live-stock exchange limiting the number of solicitors that any member shall employ, with a provision for its enforcement by fines, suspension, or expulsion from membership, is an unlawful restriction on freedom of trade and business. *People, McIlhany, v. Chicago Live-Stock Exch.* (Ill.) 373

STREET RAILWAYS. See also CARRIERS, 6-8; COURTS, 4; EMINENT DOMAIN, 6, 8, 9; STREET SPRINKLING.

1. Turnouts built by a street-railway company in pursuance of permission granted by a city ordinance granting permission to the company to lay its tracks on specified streets and construct necessary switches and turn-outs are not such obstruction of the street as to warrant their summary and forcible removal by police intervention without notice or a hearing, unless it clearly appears that the authority has been exceeded. *Cape May v. Cape May, D. B. & S. P. R. Co.* (N. J. Err. & App.) 609

2. A resolution by a city council declaring the turnouts of a street railway to be an unlawful obstruction, and directing the street committee to employ counsel and take legal measures to remove it, is not unreasonable, although permission had been granted by a city ordinance for the company to lay its tracks and construct all necessary turnouts. *Id.*

3. An ordinance directing the removal, without notice or a hearing, of a street-railway turnout 1,500 feet long, built in pursuance of an ordinance granting permission to the company to build necessary turnouts, is unreasonable, where two turnouts about 500 feet long had been built two years before and maintained without objection, and such turnouts had subsequently been connected by the construction of a turnout over the intervening 500 feet so as to make one continuous turnout. *Id.*

NOTES AND BRIEFS.

Street railroads; as nuisances. 609

STREETS. See HIGHWAYS.

STREET SPRINKLING. See also MUNICIPAL CORPORATIONS, 3.

1. An ordinance requiring streets to be sprinkled from curb to curb by a street-railway company which runs cars through the street is invalid because it is not equal and uniform, but imposes an unjust and oppressive burden. *State v. New Orleans City & L. R. Co. (La.)* 618

2. An ordinance which is unreasonable in its entirety because it attempts to compel a street-railway company to sprinkle the whole width of a street cannot be upheld in part so as to require the sprinkling of the track. *Id.*

SUBSCRIPTION. See CONTRACTS, 1, 7, 8; PRINCIPAL AND AGENT.**SUCCESSION TAX.** See CONSTITUTIONAL LAW, 8, 13, 18; TAXES, 11-13.**SUMMONS.** See WRIT AND PROCESS.**SUNDAY.** See INTOXICATING LIQUORS, 2.**SUPERINTENDENT.** See SCHOOLS, 4-7.**TAXES.** See also ASSUMPSIT, 2; CONSTITUTIONAL LAW, 8, 13, 18; COURTS, 2; MUNICIPAL CORPORATIONS, 7, 8; PUBLIC MONEY; STATUTES, 7.

1. Uniformity in an assessment for taxes and in the mode thereof exists if the same basis of valuation is taken as to all property of like character. *Kelley v. Rhodes (Wyo.)* 594

2. A statute authorizing taxes on personal property, not secured by lien on real property, to be collected at the time of making the assessment before equalization, before levy for the year, and before the beginning of the fiscal year to which they belonged, with a provision for subsequently collecting or refunding any difference between the amount collected and that which ought to be paid, is not unconstitutional for lack of uniformity, since there is sufficient difference between secured and unsecured taxes to justify the discrimination in the procedure. *Rode v. Siebe (Cal.)* 342

3. The collection of taxes at an earlier date on personal property unsecured by lien on real property than upon other property, although the taxpayer thus loses the use of his money earlier than other taxpayers do, does not violate Cal. Const. art. 13, § 1, requiring property to be taxed "in proportion to its value." *Id.*

4. A return of property for taxation in another state does not exempt it from taxation, in the absence of a statute to that effect, if the property is otherwise legally taxable under the laws. *Kelley v. Rhodes (Wyo.)* 594

5. Hearing and opportunity for review of an assessment for a tax on sheep under Wyo. act 1895 is not denied, since a provision therefor under Wyo. Rev. Stat. § 3846, is applicable in such cases. *Id.*

6. A herd of sheep driven through the state is not exempt from taxation as personal property in transit, if the purpose of driving is not merely transportation, but comprehends also that of grazing and feeding them upon the natural grasses, not as a mere necessary incident of the travel, but as one of the purposes of the movement. *Id.*

7. The existence of a purpose to obtain grazing for sheep united with the purpose of transportation, is to be determined from all the facts in each case, including the course, the character of the territory grazed upon, the time employed, the subsequent method of intended shipment, the ordinary facilities for transportation by other means, the place selected for commencing other transportation, and perhaps the time of year and the eventual purpose of their shipment. *Id.*

8. The cost of reproduction is the proper basis for local taxation of a railroad under a system by which the franchise and personal property are assessable at the principal office of the corporation, so that the real estate alone is subject to assessment by the local authorities. *People, Delaware, L. & W. R. Co., v. Clapp (N. Y.)* 237

9. A county is a "municipal corporation" within the meaning of the proviso of Wyo. Rev. Stat. § 3055, respecting actions against municipal corporations to recover back taxes actually paid over to such corporation. *Kelley v. Rhodes (Wyo.)* 594

10. State and school district taxes are collected for the "use and benefit" of the county within the meaning of the proviso of Wyo. Rev. Stat. § 3055, authorizing action to recover back a tax actually paid over to any municipal corporation for whose use and benefit it was levied or collected. *Id.*

11. The rule of uniformity is not violated by a succession tax which exempts every state less than \$7,500. *State, Gelsthorpe, v. Furnell (Mont.)* 170

12. A reasonable classification of property for taxation does not violate the rule of uniformity. *Id.*

13. The right to receive property, and not the property itself, is taxed by Mont. act March 4, 1897, imposing a tax on "all property" which shall pass by will or intestate laws, unless the estate is less than \$7,500. *Id.*

NOTES AND BRIEFS.

Taxes; legislative power as to; for what purposes. 513

Rule of local taxation of railroad. 237

On property in transit. 594

On inheritances; constitutionality of. 171

TELEGRAPHS. See also DAMAGES, 1; EJECTMENT, 1; EMINENT DOMAIN, 7.**NOTES AND BRIEFS.**

Telegraph poles and wires as nuisances in street. 619

TELEPHONES. See also ELECTRICAL USES AND APPLIANCES, 2-4.**NOTES AND BRIEFS.**

Telephone poles and wires as nuisances in street. 619

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NOTES AND BRIEFS.

Of fees to witnesses. 116

TICKET BROKERS. See CONTRACTS 12.

TIME. See LANDLORD AND TENANT, 7.

TORT. See PLEADING, 3.

TRADEMARK.

1. Organized labor may invoke the law to protect the fruits of its skill and handiwork from piracy and intrusion. *Hetterman v. Powers* (Ky.) 211

2. Unincorporated associations of workmen, although not manufacturers or vendors of goods, are within the protection of Mass. Stat. 1895 for the prevention of the use of counterfeit labels and stamps of "any person, association, or union." *Tracy v. Banker* (Mass.) 508

3. An employee whose skilled labor creates a demand for a commodity that secures for him higher remunerative wages has as definite a property right to the exclusive use of a particular label, sign, symbol, brand, or device, adopted by him to distinguish and characterize said commodity as the product of his skilled labor, as the merchant or owner has to the exclusive use of his adopted trademark on his goods. *Hetterman v. Powers* (Ky.) 211

4. Voluntary, unincorporated labor organizations, composed solely of practical cigar makers, are entitled to the protection of a label adopted by them against use by an unauthorized person, although they do not own the cigars to which their label is affixed. *Id.*

5. Other manufacturers of cigars are not attacked by the blue label of the cigar makers' international union, declaring that the cigars to which it is affixed "are not the product of an inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship." *Id.*

6. The fraudulent use of a trade union label before the passage of a statute giving such an unincorporated union a remedy for such use of its label does not give the wrongdoer any exemption from the statute. *Tracy v. Banker* (Mass.) 508

7. The illegality of some incident or particular of the purposes of a trade union will not deprive the union of the protection of the law for what would otherwise be its rights in respect to the use of a union label. *Id.*

8. The use of real labels in a fraudulent way is as unlawful, under Mass. Stat. 1895, chap. 462, as the use of counterfeit labels. *Id.*

NOTES AND BRIEFS.

Trademark; of trade union; protection of. 508

TRADE UNION. See TRADEMARK, 1-3, 5-7.

TREES.

NOTES AND BRIEFS.

On streets, as a nuisance. 670

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TRESPASS. See also LANDLORD AND TENANT, 12; SET-OFF AND COUNTERCLAIM, 3; TRIAL, 7.

1. One who enters upon his own land, and tears down a fence which has been built to inclose it by a person who wrongfully took possession of it, is not liable to an action for trespass, by the latter. *Stillwell v. Duncan* (Ky.) 868

2. The plea of *liberum tenementum* is available in an action of trespass *quare clausum fregit* brought by a person who was in actual possession of the land. *Id.*

TRIAL. See also APPEAL AND ERROR, 10, 28; CONSTITUTIONAL LAW, 3; CRIMINAL LAW, 2-4, NOTES AND BRIEFS.

1. An election for a trial by jury, required by the rules of court authorized by the amendment of 1892 to the Maryland Constitution, must be made by a separate and distinct act, and cannot be made by a demand in the declaration. *Baltimore City Pass. R. Co. v. Nugent* (Md.) 161

2. The trial court may receive evidence until the argument is concluded, whether in rebuttal or not. *Burt v. State* (Tex.) 305

3. Excerpts from standard works on medical jurisprudence cannot be read by counsel to the jury on the question of insanity in a murder trial. *Id.*

4. An hypothesis unsupported by evidence should not be submitted to the jury. *Baltimore City Pass. R. Co. v. Nugent* (Md.) 161

5. What acts, omissions, facts, and circumstances are competent evidence of damages to be considered by a jury are questions of law for the court, but whether they affect property and damage it, and the amount of such damages, are for the jury. *Jaynes v. Omaha Street R. Co.* (Neb.) 751

6. A question of the exercise of due care by persons driving a horse on a highway, which becomes frightened by the water from an open hydrant, is a question for the jury. *Topeka Water Co. v. Whiting* (Kan.) 90

7. Whether a child five years of age was a trespasser or not, when playing near an elevator in a store used by employees and reached through open doors from the main floor of the store, in which the father of the child was employed, is a question for the jury, if the child was rightfully in the store by invitation of the father. *Siddall v. Jansen* (Ill.) 112

8. It is a question of fact, and not of law, whether a purchaser of cartridges could by the exercise of reasonable care detect the fact that they were not the kind that he had asked for. *Smith v. Clark-Hardware Co.* (Ga.) 607

9. Whether an accident or a disease caused the death of a person whose life was insured against accident is a question for the jury unless the proofs are so convincing that all reasonable men, in the fair exercise of their judgment, would be brought to the same conclusion. *Modern Woodmen Acci. Assn. v. Shryock* (Neb.) 826

10. The question whether or not a will was procured by undue influence must be submit-

ted to the jury when the evidence tends to show that for some time before it was made the testator had been addicted to the use of intoxicants to an unusual degree; and that the son to whom he gave three fourths of his property was always with him when he was intoxicated, and had said there was boodle in it for him; and that he had deliberately prejudiced his father against the other children and ingratiated himself in his favor, although he was not actually present when the will was made. *Re Miller* (Pa.) 220

11. A special finding to sustain an estoppel must clearly state the facts, leaving nothing to intendment. *Franklin Nat. Bank v. Whitehead* (Ind.) 725

TRUCK. See CARRIERS, 9.

TRUSTS. See also BANKS, 1-4; CHARITIES, 1; ESTOPPEL, 5; HUSBAND AND WIFE, 3; LIFE TENANT, 4, 5; LIMITATION OF ACTIONS; MUNICIPAL CORPORATIONS, 5.

1. Grandsons, each of whom is entitled to the income of a share of a trust estate until he becomes thirty-five years of age, and then to the full payment of that share, if living, otherwise payment to be made to his descendants, if any, and if none, then to the other grandsons,—are to be regarded, with respect to the income and capital of the fund, as life tenants until they reach the age of thirty-five, and after that as remaindermen. *McLouth v. Hunt* (N.Y.) 280

2. A conveyance to his successor by a trustee who resigns is not necessary in order to give the new trustee power to convey the title of the property on a sale authorized by the trust deed. *Stearns v. Fruleigh* (Fla.) 705

3. The power of a trustee to resign after acceptance may be conferred by the instrument creating the trust. *Id.*

4. A resignation of a trust already accepted, and not a refusal to accept it, is made by an instrument reciting that property is held in trust, and referring to the trust deed for further description thereof, and declaring that the trusteeship is thereby resigned and relinquished. *Id.*

5. A trust to place one's property beyond the reach of creditors, while retaining full enjoyment of the income and revenues therefrom through the instrumentality of a trustee, cannot be created even by a married woman or a woman in contemplation of marriage. *Brown v. McGill* (Md.) 806

NOTES AND BRIEFS.

Trusts; following trust fund. 86
To place property beyond reach of creditors. 806

TWO THIRDS. See VOTERS AND ELECTIONS, 2.

ULTRA VIRES. See CORPORATIONS, 3, 12.

VACCINATION. See SCHOOLS, 1-3, NOTES AND BRIEFS.
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VENDOR AND PURCHASER. See also COMMON LAW; EJECTMENT, 2.

A vendor's lien for unpaid purchase money does not arise by implication on a conveyance of land without creating a lien by any reservation in the deed or any agreement between the parties. *Smith v. Allen* (Wash.) 83

NOTES AND BRIEFS.

Vendor and purchaser; lien of vendor. 82

VOTERS AND ELECTIONS. See also SCHOOLS, 8.

1. A requirement of an ordinance that a vote for or against a bond proposition shall be indicated by writing, or causing to be written or printed the word "Yes" or "No" on the right-hand margin of the ticket opposite the proposition, is mandatory when the ordinance is authorized by and has the force of a statute, and therefore it is insufficient to mark a cross after the word "Yes" or "No" when both those words are printed opposite the proposition. *Murphy v. San Luis Obispo* (Cal.) 444

2. Two thirds of the votes cast on the proposition are sufficient, by the express terms of Neb. Laws 1897, chap. 24, respecting an election for a county exhibit at an interstate exposition, although the general provision of Neb. Comp. Stat. chap. 18, art. 1, §§ 27-30, is construed to require two thirds of the votes cast at an election held under those statutes. *State, Douglas County, v. Cornell* (Neb.) 513

NOTES AND BRIEFS.

See also SCHOOLS.

Provision as to crossing ballots. 445

WAGES. See ASSIGNMENT; RECEIVERS, 2-6.

WAREHOUSEMEN. See also ESTOPPEL, 4; MORTGAGE, 4.

1. One who is not a warehouseman cannot give a valid warehouse receipt upon his own property, in his own possession, to secure his own debt. *Franklin Nat. Bank v. Whitehead* (Ind.) 725

2. A public warehouseman cannot issue warehouse receipts upon its own property in its own possession, and deliver them as a pledge to secure its own indebtedness. *Id.*

3. Only such corporations as are authorized by the law under which they are organized to carry on the business of warehousemen can avail themselves of the provisions of the Indiana act of 1875, as amended in 1879, entitling "any person or incorporated company" to obtain a permit to keep a public warehouse. *Id.*

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Warehouseman; validity of pledge by. 726

WARRANTS OF ATTORNEY. See CONTRACTS, 17.

WASTE. See INJUNCTION, 7.

WATERS. See also FISHERIES, 2; HIGHWAYS, 4, 5; LOGS; NUISANCES, 3, 4; STATUTES, 5.

1. The doctrine of appropriation of water applies only to public lands, and not to lands which have become private property. *Benton v. Johncox* (Wash.) 107

2. The common-law doctrine of riparian rights is not inapplicable to an arid region in which irrigation is necessary to make the land productive. *Id.*

3. The common-law rights of riparian proprietors are incident to the estate of settlers upon public lands who acquire title from the government, as against subsequent appropriators of the waters. *Id.*

4. The riparian rights of a patentee of the government attach by relation at the very inception of his title, and will be protected as against subsequent appropriation of the water naturally flowing over the land. *Id.*

NOTES AND BRIEFS.

Waters; right of appropriation or riparian right. 107

Pollution of, as a nuisance to fishery. 589

Municipal power over nuisances in. 681

WILLS. See also APPEAL AND ERROR, 15; CHARITIES, 1; EVIDENCE, 18, 22, 32; LIFE TENANT, 5; TRIAL, 10.

1. A ruling in accordance with the claim of proponents of a will that its formal execution is to be assumed will not preclude their subsequently calling the subscribing witnesses to testify to its execution. *Re Stetson's Will* (Mass.) 715

2. A devise of specified land in a specified county to designated grandchildren is such a provision for such grandchildren as will prevent their taking the same share in the estate of testatrix as if she had died intestate, although testatrix had no land in such county at the time of making the will, under Cal. Civ. Code, § 1307, providing that when any testator "omits to provide" in his will for any children or the issue of any deceased child, unless it appears that such omission was intentional, such child must have the same share in the estate of the testator as if he had died intestate. *Re Callaghan's Estate* (Cal.) 689

3. A bequest for a known and lawful purpose, where the power of execution is prescribed and available, should never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law. *Moran v. Moran* (Iowa) 204

NOTES AND BRIEFS.

Drunkenness as affecting testamentary capacity:—(I.) Present intoxication; (II.) habits of intoxication; (III.) drunkenness as evidence of incapacity: (a) generally; (b) in connection with conduct and condition; (c) in connection with nature of the act; (d) in connection 39 L. R. A.

with undue influence; (e) point of time under investigation; (f) presumption and burden of proof; (IV.) inquisition of drunkenness as evidence. 220

Effect of morphinism on testamentary capacity. 268

Opinions of subscribing witnesses as to sanity or insanity. 715

WIRES. See ELECTRICAL USES AND APPLIANCES, 1.

WITNESSES. See also CONSTITUTIONAL LAW, 3, 7, 14, 15; CONTEMPT, 1; WILLS, 1.

1. No compensation for expert testimony other than ordinary witness fees can be required as a condition of giving an opinion as an expert, when the witness has been properly subpoenaed. *Dixon v. People* (Ill.) 116

2. The duty of an expert witness to testify is the same in a suit between private parties as it is in a suit between the state and an alleged criminal, if he is properly subpoenaed and paid ordinary witness fees. *Id.*

3. The constitutional guaranty of compulsory process to require witnesses to attend court and give evidence does not require the state to provide for the expense of obtaining their attendance. *State v. Henley* (Tenn.) 126

NOTES AND BRIEFS.

Witnesses; opinions of, see EVIDENCE.

Witnesses; right of state to require service of, without compensation:—(I.) Inherent right to command service; (II.) application of constitutional provisions; (III.) the rule as applied to expert testimony; (IV.) general rules with relation to civil cases: (a) necessity of payment or tender; (b) sufficiency of payment or tender. 116

Morphinism as affecting competency. 265

Examination of, as to sanity or insanity. 305

WOMEN. See SCHOOLS, 8, NOTES AND BRIEFS.

WRIT AND PROCESS. See also APPEAL AND ERROR, 3; ATTORNEYS, 1.

Serving process on an officer of a foreign corporation which has no place of business in the state and has never done any business therein, when he is present only casually and temporarily in the state, is not sufficient to give jurisdiction to render a judgment *in personam* against the corporation. *Carstens & Earles v. Leidigh & H. Lumber Co.* (Wash.) 548

NOTES AND BRIEFS.

Writs; service on agent of foreign corporation. 548

YEAS AND NAYS. See STATUTES, 1.





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